MUSLIM CONVERTS AND BIGAMY IN PHILIPPINE PENAL LAW: EXPLORING THE FREE EXERCISE OF RELIGION AS A DEFENSE

Norhabib bin Suod S. Barodi*

Abstract

The Islamic approach to polygyny, i.e., the permission to have more than one wife but not more than four at a time, applies to Philippine Muslims, subject to compliance with the requisites and conditions of its practice under Muslim law as articulated in the Code of Muslim Personal Laws of the Philippines. However, Philippine Muslim converts with subsisting civil marriages are at the risk of being prosecuted for the crime of bigamy under Philippine penal law once they contract a second or subsequent marriage under Muslim law after their conversion to Islam. By exploring this specific problem, this article highlights significant lessons emerging from the interface of criminal prosecution for bigamy and the defense of *free exercise of religion*. With the adoption of the *Benevolent Neutrality/ Accommodation* stance using the *Strict Scrutiny-Compelling State Interest* test in the Philippine jurisdiction in the landmark *Religion Clauses* case of *Estrada v Escritor,* the possibility of a mandatory accommodation/exemption from the application of general penal law of bigamy is tested in the specific problem or context of this article. Though mandatory accommodation/exemption from criminal statutes burdening religious liberty is still uncertain in the Philippine jurisdiction, yet this article has demonstrated the extent of the *Religion Clauses* of the Philippine Constitution vis-à-vis the Islamic practice of polygamy by Philippine Muslim converts and its tension with the criminalisation of bigamy under the Revised Penal Code.

Keywords: polygamy, free exercise of religion, Philippines.

I INTRODUCTION

A significant factor that contributes to the increasing number of adherents of Islam is conversion. This is noticeable in many non-Muslim countries, including the Philippines. However, conversion to Islam is a phenomenon that affects not only the demography of countries. There are certain legal implications of conversion to Islam in jurisdictions

* Associate Professor of Law, Lawyer and Counselor-at-Law (Shari'ah), Assistant Dean, Mindanao State University College of Law, Main Campus, Marawi City, Philippines, Juris Doctor, MSU College of Law, LL.M (candidate), San Beda University Graduate School of Law, Philippines.

that recognise Muslim personal and family laws. In the Philippines, for instance, the Presidential Decree No. 1083, otherwise known as the *Code of Muslim Personal Laws of the Philippines* ('*Muslim Code*'),[1] deals with the subject of conversion, for there are legal effects of conversion to Islam on the personal laws of the convert. Certain *legal permissions* are recognised for Muslims and are articulated and regulated by the *Muslim Code*. One of these is the permission granted to Muslim males to have more than one wife but not more than four at a time, in accordance with Muslim law. Thus, in the Philippines it is not new that some Muslim converts avail of this permission. The ensuing legal complications may not be immediately apparent as it is common ground that Muslims are allowed in Islam to maintain plurality of wives within the bounds and requisites of Muslim law.

However, in all matters involving the *Muslim Code*, one must consider the scope of its applicability, for generally, it only applies to marriages solemnised under it or Muslim law. On the other hand, marriages solemnised in accordance with civil law or non-Muslim rites are governed by the Civil Code, particularly, the *Family Code of the Philippines 1987* which does not recognise bigamous or polygamous marriages. This is where a grey area emerges. There are existing civil marriages in the Philippines, i.e., they are not governed by the *Muslim Code*, but where the male party contracts a second or subsequent marriage *after* his conversion to Islam. When this occurs, the Muslim converts are at the risk of criminal prosecution for bigamy. Bigamy is a crime defined and penalised under Act No. 3815 as amended, otherwise known as the *Revised Penal Code of the Philippines* (*'RPC'*).[2]

Some defenses – for example, that the first marriage is void *ab initio* or voidable or that there is mistaken belief that the first marriage is void – raised against criminal prosecution for bigamy in the Philippines have been tried in actual cases but failed. However, not one of these defenses have involved an invocation of *religious freedom* to avoid criminal liability. In the Philippines, the question of *mandatory accommodation/ exemption*[3] from general penal laws is still an open question. That is to say, there is no Philippine case yet that has resolved whether an individual, invoking the practice of his religious beliefs, should be exempted from the application of criminal statutes. In the landmark *Religion Clauses* case of *Estrada v Escritor*,[4] the Supreme Court of the Philippines categorically declared that the Court can carve out an exemption even from the application of general penal laws, provided that it is justified by the *Religion Clauses* of the Constitution.

