

# PHILIPPINE CONSTITUTIONAL EXCEPTIONALISM: MANAGING THE SEPARATION OF CHURCH AND STATE AND RELIGIOUS FREEDOM

by: HILARIO G. DAVIDE, JR. \*

## Introduction & Executive Summary

Religion has always been an important aspect of Filipino life. Philippine national religious consciousness traces its roots to the Spanish era in the 19<sup>th</sup> century, further shaped and informed by American occupation and American federal laws from 1898 and until Philippine independence in 1946, and by modern society and social understandings of the present time. Religion is widespread. Religious beliefs inform everyday Filipino opinion, including controversial issues such as the proper role of criminal prosecution between church ministers belonging to the same religion, to contraception and reproductive health, to yet grander issues such as Muslim autonomy in the southern island of Mindanao.

Government and World Bank estimates point to a total population of 100.1 million as of 2014. Approximately 57 percent of the population is Roman Catholic, with the rest comprised of Christians and Muslims. A 2012 estimate by the National Commission on Muslim Filipinos, however, states that there are 10.7 million Muslims, which is approximately 11 percent of the total population.<sup>1</sup> If this is the case, then Islam is the largest minority religion. Approximately 60 percent of Muslims reside in Mindanao, the second largest island in the Philippines.<sup>2</sup> Muslim Mindanao today is characterized by conflict and social tension.

While the power of religion over normal life in the Philippines has not been as pervasive as it once was, especially during the Spanish era, matters of faith continue to shape and inform national consciousness.<sup>3</sup> Religious freedom forms part of our fundamental law. No less than the preambles of the Constitutions of 1935, 1973, and 1987 recognize the existence of "an active power that binds and elevates man to his Creator."<sup>4</sup> In the recent

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<sup>1</sup> Whereas the Philippine Statistics Authority reports only "0.2" percent of the population belonging to Islam. See PSA Data Archive, Philippines - 2010 Census of Population and Housing, available at <https://psa.gov.ph/nsoda/index.php/catalog/93/datafile/F9/V137> (last visited September 14, 2015). Although most Muslims in the Philippines belong to the Sunni branch of Islam, a small number of Shia live in the provinces of Lanao del Sur and Zamboanga del Sur in Mindanao. See U.S. Department of State, International Religious Freedom Report for 2013: Philippines, available at <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper> (last visited September 14, 2015).

<sup>2</sup> See PSA Data Archive, *supra* note 2; The World Bank, Philippines: Country at a Glance, <http://www.worldbank.org/en/country/philippines> (last visited September 14, 2015); U.S. Department of State, *supra* note 2. Religious groups that together constitute less than 5 percent of the population include the following international denominations: Seventh-day Adventists, United Church of Christ, United Methodists, the Episcopal Church in the Philippines, Assemblies of God, The Church of Jesus Christ of Latter-day Saints (Mormons), and Philippine (Southern) Baptists; and the following domestically established churches: Iglesia ni Cristo (Church of Christ), Philippine Independent Church (Aglipayan), Members Church of God International, and The Kingdom of Jesus Christ, the Name Above Every Name. In addition, there are Lumad, who are indigenous people of various animistic and syncretic religions. U.S. Department of State, *supra* note 2.

<sup>3</sup> See Sedfrey M. Candelaria, et al., *Walking the Line: The Philippine Approach to Church-State Conflict*, 58 ATENEO L. J. 842 (2014).

<sup>4</sup> *Aglipay vs. Ruiz*, 64 Phil. 201 (1937). As early as 1937, the Supreme Court, speaking through Mr. Justice Laurel, cited the preamble of the 1935 Constitution wherein the people invoked "the aid of Divine Providence in the fulfillment of their ideals" and declared that "this constitutional mandate is a recognition of an active power that binds and elevates man to his Creator. In so far as religion instills into the mind the purest of principles of morality, it is highly felt and appreciated." Jorge R. Coquia, *Religious Freedom in the Philippines*, IV PHILIPPINE STUDIES, no. 1, 15, 22 (1956).

landmark ruling of *Imbong vs. Ochoa*,<sup>5</sup> the Supreme Court declared that “[t]he Filipino people in ‘imploring the aid of Almighty God’ manifested their spirituality innate in [Filipino] nature and consciousness as a people, shaped by tradition and historical experience. As this is embodied in the preamble, it means that the State recognizes with respect the influence of religion in so far as it instills into the mind the purest principles of morality.”<sup>6</sup> The fact that conceptions of religion, religious freedom, and the separation of church and state, have long been entrenched as constitutional norms requires state actors to consider, apply, and realize these norms whenever decisionmakers are seized of policy questions and legal controversies. In short, the ‘State’ is required to manage religious issues once these issues enter the realm of policy, law, and adjudication. How do we characterize religious freedom in the Philippines and how do state actors, particularly the Philippine Supreme Court, approach questions concerning religious freedom and church-state relations? How do religious actors and individuals contribute to the formulation of government policies which bear upon their religious beliefs?

In this paper, I explore the ways in which government balances its secular goals and interests with religious liberty and religious interests under constitutional boundaries. Philippine constitutional law adheres to the doctrine of “benevolent neutrality.” The benevolent neutrality theory believes that with respect to governmental actions, accommodation of religion may be allowed, not to promote the government’s favored form of religion, but to allow individuals and groups to exercise their religion without hindrance.<sup>7</sup> “The purpose of accommodation is to remove a burden on, or facilitate the exercise of, a person’s or institution’s religion.”<sup>8</sup> In the Philippine jurisprudential context, discourse on contemporary notions of religious freedom is able to articulate progressive social and global understandings in religious affairs and yet remains steadfastly faithful to traditional, formalist, and originalist notions of religious freedom and separation of church and state. In fact, Philippine governmental and legal actors routinely merge progressive thought and constitutional tradition conspicuously through a comparative approach which considers the gains and successes of religious movements elsewhere. In short, Philippine jurisprudence and state behavior is both progressive and yet traditionalist, as well as comparative and dialogic. On the part of legal doctrine, Philippine religious freedom is driven in no small part by a robust and interactive dialogue between Philippine legal doctrine and foreign law, particularly U.S. Supreme Court decisions. Our laws are also shaped and informed by successes and gains of social movements and social-legal developments in the United States and parts of Europe.

The Philippine experience of religious freedom is also marked with social tension and, in the southern island of Mindanao, social instability. I will devote a significant part of my discussion on the peace accords between the Government of the Philippines and the Moro

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<sup>5</sup> G.R. No. 204819, April 8, 2014.

<sup>6</sup> *Id.*

<sup>7</sup> *See Estrada v. Escritor*, 525 Phil. 110 (2006).

<sup>8</sup> *Id.* at 148.

Islamic Liberation Front or the MILF, as well as recent legal and political developments done in the name of peace.

In **Part I**, I briefly chart the basis and origins of the constitutional guarantees of freedom of religion and of the separation of church and state up to the present constitutional order. In particular, I outline key constitutional developments since the passage of the Jones Law, also known as the Philippine Autonomy Act of 1916, which is the Organic Act passed by the United States Congress. I underscore the interplay between U.S. law and developments in Philippine law in the early Philippine republic up to the present day constitutional order.

In **Part II**, I briefly discuss the juridical personality or legal standing of the most dominant religion in the Philippines -- the Catholic Church.

In **Part III**, I focus on three Supreme Court decisions which can exemplify frontier understandings of religious freedom in the Philippines today, namely, the *Estrada vs. Escritor* cases,<sup>9</sup> which decided upon the question of whether a female court interpreter, accused of immorality, can live and maintain a family with a man not legally her husband on the basis of her religious belief as a member of the Jehovah's Witnesses which, as she argued, allowed for such conjugal arrangement; the landmark case of *Imbong et al., v. Ochoa, Jr., et al.*,<sup>10</sup> where our Supreme Court decided upon the constitutionality of the Responsible Parenthood and Reproductive Health Act of 2012 ("RH Law"); and *Leus v. St. Scholastica's College Westgrove*,<sup>11</sup> where the Court ruled upon whether a Catholic educational institution can validly dismiss an employee for having engaged in pre-marital relations, who became pregnant out of wedlock, and then who later married the father of her child.