This article explores if the invocation of *Free Exercise of Religion* would be an effective defense against criminal prosecution for bigamy when Philippine Muslim converts contract second or subsequent marriages in violation of the Philippine penal law against bigamy. While this specific problem by itself is also an open question, significant lessons emerge from this study pertaining to the extent of the *Religion Clauses* of the Philippine Constitution vis-à-vis the Islamic practice of polygamy in the Philippines as

1 *Muslim Code* 1977 (Philippines).
2 *RPC 1932* (Philippines).
3 See Part V(B) below.
4 See *Estrada v Escritor* 408 SCRA 1 (2003); *Estrada v Escritor* 492 SCRA 1 (2006).

articulated in the *Muslim Code* and its tension with the criminalisation of bigamy under the *RPC*. These significant lessons deserve attention at the very least. It is a matter of time before an actual case of criminal prosecution for bigamy reaches the Supreme Court involving a *direct* and *head-on* clash between a Philippine Muslim convert's religious belief on the Islamic practice of polygamy and the crime of bigamy under the *RPC*. There are two cases that have been decided by the Supreme Court involving Philippine Muslims and the issue of a bigamous marriage.[5] But these cases did not involve an invocation of the *Free Exercise Clause.*

The reader is advised though that this article revolves around one specific context, i.e., the specific problem of Philippine Muslim *male* converts with subsisting civil marriages who contract second or subsequent marriages *after* their conversion to Islam, in apparent violation of Philippine penal law against bigamy.[6] This analysis does *not* cover in its scope those non-Muslim husbands who convert to Islam as a reason to 'legalise' their *existing* bigamous marriage contracted *before* their conversion. The latter is an entirely different setting that requires a separate occasion for critical analysis.

Part II of this article gives a brief overview of the Islamic approach to polygamy as articulated in the *Muslim Code* and the effect of conversion to Islam on marriage. Part III discusses the brief historical background and the nature of bigamy under Philippine penal law as well as the defenses that have been raised against criminal prosecution for bigamy. Part IV gives an overview of the *Free Exercise Clause* of the Philippine Constitution and describes the specific act of the Philippine Muslim converts of contracting second or subsequent marriages as an *act* in the free exercise of religious belief. Part V examines the applicability of the *Benevolent Neutrality/Accommodation* approach to the second or subsequent marriage of Philippine Muslim converts which is alleged to be bigamous, with reference and reliance on the landmark case of *Estrada v Escritor.* Part VI provides a summative application of the lessons derived from *Estrada v Escritor.* Part VII provides the concluding remarks.

II MUSLIM CONVERSION AND PLURALITY OF MARRIAGE: A BRIEF OVERVIEW UNDER THE *MUSLIM CODE*

A *Polygamy under the Muslim Code*

The polygamous marriage permitted by Islam, i.e. polygyny, is the same kind that is articulated in the *Muslim Code*. Hence, whether polygamous marriages are permitted for Philippine Muslims is an issue that requires no debate. As a feature of Islamic family law, the permissibility of polygamous marriages in Islam has not eluded the Philippines in so far as its Muslim population is concerned. While in general polygamous marriages

5 See Part III(B) below.

6 The author, besides being a regular civil lawyer, is also a Counselor-at-Law or one who can practise before the Philippine Shari'ah courts after passing the Special Shari'ah Bar Examination in the Philippines. Most of the time, this is the specific problem or scenario on which the author is often requested to give a legal opinion, analysis or advice by private parties and other interested parties.

are not permitted in the Philippine law on persons and family relations,[7] an exception is made for the Philippine Muslims through the *Muslim Code*. Therefore, in general, the Philippine Muslims – whether by birth or by conversion – are permitted to have more than one wife but not more than four at a time in accordance with Islamic law.

However, the fact that Muslims are permitted to practice Islamic polygamy is not a blanket permission that requires only the condition of being a Muslim. A Philippine Muslim, whether by birth or by conversion, is subject to the same regulations mentioned above. While the *Muslim Code* expressly recognises polygamous marriages, there are stringent requirements for its practice. This is clear from Article 27 of the *Muslim Code* which focuses on qualifying the right of polygamous marriages with fundamental limitations. The provision reads:

> Notwithstanding the rule of Islamic law permitting a Muslim to have more than one wife but not more than four at a time, no Muslim male can have more than one wife unless he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases.