In **Part IV**, I point to three emerging areas which have the potential of furthering current understandings of religious freedom and permissible church and state boundaries. These pertain to a recent petition<sup>12</sup> seeking to legitimize same-sex marriage in the Philippines following the wave of decriminalization of such marriages in the United States, particularly in the case of *Obergefell v. Hodges* where the US Supreme Court recognized the right to marry among same-sex couples,<sup>13</sup> as well as Ireland's May 2015 referendum in favor of same-sex marriage; an illegal detention case filed by an expelled minister of the Iglesia ni Cristo against eight incumbent ministers,<sup>14</sup> which spurred mass protest; and, last but not least, the report

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<sup>9</sup> See *Estrada v Escritor*, 408 SCRA 1 (2003); *Estrada v. Escritor* 492 SCRA 1 (2006).

<sup>10</sup> G.R. Nos. 204819, Apr. 8, 2014.

<sup>11</sup> G.R. No. 187226, Jan. 28, 2015 (Third Division).

<sup>12</sup> Petitioner Jesus Nicardo Falcis III filed a petition on May 18, 2015 with the Supreme Court, arguing that limiting civil marriages and related rights to heterosexuals violate the constitutionally guaranteed protection for equal treatment, undue interference to liberty rights, and marital autonomy. Falcis seeks a declaration of unconstitutionality over 1987 Family Code provisions favoring only opposite-sex marriages which repealed the 1949 Civil Code, the latter which, as Falcis argues, never made such a distinction. Buena Bernal, *SC Asked: Allow Same-sex Marriage in PH*, RAPPLER, May 25, 2015, <http://www.rappler.com/nation/94266-same-sex-marriage-petition-supreme-court> (last visited September 21, 2015).

<sup>13</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

<sup>14</sup> Expelled Minister Files Illegal Detention Raps vs INC Execs, PHIL. STAR., August 26, 2015, available at <http://www.philstar.com/headlines/2015/08/26/1492444/expelled-minister-files-illegal-detention-raps-vs-inc-execs> (last visited September 14, 2015).

and findings of our Peace Council about the draft Bangsamoro Basic Law,<sup>15</sup> a centerpiece of the peace accords<sup>16</sup> between the Government of the Philippines and the Moro Islamic Liberation Front.

## I. Basis and Origins of Constitutional Guarantees of Religious Freedom

Philippine jurisprudence in religious freedom and separation of church and state can be seen as characteristically progressive yet traditional, native and local and yet definitely global in reach, and methodically comparative. On the one hand, individuals and institutions enjoy free exercise and freedom of religious profession and worship. This is presently captured in the 'free exercise' clause found in Section 5, Article III (Bill of Rights) of the 1987 Philippine Constitution, which reads: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed." The free exercise clause is based upon "the respect for the inviolability of the human conscience . . . [thus prohibiting the State] from unduly interfering with the outside manifestations of one's belief and faith."<sup>17</sup>

On the other hand, the 'non-establishment' clause, also found in the same Section, states: "No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof."<sup>18</sup> This clause essentially "prohibits the establishment of a state religion and the use of public resources for the support or prohibition of a religion."<sup>19</sup>

Yet a third constitutional norm, though not found in the Philippine Bill of Rights but found under the 'Declaration of Principles and State Policies', provides that "[t]he separation of Church and State shall be inviolable."<sup>20</sup> The separation of Church and State doctrine is reinforced by Section 2(5), Article IX-C, which provides that no religious sect may be registered as a political party;<sup>21</sup> by Section 5(2) of Article VI, which provides that no sectoral

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<sup>15</sup> The draft 'Bangsamoro Basic Law' is the product of the consolidated version of House Bill No. 4994 as well as Senate Bill No. 2408, Philippine Congress.

<sup>16</sup> See 27 March 2014 Comprehensive Agreement on the Bangsamoro; 15 October 2012 Framework Agreement on the Bangsamoro (calling for the creation of an autonomous political entity named *Bangsamoro*, replacing the Autonomous Region of Muslim Mindanao (ARMM)).

<sup>17</sup> Candelaria, et al., *supra* note 4, at 858, *citing* *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014. The meaning of the free exercise clause is explained by the U.S. Supreme Court in the case of *Cantwell v. Connecticut*, 310 U.S. 296 (1940). *Cantwell* held that such prohibition has a double aspect:

The constitutional inhibition on legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the amendment embraces two concepts, — the freedom to believe and the freedom to act. The first is absolute, but in the nature of things, the second cannot be. *Id.* at 303.

<sup>18</sup> Section 5, Article III reads in full: "No law shall be made respecting an establishment of religion or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights."

<sup>19</sup> See Candelaria, et al., *supra* note 4, at 855, *citing* *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014.

<sup>20</sup> PHIL. CONST., Art. II § 6.

<sup>21</sup> This provision reads in full:

Section 2. The Commission on Elections shall exercise the following powers and functions:

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(5) Register, after sufficient publication, political parties, organizations, or coalitions which, in addition to other requirements, must present their platform or program of government; and accredit citizens' arms of the Commission on Elections. Religious denominations and sects shall not be registered. Those which seek to achieve their goals through violence or unlawful means, or refuse to uphold and adhere to this Constitution, or which are supported by any foreign government shall likewise be refused registration.

representative from the religious sector may participate in the party-list system;<sup>22</sup> and by Section 29(2), Article VI, which prohibits the use of public funds for the benefit of religious sects, system of religion, or a religious dignitary thereof.<sup>23</sup>

The 1987 Constitution provides for a number of exceptions to an otherwise strict delineation between Church and State: Section 28(3), Article VI, provides that churches, personages, and mosques, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious purposes shall be exempt from taxation;<sup>24</sup> Section 29(2), Article VI, as stated, prohibits appropriations for sectarian benefits except when the priest or religious minister is assigned to the armed forces or to any penal institution or government orphanage or leprosarium; Section 3(3) of Article XIV provides for optional religious instruction for public elementary and high school students;<sup>25</sup> and Section 4(2), Article XIV, restricts ownership of educational institutions to Filipino citizens except those established by religious groups and mission boards.<sup>26</sup>

Between the 16<sup>th</sup> century and prior to the advent of American rule in 1898, the Philippine constitutional order was characterized by the primacy of religion, particularly, the Catholic Church, established under the auspices of Spanish rule. Catholicism was regarded as the state religion and Catholics alone enjoyed the right of engaging in public ceremonies of worship.<sup>27</sup> The Catholic Church was then under the protection of the Spanish Penal Code, then in effect in the Philippines, which punished crimes against the state religion.<sup>28</sup>

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PHIL. CONST., Art. IX-C § 2(5).

22 This provision reads in full:

The party-list representatives shall constitute twenty per centum of the total number of representatives including those under the party list. For three consecutive terms after the ratification of this Constitution, one-half of the seats allocated to party-list representatives shall be filled, as provided by law, by selection or election from the labor, peasant, urban poor, indigenous cultural communities, women, youth, and such other sectors as may be provided by law, except the religious sector.

PHIL. CONST., Art. VI § 5(2).

23 This provision states in full:

No public money or property shall be appropriated, applied, paid, or employed, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, sectarian institution, or system of religion, or of any priest, preacher, minister, other religious teacher, or dignitary as such, except when such priest, preacher, minister, or dignitary is assigned to the armed forces, or to any penal institution, or government orphanage or leprosarium.

PHIL. CONST., Art. VI § 29(2).

24 This provision states in full:

Charitable institutions, churches and personages or convents appurtenant thereto, mosques, non-profit cemeteries, and all lands, buildings, and improvements, actually, directly, and exclusively used for religious, charitable, or educational purposes shall be exempt from taxation.

PHIL. CONST., Art. VI § 28(3).

25 This provision states in full:

At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.

PHIL. CONST., Art. XIV § 3(3).

26 This provision states:

Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty per centum of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions. The control and administration of educational institutions shall be vested in citizens of the Philippines.

PHIL. CONST., Art. XIV § 4(2).

27 JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 284 (1996).

28 *Id.*

Following Philippine independence from Spain and transition into American rule, the primacy of religion was abandoned. When Spain ceded the Philippines to the United States through the Treaty of Paris of 1898, parties to the treaty agreed that “the inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of religion.”<sup>29</sup> Two months later, or on January 22, 1899, the short-lived Philippine Republic under General Emilio Aguinaldo, through the Malolos Constitution, provided that “The state recognizes the liberty and equality of all religions in the same manner as the separation of Church and State.”<sup>30</sup> The Malolos Constitution, one of the earliest assertions of Philippine independence and sovereignty and considered by historians to be the basic law of the First Philippine Republic, sought to establish popular sovereignty as well as freedom and equality of all faiths. The contemporary concept of freedom of religion and worship was introduced officially into the Philippines almost simultaneously through these two historic documents – the Malolos Constitution and the Treaty of Paris.<sup>31</sup> Later under American rule, the Philippine Commission, under instructions from President William McKinley, introduced the rule that survives to this day, with essentially the same wording as it is currently found in the 1987 Constitution.<sup>32</sup> Through McKinley’s instructions, the Philippine Commission was established and assumed civil government in the Philippines. President McKinley emphasized that “the separation between State and Church shall be real, entire and absolute.”<sup>33</sup> McKinley’s instructions were taken as directives to establish a secularist attitude among the people both in government and in the field of education.<sup>34</sup> In the Philippine Bill of 1902, otherwise known as the Philippine Organic Act, reiterated the provisions of the Treaty of Paris regarding religious freedom.<sup>35</sup> It was also apparent that the provisions on religious freedom and the separation of church and state were reproductions of the First Amendment of the U.S. Constitution which sought to incorporate or First Amendment interpretations into Philippine law. This said, contrary to McKinley, the eminent Philippine jurist Jorge R. Coquia was of the view that separation of church and state was never meant to be an “absolutist idea”, so much so that then President Manuel Quezon (1878-1944), during the Philippine Commonwealth period, once declared:

. . . But there are times when the issues of civil society come within the purview of the spiritual office of the Church, where for example, temporal affairs raise moral issues. Thus in the presidential elections of 1953 in the Philippines, the Catholic Church through a series of pastoral letters and sermons

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Coquia, *supra* note 5, at 15.

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*Id.* Title III, Article 5 of the Malolos constitution provided: “The State recognizes the freedom and equality of all beliefs, as well as the separation of Church and State.”

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Coquia, *supra* note 5, at 15.

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Candelaria, et al., *supra* note 4, at 846, *citing* JORGE R. COQUIA, CHURCH AND STATE LAW IN THE PHILIPPINES 46-47 (1959).

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This was recognized by Justice Malcolm in *In the matter of the estate of Cheong Boo vs. Cheong Seng Gee*, G.R. No. 18081, March 3, 1922.

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Coquia, *supra* note 5, at 16.

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*Id.*

from the pulpit exhorted the people to use their ballots in the proper way by voting into office men of high moral integrity.

The principle of the non-establishment clause of the Constitution does not imply suppression of worship but is rather designed to safeguard liberty in the exercise of faith.<sup>36</sup>

Thus, McKinley's instructions notwithstanding, the organic, if not early constitutional provisions of freedom of religion and of the separation of church and state were not meant to envision strictly separate realms of activity. Rather, religion and state affairs were meant to be interactive, dynamic, and regulated only in ways that give rise to respect to and free exercise of faiths. This dynamic would set the tone of Philippine society and politics in the years and decades to come, up to the present day when religious beliefs and affiliation would shape and inform important political questions.

Once religious provisions were constitutionalized during the early Philippine republic, they were implemented in statutory form.<sup>37</sup> In fact, the 1950 Civil Code of the Philippines,<sup>38</sup> great portions of which are still good law today, provides that vexing or humiliating another on account of his religious beliefs is a cause of action for damages.<sup>39</sup> The Civil Code also provides that any act of any public officer who obstructs, defeats or impairs the right of freedom of religion of any individual is liable for damages.<sup>40</sup> To guarantee religious freedom in the solemnization of marriages, the Civil Code, prior to the advent of the 1987 Family Code, provided that public officials in issuing authorization to solemnize marriages should not inquire into the truth or validity of any religious doctrine held by the applicant.<sup>41</sup> Under the Revised Penal Code, in force since 1930, public officers or employees who prevent or disturb religious ceremonies are criminally liable.<sup>42</sup> Article 133 of the same Code punishes any individual who commits acts which are offensive to religious feelings.<sup>43</sup>

The Civil Code also protects the exercise of religious beliefs in the burial of the dead, particularly in determining the funeral rites to be observed.<sup>44</sup> Under Philippine law on

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<sup>36</sup> *Id.* at 18, quoting President Manuel Quezon.

<sup>37</sup> *See id.* at 20.

<sup>38</sup> Republic Act No. 386, as amended (June 18, 1949).

<sup>39</sup> *See* Civil Code of the Philippines, Republic Act No. 386, as amended, art. 26(4) (June 18, 1949). *See also* Coquia, *supra* note 5, at 20;

<sup>40</sup> *See* Civil Code of the Philippines, Republic Act No. 386, as amended, art. 32(1) (June 18, 1949).

<sup>41</sup> *See id.* art. 93. This was amended by the 1987 Family Code of the Philippines.

<sup>42</sup> The Revised Penal Code of the Philippines, Act No. 3815, as amended, art. 132 (December 8, 1930). Article 132 provides in full:

Art. 132. *Interruption of religious worship.* — The penalty of prison correccional in its minimum period shall be imposed upon any public officer or employee who shall prevent or disturb the ceremonies or manifestations of any religion.

If the crime shall have been committed with violence or threats, the penalty shall be prison correccional in its medium and maximum periods.

<sup>43</sup> *Id.* art 133. Article 133 provides in full:

Art. 133. *Offending the religious feelings.* — The penalty of arresto mayor in its maximum period to prison correccional in its minimum period shall be imposed upon anyone who, in a place devoted to religious worship or during the celebration of any religious ceremony shall perform acts notoriously offensive to the feelings of the faithful.

<sup>44</sup> Art. 307 provides:

evidence, clergymen or priests are exempted from testifying in court on matters confessed to them in their professional character in the course of complying with the discipline enjoined by the church to which they belong.<sup>45</sup>

The various organic acts leading towards the Philippine Independence Law, otherwise known as the Tydings-McDuffie Law,<sup>46</sup> all included the same protection of religious freedom.<sup>47</sup>

The 1935 Constitution did not expressly provide for the 'separation of church and state' in the manner as McKinley's instructions had then set forth. The 1935 Constitution provided for this separation only by inference, through the non-establishment and free exercises clauses.<sup>48</sup> The 1935 Constitution was supplanted by the 1973 Constitution. Unlike the 1935 charter, the 1973 Constitution expressly declared that "the separation of the church and the state shall be inviolable."<sup>49</sup> Even though there was no explicit provision in the 1935 charter, law authors opine that the 1935 Constitution did not deviate from the separation principle.<sup>50</sup>

In the present times and under the 1987 Constitution, freedom of religion is considered as a fundamental right. The main provisions have remained intact and have not changed since the 1935 Constitution.<sup>51</sup> Section 5 of Article III (Bill of Rights) of the 1987 Constitution provides:

No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

There are three parts to Section 5. The first enjoins the government from passing laws which promote or inhibit any religion. The policy has consistently been one of *government*

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The funeral shall be in accordance with the expressed wishes of the deceased. In the absence of such expression, his religious beliefs or affiliation shall determine the funeral rites. In case of doubt, the form of the funeral shall be decided upon by the person obliged to make arrangements for the same, after consulting the other members of the family.

<sup>45</sup> This is now found in the current rules of evidence under Section 24(d), Rule 130, Rules of Court:

Section 24. *Disqualification by reason of privileged communication.* — The following persons cannot testify as to matters learned in confidence in the following cases:

....

(d) A minister or priest cannot, without the consent of the person making the confession, be examined as to any confession made to or any advice given by him in his professional character in the course of discipline enjoined by the church to which the minister or priest belongs; . . . .

*See also* Coquia, *supra* note 5, at 20.