Under this provision, a Muslim male can have more than one wife only if he can comply with the fundamental requirement of equal companionship and just treatment. This condition on equal and just treatment is the paramount test that must be satisfied by Muslims desiring to have more than one wife. However, justice as mentioned in *Surah* 4:3 'only relates to the humanly possible equitable treatment.'[8] 'It refers to justice in outward matters such as justice in providing maintenance (*nafkah*), justice in conjugal relationships that is, taking turns with the wives and justice in the place of dwelling.'[9]

For Justice Saaduddīn A. Alauya,[10] whether the husband can deal with his wives with equal companionship and just treatment 'can only be wisely determined by properly scrutinising the financial status of the husband and of his peculiarities in life[.]'[11] This view is consistent with the interpretation of the *Shafi'i* school that 'the Qur'an subjected the permission for plurality of wives to the conditions of the husband's financial capacity to provide maintenance to more than one wife.'[12]

There is no case yet from the Philippine Shari'ah Courts which has reached the Supreme Court on the issue of financial means of a Philippine Muslim desiring to have more than one wife. However, in foreign jurisdictions, the proper Shari'ah Courts have rejected applications by the Muslims to have more than one wife on the ground of lack of financial means to support the wives and children. In Malaysia, the case of *Re Ruzaini bin*

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7 Art. 35. The following marriages shall be void from the beginning: […]; (4) Those bigamous or polygamous marriages […]. [*The Family Code of the Philippines 1987* (Philippines) art 35(4)].

8 Nora Abdul Hak, 'Just and Equal Treatment in Polygamous Marriage: The Practice in the Shariah Courts in Malaysia' (2008) 16(1) International Islamic University Malaysia Law Journal 141-155, 143.

9 Ibid.

10 Former Jurisconsult in Islamic Law in the Philippines with the rank of Justice of the Court of Appeals. He was a member of the Presidential Commission that drafted the Code of Muslim Personal Laws of the Philippines.

11 Saaduddīn A. Alauya, *The Quizzer in Muslim Personal Law* (KFCIAS, 1984) 31.

12 Bensaudi I. Arabani, *Commentaries on the Code of Muslim Personal Laws of the Philippines with Jurisprudence and Special Procedures* (Rex Book Store, 1990) 283-4.

Hassan[13] is a good example. In *Just and Equal Treatment in Polygamous Marriage: The Practice in the Shariah Courts in Malaysia*,[14] Abdul Hak summed up the case as follows:

> In *Re Ruzaini bin Hassan*, the applicant had filed the application for polygamy under section 23 of the Islamic Family Law Enactment (Negeri Sembilan). The applicant claimed that his financial condition was stable for him to support two families. However, the first wife has objected to it. The applicant explained in detail to the Syariah Court of his financial capability. The Court after considering the evidence from the applicant decided that the applicant did not have the financial ability to have a second wife. Therefore the application was rejected.

Article 27 of the *Muslim Code* likewise requires that the Muslim male desiring to marry more than one wife must be doing so only in 'exceptional cases'. This requirement means that 'his reason for seeking to contract a subsequent marriage, must be based upon a meritorious, reasonable, and valid ground, or that it is necessary and just.'[15] In particular, the following circumstances may be considered: 'sterility, physical unfitness for conjugal relation, willful avoidance of a decree of restitution of conjugal rights, or insanity on the part of the present wife.'[16] There is no Philippine case yet that has reached the Supreme Court on the issue of '*exceptional cases*'. Nonetheless, the foreign case of *Sharif bin Jamaluddin v Kuning binti Kasman*,[17] summed up by Normi Abdul Malek, demonstrates the satisfaction of this requirement:

> [T]he application of the husband who was capable of practising polygamy was granted. In this case, the wife was suffering from some illness which made her incapable to fulfil her responsibility as a wife. This case is a good example of polygamy becoming a remedy to certain types of difficulty that can happen in a marriage. By practising polygamy, the husband can fulfil his sexual needs and at the same time fulfil his responsibilities to maintain and take care of his sick wife.[18]

A third requisite is imposed by Article 162 of the *Muslim Code*. It is necessary for a Muslim husband who wants to contract a subsequent marriage to show that he is so authorised by an order of the Shari'ah Circuit Court upon consent of the present wife or, her objection (if any) was not sustained by the court. However, the author believes that Article 162 should be treated in a separate study.