<sup>46</sup> The Tydings–McDuffie Act (officially the Philippine Independence Act), Pub.L. 73–127, 48 Stat. 456 (March 24, 1934).

<sup>47</sup> *See* Candelaria, et al., *supra* note 4, at 846; COQUIA, *supra* note 33, at 46-47.

<sup>48</sup> *See* Candelaria, et al., *supra* note 4, at 846.

<sup>49</sup> PHIL. CONST., Art. XV § 15 (1973).

<sup>50</sup> *See* Candelaria, et al., *supra* note 4, at 846. During the deliberations, the discussion did not call the basic provisions of free exercise and non-establishment into question. It was accepted without any issue. *Id. citing* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 327-328 (2009).

<sup>51</sup> *See* Candelaria, et al., *supra* note 4, at 846.

*neutrality*.<sup>52</sup> The second part pertains to the free exercise clause proper, which is couched as an affirmative right. The free exercise clause simply means that religious worship or profession of one's religion is guaranteed to be *free from governmental interference*.<sup>53</sup> There are two aspects to free exercise — the freedom to believe, and the freedom to act.<sup>54</sup> While strict belief cannot be inquired into, the moment such belief flows over into action, it becomes subject to government regulation and police power.<sup>55</sup> Judicial inquiry requires a balancing act, holding on one hand the religious freedom of the actor, and on the other, the secular interest of the State.<sup>56</sup> The third part pertains to the prohibition of state-sponsored religious tests as preconditions for the exercise of civil or political rights. In all three aspects, Philippine jurisprudence generally makes an effort to consider American cases.<sup>57</sup>

In policing the boundaries of government intervention, not all government aid to religion is disallowed. If the action in question has a secular purpose, a primary effect that neither advances nor inhibits religion, and does not result in excessive entanglement, then such aid is allowed.<sup>58</sup>

## II. Juridical personality of the Catholic Church

In spite of the American concept of the corporate status of a church, namely, that it is a mere concession of the State, the Philippine courts declared as early as 1907 that the Catholic Church enjoys independent juridical status.<sup>59</sup>

Philippine courts hold that the Treaty of Paris of 1898 declared that the cession of the Philippines in no way impaired the property or rights which belonged to ecclesiastical institutions. When the Philippine Independent Church leaders headed by Bishop Gregorio Aglipay claimed that with the transfer of the Philippines to the United States, Catholic Church properties also passed to the Philippine government under the United States, the Supreme Court in an early line of cases upheld the international status of the Church, and declared that all properties of the Catholic Church during the Spanish regime remained with the same institution.<sup>60</sup>

## III. Religious Questions as Justiciable Questions

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<sup>52</sup> BERNAS, *supra* note 51, at 346. There are four requirements of propositions of government neutrality: government must not prefer one religion over another, or religion over irreligion; government funds must not be used for religious purposes; government action must not aid religion; and government action must not result in excessive entanglement with religion. *Id.*

<sup>53</sup> See Candelaria, et al., *supra* note 4, at 847, citing JORGE R. COQUIA, CHURCH AND STATE LAW IN THE PHILIPPINES 114 (2007 ed.).

<sup>54</sup> *Id.* citing *Cantwell v Connecticut*, 310 US 296 (1940).

<sup>55</sup> BERNAS, *supra* note 28, at 292.

<sup>56</sup> JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 331 (2009 ed.).

<sup>57</sup> See BERNAS, *supra* note 28, at 297.

<sup>58</sup> See Candelaria, et al., *supra* note 4, at 847, citing *Abington School District v. Schempp*, 374 U.S. 263 (1963); *Board of Education v. Allen*, 392 U.S. 236 (1968); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971).

<sup>59</sup> Coquia, *supra* note 5, at 24, citing *Barlin vs. Ramirez*, 7 Phil. 41 (1907).

<sup>60</sup> The Supreme Court went on to say that “the question merited no serious consideration since it is made with reference to an institution which antedates by almost a thousand years any personality in Europe and which existed when Grecian eloquence still flourished in Antioch, and when idols were still in the temple of Mecca.” *Id.* at 24, citing *Barlin vs. Ramirez*, 7 Phil. 41; *Roman Catholic Church vs. Santos*, 7 Phil. 60 (1907); *Roman Catholic Church vs. Mun. of Tarlac*, 9 Phil. 450 (1908); *City of Manila vs. Catholic Church*, 7 Phil. 763 (1908).

a. ***Smith* in light of *Escritor***

How does the State mediate between the exercise of religious freedom and the performance of state policies? One can imagine competing polar opposites where an individual or an institution will assert a religious practice as a legal right, such as the use of a proscribed medical substance for use in a religious gathering, in spite of an existing statutory prohibition against that use. The case of *Employment Division v. Smith*,<sup>61</sup> a decision penned by Justice Scalia of the U.S. Supreme Court in 1990, can typify a prudential balancing approach towards such questions. In essence, *Smith* abandoned strict or heightened scrutiny and the compelling justification approach for evaluating laws burdening religion, and, instead, held that neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion.<sup>62</sup> *Smith* involved a challenge by Native Americans to an Oregon law prohibiting use of peyote, a hallucinogenic substance. Specifically, individuals challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits.<sup>63</sup>

The U.S. Supreme Court, speaking through Justice Scalia, held that the Free Exercise Clause permits the State to prohibit sacramental peyote use, and thus to deny unemployment benefits to persons discharged for such use.<sup>64</sup> Justice Scalia declared "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"<sup>65</sup> The Philippine Supreme Court incorporated *Smith* by raising it as a possible doctrine for application, and then rejected it for being "highly unsatisfactory in several respects".<sup>66</sup> Justice Puno, speaking for the majority in *Estrada vs. Escritor*, held that *Smith* is dangerous precedent because it subordinates fundamental rights of religious belief and practice to all neutral, general legislation. *Escritor* involved a court interpreter who was accused of disgraceful and immoral conduct defined under the Revised Administrative Code, for living with a man not her husband, and having borne a child within this live-in arrangement.<sup>67</sup> It was alleged that Soledad Escritor was committing an immoral act that tarnishes the image of the court, thus she should not be allowed to remain employed therein as it might appear that the court condones her act.<sup>68</sup> Escritor raised the defense of freedom of religion and argued that as a member of the religious sect known as the Jehovahs Witnesses and the Watch Tower and Bible Tract Society, their conjugal arrangement is in

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61 494 U.S. 872 (1990).

62 *Estrada v. Escritor*, A.M. No. P-02-1651, June 22, 2006, citing ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1213 (2nd ed. 2002).

63 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876, 1990 U.S. 2021.

64 *Id.* at 876-890.

65 *Id.* at 878-889.

66 *Id.*

67 Respondent was charged with committing disgraceful and immoral conduct under Book V, Title I, Chapter VI, Sec. 46(b)(5) of the Revised Administrative Code. *Estrada v. Escritor*, A.M. No. P-02-1651, June 22, 2006.

68 *Id.*

conformity with their religious beliefs, has the approval of her congregation, and thus warrants constitutional protection. She further added that after ten years of living together, she executed on July 28, 1991, a Declaration of Pledging Faithfulness.<sup>69</sup>

The Court, speaking through Justice Puno, held that the accused, under the conjugal arrangement, cannot be penalized as she has made out a case for exemption from the law based on her fundamental right to freedom of religion. The Court recognized that state interests must be upheld in order that freedoms - including religious freedom - may be enjoyed. The case of *Smith*, while expressly recognizing the power of legislature to give accommodations to religious freedom, is in effect contrary to the benevolent neutrality or accommodation approach. Instead of low level scrutiny, strict scrutiny is appropriate for free exercise challenges because the compelling interest test reflects the constitutional mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. Underlying the compelling state interest test is the notion that free exercise is a fundamental right and that laws burdening it should be subject to strict scrutiny.<sup>70</sup> *Escritor* has now become a leading case in religious freedom.

#### b. ***Imbong* and the Reproductive Health Law**

The strict scrutiny test in *Estrada v. Escritor* was recently affirmed in the landmark ruling on the Reproductive Health Law, *Imbong vs. Ochoa*.<sup>71</sup> *Imbong* held that in ascertaining the limits of the exercise of religious freedom, the compelling state interest test is proper, on the reasoning that free exercise is a fundamental right and that laws burdening it should be subject to strict scrutiny.<sup>72</sup>

The Reproductive Health Law<sup>73</sup> was passed in 2012 as a means to manage the country's burgeoning population. Despite prior legislative measures, the population of the country had grown from just over 27 million Filipinos in 1960, to over 76 million in the year 2000, and over 92 million in 2010.<sup>74</sup> To rein in the problem, the RH Law was enacted to provide Filipinos, especially the poor and the marginalized, access and information to the full range of modern family planning methods, supplies and services, and to ensure that its

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The Declaration provides:

DECLARATION OF PLEDGING FAITHFULNESS

I, Soledad S. Escritor, do hereby declare that I have accepted Luciano D. Quilapio, Jr., as my mate in marital relationship; that I have done all within my ability to obtain legal recognition of this relationship by the proper public authorities and that it is because of having been unable to do so that I therefore make this public declaration pledging faithfulness in this marital relationship.

I recognize this relationship as a binding tie before Jehovah God and before all persons to be held to and honored in full accord with the principles of Gods Word. I will continue to seek the means to obtain legal recognition of this relationship by the civil authorities and if at any future time a change in circumstances make this possible, I promise to legalize this union.

Signed this 28th day of July 1991.

*Id.*

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*Id.*

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G.R. No. 204819, April 8, 2014.

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*See id.*

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The Responsible Parenthood and Reproductive Health Act of 2012, Republic Act No. 10354 (2012).

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*Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014 (citing National Statistical Coordination Board findings).

objective to provide for the peoples' right to reproductive health be achieved. The RH Law also mandated schools to provide reproductive health education. In short, the RH Law was considered an enhancement measure to fortify and make effective the current laws on contraception, women's health and population control.<sup>75</sup>

A number of constitutional challenges to the RH Law were made from various sectors of society<sup>76</sup> on the following grounds: (i) the RH Law violates the right to life of the unborn, because the implementation of the RH Law would authorize the purchase of hormonal contraceptives, intra-uterine devices and injectables which are abortives, in violation of Section 12, Article II of the Constitution which guarantees protection of both the life of the mother and the life of the unborn from conception; (ii) the RH Law violates the right to health and the right to protection against hazardous products; and (iii) the RH Law violates the right to religious freedom as it authorizes the use of public funds for the procurement of contraceptives. A number of the petitioners argued that the use of public funds for purposes that are believed to be contrary to their beliefs is proscribed by the constitutional mandate ensuring religious freedom.<sup>77</sup>

Ruling on aspects of religious freedom, *Imbong* noted that while contraceptives and procedures like vasectomy and tubal ligation are not covered by constitutional proscriptions, there are those who, because of their religious education and background, sincerely believe that contraceptives, whether abortifacient or not, are evil. Some of these are medical practitioners who essentially claim that their beliefs prohibit not only the use of contraceptives but also the willing participation and cooperation in all things dealing with contraceptive use. A number of the petitioners in particular challenged the 'duty to refer' under the RH Law: while the RH Law attempts to address religious sentiments by making provisions for a conscientious objector, the constitutional guarantee is nonetheless violated because the law also imposes upon the conscientious objector the duty to refer the patient seeking reproductive health services to another medical practitioner who would be able to provide for the patient's needs. For some of the petitioners, this amounts to requiring the conscientious objector to cooperate with the very thing he refuses to do.<sup>78</sup> One petitioner argued that the requirement for a conscientious objector to refer the person seeking reproductive health care services to another provider infringes on one's freedom of religion as it forces the objector to become an unwilling participant in the commission of a serious sin under Catholic teachings. They added that compelling conscientious objectors to refer the matter to another health care service is an act against their will, thus violating the Doctrine of Benevolent Neutrality. Authorizing the use of contraceptives with abortive effects, mandatory sex education, mandatory pro-bono reproductive health services to indigents, they argue, encroach upon the religious freedom of those upon whom they are required. The petitioners

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<sup>75</sup> See *id.*

<sup>76</sup> Fourteen (14) petitions and two (2) petitions-in-intervention.

<sup>77</sup> *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014.

<sup>78</sup> See *id.*

also questioned provisions of the RH Law requiring would-be couples to attend family planning and responsible parenthood seminars and to obtain a certificate of compliance. They claimed that the provision forces individuals to participate in the implementation of the RH Law even if it contravenes their religious beliefs. As the assailed law dangles the threat of penalty of fine and/or imprisonment in case of non-compliance with its provisions, petitioners claimed that the RH Law forcing them to provide, support and facilitate access and information to contraception against their beliefs must be struck down as it runs afoul to the constitutional guarantee of religious freedom. Last, the petitioners questioned the State-sponsored procurement of contraceptives, arguing that the expenditure of their taxes on contraceptives violates the guarantee of religious freedom since contraceptives contravene their religious beliefs.<sup>79</sup>

All 15 Justices of the Court, save for eight provisions, voted to declare "not unconstitutional" all other provisions questioned in the consolidated petitions.<sup>80</sup> The *Imbong* decision was composed of 10 different opinions, with the Justices voting differently on a number of issues. In the majority decision penned by Justice Jose Mendoza, the Court pointed to the preamble of the Philippine Constitution where the Filipino people, in "imploring the aid of Almighty God," manifested our innate spirituality and consciousness as a people, shaped by tradition and historical experience. As this is embodied in the preamble, this means that the State recognizes with respect the influence of religion in so far as it instills into the mind the purest principles of morality. Moreover, *Imbong* noted that in recognition of the contributions of religion to society, the 1935, 1973 and 1987 Constitutions contain benevolent and accommodating provisions towards religions such as tax exemption of church property, salary of religious officers in government institutions, and optional religious

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*See id.*

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*Imbong* declared following provisions unconstitutional:

1) Section 7 and the corresponding provision in the implementing rules and regulations of the RH Law (RH-IRR) insofar as they: a) require private health facilities and non-maternity specialty hospitals and hospitals owned and operated by a religious group to refer patients, not in an emergency or life-threatening case, as defined under Republic Act No. 8344, to another health facility which is conveniently accessible; and b) allow minor-parents or minors who have suffered a miscarriage access to modern methods of family planning without written consent from their parents or guardian/s;

2) Section 23(a)(1) and the corresponding provision in the RH-IRR, particularly Section 5.24 thereof, insofar as they punish any healthcare service provider who fails and/or refuses to disseminate information regarding programs and services on reproductive health regardless of his or her religious beliefs.

3) Section 23(a)(2)(i) and the corresponding provision in the RH-IRR insofar as they allow a married individual, not in an emergency or life-threatening case, as defined under Republic Act No. 8344, to undergo reproductive health procedures without the consent of the spouse;

4) Section 23(a)(2)(ii) and the corresponding provision in the RH-IRR insofar as they limit the requirement of parental consent only to elective surgical procedures.