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13 *Re Ruzaini bin Hassan* [1990] 3 MLJ lx; (1990) 7 JH 152.

14 Abdul Hak (n 8) 147.

15 Arabani (n 12) 284.

16 Ibid. See also *Selangor Islamic Family Law Enactment 1984* (Malaysia) s 23(4)(a).

17 (2002) 15 JH 173.

18 Normi Abdul Malek, 'The Family Institution and Its Governing Laws in Malaysia as a Vanguard in Protecting the Society from Social Ailments: A Shari'ah Perspective' (2016) 24(2) *International Islamic University Malaysia Law Journal* 397-413, 411.

B *Effect of Conversion to Islam on Marriages under the Muslim Code*

In the applicability clause of Article 13 of the *Muslim Code*, it is expressly stated that '[t]he provisions [on marriage and divorce] shall apply to marriage and divorce wherein both parties are Muslims, or wherein only the male party is a Muslim and the marriage is solemnised in accordance with Muslim law or this Code in any part of the Philippines.'[19] 'In case of a marriage between a Muslim and a non-Muslim, solemnised not in accordance with Muslim law or this Code in any part of the Philippines, the Civil Code of the Philippines shall apply.'[20] It is clear from these provisions that marriages between non-Muslims solemnised in accordance with non-Muslim law or the Civil Code are beyond the coverage of the *Muslim Code*. Thus, this is where conversion to Islam becomes a factor to consider as it may alter this conclusion.

Non-Muslim or civil marriages may yet be placed within the scope of application of the *Muslim Code* through the mechanism of conversion to Islam of both non-Muslim spouses under Article 178. The provision states as follows:

> Article 178. *Effect of conversion to Islam on marriage.* The conversion of non-Muslim spouses to Islam shall have the legal effect of ratifying their marriage as if the same had been performed in accordance with the provisions of this Code or Muslim law, if there is no legal impediment to the marriage under Muslim law.

It must be noted that this provision requires the conversion of *both* spouses for the provision's legal effect to apply. About the application of this provision, the author has previously observed that:

> '[Article 178] deals with the 'conversion of non-Muslim spouses'. Thus, for the provision to have complete application on the effect of conversion to Islam on a marriage, the conversion must be on the part of both spouses. If only one of the non-Muslim spouses converts to Islam, then the provision finds no application. In which case, the marriage is not ratified 'as if the same had been performed in accordance with the provisions of this Code or Muslim law'. This situation is prevalent in many existing non-Muslim marriages in that only one of the spouses converts to Islam. Accordingly, the marriage continues to be governed by the non-Muslim law in accordance with which it was originally solemnised.'[21]

When both non-Muslim spouses convert to Islam, their conversion has the legal effect of '*ratifying* their marriage as if the same had been performed in accordance with the provisions of [the Muslim] Code or Muslim law.'[22] Thus, their marriage shall be governed by the *Muslim Code* including the provisions on subsequent marriage by the Muslim husband. However, the complication commences when only one of the non-Muslim

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19 *Muslim Code* (n 1) art 13(1).

20 Ibid art 13(2).

21 Norhabib Bin Suod S. Barodi, 'The Code of Muslim Personal Laws of the Philippines: Beyond the Lenses of *Bondagjy v. Bondagjy*' (2019) 27(2) *International Islamic University Malaysia Law Journal* 367-396, 375.

22 *Muslim Code* (n 1) art 178.

spouses, such as the husband, converts to Islam. In such a case, the legal effect of Article 178 – *ratifying* their marriage as if the same had been performed in accordance with the provisions of the Muslim Code or Muslim law – is not produced. This means that 'the marriage continues to be governed by the non-Muslim law in accordance with which it was originally solemnised',[23] which in this case is Philippine civil law, which does not recognise bigamous or polygamous marriages. From this scenario arises the situation of Philippine Muslim converts – those with subsisting civil marriages who contract a second or subsequent marriage under Muslim law or the Muslim Code – being at risk of facing criminal prosecution for bigamy.