5) Section 23(a)(3) and the corresponding provision in the RH-IRR, particularly Section 5.24 thereof, insofar as they punish any healthcare service provider who fails and/or refuses to refer a patient not in an emergency or life-threatening case, as defined under Republic Act No. 8344, to another health care service provider within the same facility or one which is conveniently accessible regardless of his or her religious beliefs;

6) Section 23(b) and the corresponding provision in the RH-IRR, particularly Section 5.24 thereof, insofar as they punish any public officer who refuses to support reproductive health programs or shall do any act that hinders the full implementation of a reproductive health program, regardless of his or her religious beliefs;

7) Section 17 and the corresponding provision in the RH-IRR regarding the rendering of pro bona reproductive health service in so far as they affect the conscientious objector in securing PhilHealth accreditation; and

8) Section 3.01 of the RH-IRR, which added the qualifier "primarily" in defining abortifacients and contraceptives, as they are ultra vires and, therefore, null and void for contravening Section 4(a) of the RH Law and violating Section 12, Article II of the Constitution.

instructions in public schools.<sup>81</sup> *Imbong* then drew from the intent of the Framers who felt the need to put up a strong barrier so that the State would not encroach into the affairs of the church, and vice-versa, under the principle of separation of Church and State.<sup>82</sup>

Affirming *Escritor*, the Court affirmed that the establishment and free exercise clauses were not designed to serve contradictory purposes. They have a single goal—to promote freedom of individual religious beliefs and practices. In simplest terms, the free exercise clause prohibits government from inhibiting religious beliefs with penalties for religious beliefs and practice, while the establishment clause prohibits government from inhibiting religious belief with rewards for religious beliefs and practices. In other words, the two religion clauses were intended to deny government the power to use either the carrot or the stick to influence individual religious beliefs and practices.<sup>83</sup> Thus, in case of conflict between the free exercise clause and the State, the Court adheres to the doctrine of benevolent neutrality. Following *Escritor*, this holds that benevolent neutrality-accommodation, whether mandatory or permissive, is the spirit, intent and framework underlying the Philippine Constitution. The benevolent neutrality theory believes that with respect to these governmental actions, accommodation of religion may be allowed, not to promote the government's favored form of religion, but to allow individuals and groups to exercise their religion without hindrance. The purpose of accommodation is to remove a burden on, or facilitate the exercise of, a person's or institution's religion. What is sought under the theory of accommodation is not a declaration of unconstitutionality of a facially neutral law, but an exemption from its application or its 'burdensome effect,' whether imposed by the legislature or the courts. In ascertaining the limits of the exercise of religious freedom, the Court in *Imbong*, as in *Escritor*, deployed the compelling state interest test. Underlying the compelling state interest test is the notion that free exercise is a fundamental right and that laws burdening it should be subject to strict scrutiny, and not lower-level scrutiny as in *Smith*.

It was the position of the Court that it was not within the province of the Court to determine whether the use of contraceptives or one's participation in the support of modern reproductive health measures is moral from a religious standpoint or whether the same is right or wrong according to one's dogma or belief. For the Court, these were matters dealing with "faith, practice, doctrine, form of worship, ecclesiastical law, custom and rule of a church [which] are unquestionably ecclesiastical matters [ ] outside the province of the civil courts."<sup>84</sup> The jurisdiction of the Court extends only to public and secular morality.

*Imbong* affirmed that while the Court stands without authority to rule on ecclesiastical matters, as vanguard of the Constitution, it does have authority to determine whether the RH Law contravenes the guarantee of religious freedom. The *Imbong* majority then held that it was misguided to suppose that the State cannot enhance its population control program

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81 *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014.

82 This is enshrined in Article II, Section 6 of the 1987 Constitution.

83 *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014.

84 *Id.*

through the RH Law simply because the promotion of contraceptive use is contrary to one's religious beliefs. Indeed, the State is not precluded to pursue its legitimate secular objectives without being dictated upon by the policies of any one religion.

This said, the *Imbong* majority carved out an exemption for conscientious objectors under the test of strict scrutiny. The RH Law mandated that a hospital or a medical practitioner to immediately refer a person seeking health care and services under the law to another accessible healthcare provider despite their conscientious objections based on religious or ethical beliefs. *Imbong* was of the view that the obligation to refer imposed by the RH Law violated the religious belief and conviction of a conscientious objector. Once the medical practitioner, against his will, refers a patient seeking information on modern reproductive health products, services, procedures and methods, his conscience is immediately burdened as he has been compelled to perform an act against his beliefs. *Imbong* held that while the RH Law seeks to provide freedom of choice through informed consent, freedom of choice guarantees the liberty of religious conscience and prohibits any degree of compulsion or burden, whether direct or indirect, in the practice of one's religion. The Court was of the strong view that the religious freedom of health providers, whether public or private, should be accorded primacy. Accordingly, a conscientious objector should be exempt from compliance with the mandates of the RH Law. If he would be compelled to act contrary to his religious belief and conviction, it would be violative of "the principle of non-coercion" enshrined in the constitutional right to free exercise of religion.

At its core, current free exercise doctrine, expressed through the provisions of the 1987 charter and Supreme Court rulings thereunder, provides "benevolent and accommodating provisions towards religions."<sup>85</sup> In case of conflict between the assertion of the free exercise of one's beliefs, on one hand, and the interests of the State, Philippine jurisprudence requires courts and other state actors to adhere to the doctrine of 'benevolent neutrality'. In *Estrada v. Escritor*,<sup>86</sup> affirmed by *Imbong*, the Supreme Court had the occasion to state that the benevolent neutrality-accommodation doctrine is a framework which underlies the Philippine Constitution.<sup>87</sup> *Escritor* and *Imbong* held that "[t]he benevolent neutrality theory believes that with respect to [ ] governmental actions, accommodation of religion may be allowed, not to promote the government's favored form of religion, but to allow individuals and groups to exercise their religion without hindrance."<sup>88</sup> "The purpose of accommodation," continued the Court in *Escritor*, "is to remove a burden on, or facilitate the exercise of, a person's or institution's religion."<sup>89</sup>

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*Id.*

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525 Phil. 110 (2006).

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525 Phil. 110, 137 (2006).

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525 Phil. 110 (2006); *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014.

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*Estrada v. Escritor*, 525 Phil. 110, 148 (2006).

### c. **Santos Leus vs. St. Scholastica's College Westgrove**

The case of *Santos Leus vs. St. Scholastica's College Westgrove*<sup>90</sup> is a recent jurisprudential development and was decided on January 28, 2015. In this case, the petitioner was hired by a Catholic educational institution, as non-teaching personnel. She was found to have engaged in pre-marital sexual relations, became pregnant out of wedlock, married the father of her child, and was dismissed by the college, in that order. The Court ruled that the college was guilty of illegal dismissal.

The fact that the petitioner was employed by a Catholic educational institution per se, reasoned the Court, does not absolutely determine whether her pregnancy out of wedlock is disgraceful or immoral. The Court held that it is still necessary to determine whether the petitioner's pregnancy out of wedlock is considered disgraceful or immoral in accordance with the prevailing norms of conduct, and not necessarily and exclusively by Catholic teachings. To this end, public and secular morality should determine the prevailing norms of conduct, not religious morality. However, for the Court, determining what the prevailing norms of conduct are considered disgraceful or immoral was not an easy task. An individual's perception of what is moral or respectable is a confluence of a myriad of influences, such as religion, family, social status, and a cacophony of others. The Court turned to *Estrada v. Escritor* for instruction, even if that case involved the application of civil service rules,<sup>91</sup> whereas *Santos Leus* involved a private but Catholic educational institution. The morality referred to in the law, said the Court, is public and necessarily secular, not religious. When the law speaks of immoral or, necessarily, disgraceful conduct, it pertains to public and secular morality; it refers to those conducts which are proscribed because they are detrimental to conditions upon which depend the existence and progress of human society. Religious teachings as expressed in public debate may influence the civil public order but public moral disputes may be resolved only on grounds articulable in secular terms. Otherwise, if government relies upon religious beliefs in formulating public policies and morals, the Court reasoned, the resulting policies and morals would require conformity to what some might regard as religious programs or agenda. The non-believers would therefore be compelled to conform to a standard of conduct buttressed by a religious belief, *i.e.*, to a "compelled religion," which is anathema to religious freedom. Likewise, if government based its actions upon religious beliefs, it would tacitly approve or endorse that belief and thereby also tacitly disapprove contrary religious or non-religious views that would not support the

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<sup>90</sup> G.R. No. 187226, January 28, 2015.

<sup>91</sup> The Court in *Santos Leus* held that While *Estrada* is an administrative case against employees in the civil service, the Court, in *Santos Leus*, saw no reason not to apply the doctrines enunciated therein. *Estrada* required the Court to delineate what conducts are considered disgraceful and/or immoral as would constitute a ground for dismissal. More importantly, as in the said administrative cases, the instant case involves an employee's security of tenure; this case likewise concerns employment, which is not merely a specie of property right, but also the means by which the employee and those who depend on him live. See *Santos Leus*, G.R. No. 187226, January 28, 2015.

policy. Expansive religious freedom requires that government be neutral in matters of religion. Governmental reliance upon religious justification is inconsistent with this policy of neutrality.

Under secular standards, therefore, to the Court, the petitioner's pregnancy out of wedlock was not considered disgraceful or immoral conduct since she and the father of her child had no impediment to marry each other. Admittedly, the petitioner was employed in an educational institution where the teachings and doctrines of the Catholic Church, including that on pre-marital sexual relations, is strictly upheld and taught to the students. The Court noted that her 'indiscretion', which resulted in her pregnancy out of wedlock, may be anathema to the doctrines of the Catholic Church, but if viewed against prevailing norms of conduct, her conduct cannot be considered as disgraceful or immoral under law, as such conduct is not denounced by public and secular morality. The Court again stressed that pre-marital sexual relations between two consenting adults who have no impediment to marry each other, and, consequently, conceiving a child out of wedlock, gauged from a purely public and secular view of morality, does not amount to a disgraceful or immoral conduct under existing labor standards.

### **III. Emerging Issues:**

#### **a. Same Sex Marriages**

Very recently, a petition<sup>92</sup> was filed by Jesus Nicardo Falcis III with the Supreme Court, arguing that limiting civil marriages and related rights to heterosexuals violate the constitutionally guaranteed protection for equal treatment, undue interference to liberty rights, and marital autonomy. Here, Falcis is seeking a declaration of unconstitutionality over 1987 Family Code provisions favoring only opposite-sex marriages which repealed the 1949 Civil Code, the latter which, as the petitioner argues, never made such a distinction. Falcis, who openly identified himself as a homosexual, argued for the need for a more LGBT<sup>93</sup>-inclusive society. The case is the first known and reported legal action of its kind before the Philippine Supreme Court.

The petition follows the wave of decriminalization of such marriages in the United States, particularly in the case of *Obergefell v. Hodges* where the US Supreme Court recognized the right to marry among same-sex couples,<sup>94</sup> as well as Ireland's May 2015 referendum in favor of same-sex marriage. While the Falcis petition does not expressly invoke the free exercise clause, the petition is expected to generate social discourse, especially one shaped by Catholic church groups, in considering the question of gay marriages.

#### **b. Criminal complaint against Iglesia ni Cristo ministers**

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<sup>92</sup> Petitioner Jesus Nicardo Falcis III filed a petition on May 18, 2015.

<sup>93</sup> Lesbian, Gay, Bisexual, Transgender.

<sup>94</sup> *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015).

On August 26, 2015, Isaias Samson Jr., a former minister of Iglesia ni Cristo (INC), lodged a criminal complaint against INC officials for allegedly harassing and illegally detaining him and his family. In a complaint affidavit filed with the Department of Justice, Samson, who was former editor-in-chief of INC's official publication *Pasugo*, accused the respondents of harassment, illegal detention, threats and coercion of him and his family.<sup>95</sup> In a press statement, Samson claimed that a number of INC officials went to his office and told him that he was being held "under house arrest". Samson also announced that INC officials had forced their way into his residence and confiscated personal items, and added that he and his family had been prohibited from going out of their residence. He said that he was detained by INC officials because he began questioning transactions and policies set by the *Sanggunian*, the INC's governing council, which he felt were against avowed principles of their faith. Samson pointed to activities amounting to a serious mishandling of the finances of the INC and corruption in the church leadership.

In a statement, Iglesia Ni Cristo denied all accusations and said it was but right for their church to enforce discipline in accordance with their rules after Samson and other now-dismissed ministers had sought to sow discord.<sup>96</sup> When reports circulated that the Department of Justice Secretary Leila de Lima had acted upon Samson's complaint for illegal detention, INC ministers then criticized Secretary de Lima for unfair treatment and for not giving the same attention to the case of the 44 fallen commandos of the Philippine National Police-Special Action Force (PNP-SAF) who died during an encounter against armed groups in Mamasapano, Maguindanao in January. Two of the 44 SAF forces were reportedly members of INC. INC then urged De Lima and the DOJ to focus on the Mamasapano case instead.<sup>97</sup>

The day after Samson filed his complaint, or on August 27, 2015, INC members undertook mass action, initially at the Department of Justice headquarters in Manila against what they considered as Justice Secretary Leila de Lima's "meddling in INC's internal affairs."<sup>98</sup> Several thousands of INC members occupied main public thoroughfares for several days.

While mass protests have ended, INC leadership remains critical at DOJ action. Samson's case remains pending at the Department of Justice. In finding whether probable cause exists for the crimes charged, DOJ prosecutors and our courts are required to deploy the standards in *Escritor*, affirmed in *Imbong*. In particular, it is expected that government prosecutors will be balancing, on one hand, the religious freedom of the actor, here, the INC, in imposing discipline among its ranks in accordance with its practices and beliefs, and, on

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<sup>95</sup> See, e.g., Mark D. Meruenas, GMA News, *Former INC minister sues church execs over illegal detention; INC fires back*, August 26, 2015, <http://www.gmanetwork.com/news/story/534483/news/nation/former-inc-minister-sues-church-execs-over-illegal-detention-inc-fires-back#sthash.SRNLLs4t.dpuf> (last accessed September 21, 2015).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> Amanda Fernandez, GMA News, *EDSA to remain open to traffic despite Iglesia ni Cristo rally*, August 29, 2015, <http://www.gmanetwork.com/news/story/534828/news/metro/edsa-to-remain-open-to-traffic-despite-iglesia-ni-cristo-rally#sthash.M4Q6GZMa.dpuf> (last accessed September 21, 2015).

the other hand, the secular interest of the State in promoting peace and order, notably, the prevention of crimes. While strict belief cannot be inquired into, the moment such belief flows over into action, it becomes subject to government regulation and police power. Samson's position implicates the application of general, facially neutral criminal law. The crime of serious illegal detention is punishable under Article 267 of the Revised Penal Code, classified as a crime against personal liberty and security. It remains to be seen whether prosecutors, and later, the courts, will consider whether free exercise, here couched in terms of the power of a church to discipline its members according to the rudiments of its faith, will trump the deployment of the secular power of the state to mete punishment whenever there are disruptions of peace and order. To do this, the trier of fact must decide whether there is, in the first place, a genuine assertion of religious freedom. If there can be such a finding, triers of fact will then proceed to consider whether the application of provisions punishing illegal detention can pass muster under strict scrutiny.

### **c. The Bangsamoro Basic Law and the GRP-MILF peace accords**

On March 27, 2015, exactly a year after the Comprehensive Agreement on the Bangsamoro (CAB) was signed by the Moro Islamic Liberation Front (MILF)<sup>99</sup> and the Philippine Government, President Benigno S. Aquino III formed a Peace Council and invited five citizens known for their wisdom and integrity to take a close look at the proposed Bangsamoro Basic Law (BBL) now pending in Congress.<sup>100</sup>

The Comprehensive Agreement on the Bangsamoro, or CAB, is the final peace agreement signed between the Government of the Philippines and the Moro Islamic Liberation Front on 27 March 2014 at the Malacañang Palace in Manila. The CAB sets forth decommissioning and transitional justice mechanisms for rebel forces. In return for laying down arms, the CAB envisions the creation of a new autonomous political entity called the "Bangsamoro Autonomous Region," replacing the current Autonomous Region in Muslim Mindanao (ARMM). This will be done through the passage of the Bangsamoro Basic Law or BBL.

Through cluster meetings<sup>101</sup> and upon holding a National Peace Summit, members of the Peace Council independently looked into the provisions of the BBL and offered their collective views and recommendations, each according to his or her knowledge, experience,

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Although the government maintained a cease fire with the MILF, there were attacks by rogue elements often in relation to clan, land, and election politics. In August 2008 after the Supreme Court issued a temporary restraining order on the signing of a government-MILF territorial agreement, an agreement later declared unconstitutional, MILF attacks and subsequent clashes with government troops resulted in the deaths of hundreds of Christian and Muslim residents and the internal displacement in central Mindanao of hundreds of thousands of civilians. The government and MILF instituted a ceasefire in July 2009 and have since engaged in peace talks. See U.S. Dept. of State, 2013 Report on International Religious Freedom – Philippines (July 28, 2014), available at <http://www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm> (last accessed September 21, 2015).