III BIGAMY UNDER PHILIPPINE PENAL LAW

A *Bigamy: From the Spanish Penal Code to the Revised Penal Code*

For a sharper nuance on bigamy under Philippine penal law, it is imperative to trace the history of the *RPC* under which bigamy is included as one of the felonies.

In his treatise on criminal law, the distinguished Justice Florenz D. Regalado traced the history of the *RPC* to the *Spanish Penal Code of 1870*, which incidentally also 'extensively drew upon the provisions of the French Penal Code of 1810[.]'[24] The Revised Penal Code of the Philippines, he wrote, 'is actually a mere revision of the old Penal Code in force in the Philippines from July 14, 1887 and which, in turn, was based on the Spanish Penal Code of 1870.'[25] This historical fact is significant to explain why the prohibition of bigamy is firmly institutionalised in Philippine penal law. This is notwithstanding that the Islamic presence in the Philippines was preceded by two centuries before the onset of Spanish colonialism in the Philippines in 1521.[26] Incidentally, the Spanish colonialism in the Philippines that lasted for centuries included the spread of the Catholic faith through the 'Spanish program of Christianisation of both Muslims and pagan groups.'[27] This Spanish programme was evident in the enforcement of Spanish laws which were characterised to some extent by Catholic traditions. A good example of these laws would be the criminalisation of bigamy under the *Spanish Penal Code of 1870*, which was carried over to Article 349 of the *RPC*. The prohibition of bigamy, without need of further debate, is a standard Catholic tradition. In this regard, it has been stated that '[t]he religious basis for the condemnation [of polygamy] was unmistakable: "It is contrary to the spirit of Christianity and of the civilisation which Christianity has produced in the Western world."'[28]

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23 Barodi, 'Muslim Personal Laws' (n 21) 375.

24 Florenz D. Regalado, *Criminal Law Conspectus* (National Book Store, 2003) 3.

25 Ibid 2.

26 See specially Norhabib Bin Suod S Barodi, *Shari'ah for the Muslim Region in the Philippines: The Essence of Moro Self- Determination* (Ivory Printing and Publishing House, 2017) 78-81, citing Sonia M. Zaide, *The Philippines: A Unique Nation* (All Nations Publishing, 2013) 148, Sukarno D. Tanggol, *Muslim Autonomy in the Philippines: Rhetoric and Reality* (MSU Press and Information Office, 1993) 4-5, and Datumanong Di. A. Sarangani, 'Islamic Penetration in Mindanao and Sulu' (1974) 1(1) *Mindanao Journal* 49-73, 51-4.

27 Mamitua Saber, 'Majority-Minority Situation in the Philippines' (1974) 1(1) *Mindanao Journal* 3-22, 7, 11.

28 John McDermott, 'The Non-Recognition of Islamic Marriage and Divorce' (2010) 18(1) *International Islamic University Malaysia Law Journal* 33-74, 42.

Be that as it may, the phenomenon of polygamous marriages should not be viewed as totally surprising or strange even in the generally conservative Philippine society. Though bigamy is penalised as a felony, yet the reality is that many are into polygamous relationships. This is discernible by simply looking at the numerous cases that reached the Supreme Court of the Philippines involving relations outside lawful wedlock and illegitimate children. In fact, official data suggests that 'illegitimate or non-marital children in the Philippines is now at 53 percent[.]'[29] According to the Philippine Statistics Authority, '[m]ore than half (906,106 or 54.3%) of the total registered live births in 2018 were born out of wedlock.'[30]

Bigamy, being punished under the *RPC*, is a felony belonging to the category of *malum in se*. '[*M*]*alum in se* is a wrong in itself, involving as it does an illegality from its very nature[.]'[31] Hence, the perspective of the *RPC* is that bigamy is *wrong in itself, involving as it does an illegality from its very nature.*

B *Defenses that have been raised*

It appears from Article 349 of the *RPC* that the mere act of contracting a second or subsequent marriage during the subsistence of a previous valid marriage is penalised.[32] Few defenses relevant to this have been raised, *e.g.* that the previous marriage is void *ab initio* or voidable or there is a mistaken belief that the previous marriage is voidable. However, these defenses failed. Even if the previous marriage is void *ab initio,* the offender cannot escape criminal liability for bigamy if he remarries prior to a judicial declaration of nullity of the previous marriage.[33] This is because the previous marriage must be first declared by the court as void *ab initio* before the offender can contract another marriage. The same is true with a voidable marriage. If the offender remarries in the belief that his previous marriage is voidable, he is still liable for bigamy.[34] The reason is that a voidable marriage is valid until annulled. The offender's belief as to a mistake of law does not excuse him from criminal liability for bigamy. The offender cannot also feign ignorance of his subsisting marriage for obvious reasons.