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Manila Archbishop Luis Antonio Cardinal Tagle, former Chief Justice Hilario Davide, Jr, businessman Jaime Augusto Zobel de Ayala, former Philippine Ambassador to the Holy See and Malta Howard Dee, and founder of Teach Peace, Build Peace Movement Bai Rohaniza Sumndad-USman accepted the invitation and gathered 27 other responsible and respected leaders from all sectors of society. There were Christians, Muslims, Indigenous Peoples, religious leaders for various faiths, civil society representatives, businessmen, academics, researchers, and youth. Resource persons were also invited. See Citizens' Peace Council, Executive Summary, Report of the Peace Council on the Bangsamoro Basic Law 1 (April 27, 2015), available at <http://www.opapp.gov.ph/sites/default/files/peace-council-report-bbl.pdf> (last accessed September 21, 2015).

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A total of 136 participants joined the discussions in one or more of the clusters reflecting these themes and separately discussed the BBL from 8-17 April before convening for the National Peace Summit on 18 April 2015. See Citizens' Peace Council, *supra* note 101, at 1.

and expertise. According to the Conveners of the National Peace Summit, the summit served as “an avenue for dialogue between and among independent-minded citizens who believe in the importance of understanding the BBL and to discuss its implications for peace and development in our country in a fair and reasonable manner.” The Peace Council then rendered a report, which reviewed the BBL along four themes: (1) Constitutionality, Form and Powers of Government; (2) Economy and Patrimony, (3) Social Justice and Human Development, and (4) Peace and Order and Human Security.

In what follows, I summarize this report, where I took an active part in the drafting and formulation. I discuss a number of these findings as raised by the Cluster on Constitutionality, Form and Powers of Government and by the Cluster on Social Justice and Human Development which happen to be relevant to the issue of religion and social tensions, as well as religion and social stability. Many of these highlight the tension between religious freedom and state interests, and underscore the need to enforce the separation of church and state in the Bangsamoro region.

It is important to emphasize that the creation of a meaningful autonomy in Muslim Mindanao is both a social justice and a peace and development issue. Fourteen of those who helped create the 1987 Philippine Constitution, three of whom actively participated in the Summit, see the proposed BBL as an attempt at delivering on the Constitutional promise of “closing the gap between law and justice”. The Peace Council believes that it is “necessary to fulfill the vision and spirit that guided the constitutional provisions on autonomous regions since the passage of the Organic Act of the Autonomous Region of Muslim Mindanao. It was our view that the current ARMM Law did not go far enough to give life to the concept of autonomy for Muslim Mindanao as envisioned by the Constitution.”<sup>102</sup>

The BBL is also a product of a peace agreement, forged after decades of peace negotiations, borne out of the country’s exhaustion with war. Understanding this nature of the BBL will place greater significance on the legislative process and put it in the proper perspective. Legislation must be seen, therefore, as a continuation and finalization of the peace agreement. The grant of regional autonomy is an alternative to a declaration of independence or secession. But more than that, the establishment of the Bangsamoro Autonomous Region through the BBL must be seen as an alternative to war. Legislation, therefore, in this context, should be seen as a peace-building exercise. Under the peace process, legislators are not only policy formulators, they become peace-builders.<sup>103</sup>

Bearing in mind the foregoing, we analyzed the major contentious issues on the BBL and published a number of major findings.

*First*, the BBL does not make the Bangsamoro Government an independent state. The provisions on “people,” “territory,” and “self-determination” found on the BBL draft do not

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2.

imply the creation of a separate state, but are consistent with the constitutionally mandated creation of autonomous regions.<sup>104</sup>

*Second*, and more pertinent to the issue, the Bangsamoro Government, as constituted in the BBL, is compliant with the requirements of the Constitution. Passing the BBL does not constitute establishment of religion, much less enforce one upon Filipino citizens. The creation of a “Muslim” Mindanao or the use of a “Wali” as a titular head of the Bangsamoro does not violate the separation of Church and State.<sup>105</sup>

*Third*, the inter-governmental relation between the National Government and the Bangsamoro Government is consistent with the allocation of powers mandated by the Constitution. The defined relationship between the National Government and the Bangsamoro Government embodies the essence of genuine autonomy, based on principles of subsidiarity and solidarity. But, to avoid confusion, we recommended that the phrase “asymmetric relationship” be defined in the BBL in order to clarify that it merely “refers to the relationship between the central government and the Bangsamoro government as an autonomous region, where, as provided under Section 15, Article X of the 1987 Constitution, the autonomous regions are granted more powers and less intervention from the national government than territorial and political subdivisions.”<sup>106</sup>

*Fourth*, the BBL provides for the establishment of *Shari’ah* Circuit Courts, *Shari’ah* District Courts, and a *Shari’ah* High Court, respectively. Under the Constitution, the Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts and it can authorize the autonomous region to possess such legislative power. Furthermore, it should be clarified that Judicial power remains with the Supreme Court while the BBL envisions the creation of special lower courts under the Supreme Court’s control and supervision. However, the BBL provision that states that the decisions of the *Shari’ah* High Court shall be ‘final and executory’ invites controversy. In order to avert any confusion, the provision ought to be amended to include the clause, “subject to the review powers of the Supreme Court.” In any case, under the Constitution, all government actions can be brought to the Supreme Court for settlement of actual controversies or when there is grave abuse of discretion.<sup>107</sup>

*Fifth*, as highlighted by the Cluster on Social Justice and Human Development, the best protection against secession and extremism is the Constitution, and the best assurance against secession or extremism is not in the text of the BBL but in its implementation and by giving genuine autonomy a chance. Among the issues discussed by the Cluster with general significance to the Peace Process concerned the general public’s (a) need for assurance that the Bangsamoro would not secede as an independent state in the future, (b) need for

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104 *Id.* at 3.

105 *Id.* at 4.

106 *Id.*

107 *Id.* at 5.

protection from extremism, (c) bigotry and bias against Muslims, and (d) the need to acknowledge the efforts of the Moro Islamic Liberation Front or MNLF. Allowing the peace process to move with the passage of the BBL will also serve to strengthen the position of the moderates among the rebels, and thus usher in hope that it will fend off extremist influence. But successfully implementing the BBL will require that the public come to terms with its biases. This can be addressed by incorporating peace education and Muslim and indigenous peoples' (IP) history in all levels. Finally, our lawmakers will need to acknowledge even at least in its explanatory note that the BBL benefited from the gains and experience of the MNLF and their own peace agreement and process.<sup>108</sup>

In conclusion, the Peace Council declared that the BBL complies with the Constitution's mandate for the creation of autonomous regions, "within the framework of (the) Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines." While imperfect, it is a significant document that should serve as catalyst for building national consensus towards the realization of the long term aspiration, expressed by the country three decades ago, for justice, solidarity and peace, for Mindanao, and for the entire Philippines.<sup>109</sup>

### **Conclusion**

While Philippine law does recognize the Church's influence and power, the State is directed to disallow any encroachment into its affairs by the Church.<sup>110</sup> Verily, the principle of separation of Church and State is based on mutual respect. Generally, the State cannot meddle in the internal affairs of the church, much less question its faith and dogmas or dictate upon it. It cannot favor one religion and discriminate against another. On the other hand, the church cannot impose its beliefs and convictions on the State and the rest of the citizenry. It cannot demand that the nation follow its beliefs, even if it sincerely believes that they are good for the country.<sup>111</sup>

Thus, in disposing publicly sensitive cases such as that of the illegal detention case against Iglesia ni Cristo ministers, the State, including its courts, may not "meddle in the internal affairs of the Church, much less question its faith and dogmas or dictate upon it. It cannot favor one religion and discriminate against another."<sup>112</sup>

Conversely, "the Church cannot impose its beliefs and convictions on the State and the rest of the citizenry. It cannot demand that the nation follow its beliefs[.]"<sup>113</sup> This mandate is particularly resonant in the drafting and formulation of the BBL whose text introduces concepts associated with Islamic (*Shari'ah*) law.

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108 *Id.* at 9.

109 *Id.* at 5.

110 *See* *Imbong v. Ochoa*, G.R. No. 204819, April 8, 2014.

111 *See id.*

112 *Id.*

113 *Id.*

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