These defenses will also fail in the case of Philippine Muslim converts who contract second or subsequent marriages while their civil marriages are still subsisting. Thus, the defence that the previous civil marriage of the Muslim convert is voidable or void *ab initio* and that he is under a mistaken belief that the said marriage is invalid are, according to jurisprudence, not effective defenses to avoid criminal liability for bigamy. However, a remarkable fact about these defenses so far is that none of them had at its centrality the invocation of *free exercise of religion.*

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29 Tetch Torres-Tupas, 'Expert says more children born out of wedlock in PH', *Philippine Inquirer* (online, 03 September 2019) <https://newsinfo.inquirer.net/1160517/expert-says-more-children-born-out-of-wedlock-in-ph>.

30 Philippine Statistics Authority, 'Births in the Philippines, 2018', *Philippine Statistics Authority* (online, 27 December 2019) <https://psa.gov.ph/vital-statistics/id/144897>.

31 Regalado (n 24) 18, *citing State v Sherdowdy*, 45 N.M. 516, 18 P. 2, 380.

32 Leonor D. Boado, *Compact Reviewer in Criminal Law* (Rex Book Store, 2013) 451.

33 See generally *Wiegel v Sempio-Diy*, 143 SCRA 499, *cited* in Regalado (n 24) 667.

34 See generally *People v Cotas*, CA, 40 O.G. 3154, *cited* in Regalado (n 24) 668.

Parenthetically, two cases have already been decided by the Supreme Court involving Philippine Muslims embroiled in litigation that demonstrated the interplay of the *Muslim Code*'s applicability and the *RPC*'s criminalisation of bigamy. These are the cases of *Estrellita Juliano-Llave v Republic of the Philippines, et. al.* ('*Juliano-Llave v Republic*')[35] and *Atty. Marieta D. Zamoranos v People of the Philippines and Samson R. Pacasum, Sr.* ('*Zamoranos v People*').[36] In *Juliano-Llave v Republic,* the petitioner's second marriage was declared void *ab initio* under civil law for being bigamous as the Muslim male spouse had a subsisting civil law marriage. This case sprung from a civil complaint for declaration of nullity of marriage. It was not about criminal prosecution for bigamy. In *Zamoranos v People,* the petitioner was charged for bigamy, but the case was dismissed because her subsequent marriage was validly solemnised in accordance with the *Muslim Code*, her previous Muslim marriage having been dissolved through divorce under the same law. Therefore, her subsequent marriage was not bigamous.

Neither *Juliano-Llave v Republic* nor *Zamoranos v People* directly involved a deliberate and point-blank invocation of the *Free Exercise Clause* of the Constitution to avoid criminal liability for bigamy. It is for this reason that this article explores the potential of factoring in the *free exercise of religion* in the dynamics of the Muslim converts' second or subsequent marriage and the prohibition of bigamy under the *RPC*. This of course requires a discussion on 'free exercise of religion'.

IV FREE EXERCISE OF RELIGION

When *free exercise of religion* or *freedom of religious profession and worship* is placed at the centrality of the defense against the prosecution for bigamy under Philippine penal law, there are significant lessons that would certainly come out which deserve attention at the very least. This is because the right to religious freedom 'is a fundamental right that enjoys a preferred position in the hierarchy of rights.'[37] The 'religion clauses, like the other fundamental liberties found in the Bill of Rights, is a preferred right and an independent source of right.'[38] It 'is sacred for an invocation of the Free Exercise Clause is an appeal to a higher sovereignty.'[39] In the language of the Supreme Court of the Philippines, '[t]he entire constitutional order of limited government is premised upon an acknowledgment of such higher sovereignty. Thus, the Filipinos implore the "aid of Almighty God in order to build a just and humane society and establish a government."'[40] For these reasons, sometimes state interest alone is not enough to prevail over free exercise of religion. Freedom of religion is articulated in the Constitution of the Philippines as follows:

> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession

35 (2011) 646 SCRA 637 ('*Juliano-Llave v Republic*').
36 (2011) 650 SCRA 304 ('*Zamoranos v People*').
37 (2003) 408 SCRA 1 ('*Estrada v Escritor (2003)*') 171.
38 (2006) 492 SCRA 1 ('*Estrada v Escritor (2006)*') 77.
39 *Estrada v Escritor (2003)* (n 37) 171.
40 Ibid.

> and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.[41]

A *Freedom to Act One's Belief*

Freedom of religion consists of two aspects, *namely,* freedom to believe and freedom to act on one's belief. This article will not dwell much on freedom to believe as it is absolute. Individuals can believe or disbelieve in the existence of God. They can subscribe to religion or just consider it as a myth because freedom of religion encompasses rejection of religion. As put by *Cruz* and *Cruz,*

> However absurd his beliefs may be to others, even if they be hostile and heretical to the majority, he has full freedom to believe as he pleases. He may not be required to prove his beliefs. He may not be punished for his inability to do so. Religion, after all, is a matter of faith. "Men may believe what they cannot prove." Everyone has a right to his beliefs and he may not be called to account because he cannot prove what he believes.[42]

An individual is free to reject faith and even the Islamic faith for that matter. This is the context of *Surah* (Chapter) *109* of the Holy Qur'an.[43] According to Yusuf Ali*,* this *surah* 'defines the right attitude to those who reject Faith: in matters of Truth we can make no compromise, but there is no need to prosecute or abuse anyone for his faith or belief.'[44] Belief resides in the mind. And as long as it remains there, not translated into external acts, it is protected as an absolute freedom.

However, it is a different story when religious belief is translated into external acts. While freedom of religion includes freedom to act on one's belief, yet external acts in the exercise of religion may invite the power of the state to regulate acts that affect the public welfare. In other words, while freedom to believe is absolute, freedom to act on one's belief is not. For this, we affirm the following observation:

> But where the individual externalises his beliefs in acts or omissions that affect the public, his freedom to do so becomes subject to the authority of the State. As great as this liberty may be, religious freedom, like all the other rights guaranteed in the Constitution, can be enjoyed only with a proper regard for the rights of others. It is error to think that the mere invocation of religious freedom will stalemate the State and render it impotent in protecting the general welfare. The inherent police power can be exercised to prevent religious practices inimical to the society.[45]

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41 *Constitution of the Philippines 1987* (Philippines) art 3, s 5.

42 Isagani A. Cruz and Carlo L. Cruz, *Constitutional Law* (Central Book Supply, 2015) 447.

43 'Say: O ye That reject Faith! I worship not that Which ye worship, Nor will ye worship That which I worship. And I will not worship That which ye have been Wont to worship, Nor will ye worship That which I worship.' [Surah 109, Holy Qur'an].

44 *The Holy Qur'an, English translation of the meanings and Commentary*, tr *Mushaf Al-Madinah An-Nabawiyah*, adopting with refinements the translation of the late Ustadh Abdullah Yusuf Ali (King Fahd Holy Qur'an Printing Complex) 2020.

45 Cruz and Cruz (n 42) 447.

Thus, for instance, the practice of human sacrifice, in the name of religious belief can be punished as murder. One cannot burn down another's house as a religious act, for that constitutes arson. A person who forcibly or without consent of the owner takes private property not belonging to him as an offering to please his *deity* would be liable for robbery or theft. This does not mean however that the State's authority always prevails over the freedom to act on one's belief. As succinctly put by the Supreme Court of the Philippines –

> However, not any interest of the state would suffice to prevail over the right to religious freedom as this is a fundamental right that enjoys a preferred position in the hierarchy of rights - "the most inalienable and sacred of all human rights", in the words of Jefferson.[46]

There are many instances where the interference of the state on religious acts or matters, were declared unconstitutional for violating the Religion Clauses of the Philippine Constitution. In *Islamic Da'wah Council of the Philippines v Office of the Executive Secretary* ('*Islamic Da'wah Council of the Philippines*'),[47] granting the Office on Muslim Affairs under Executive No. 46, s. 2001, the exclusive authority to issue *halal* certifications was declared unconstitutional. According to the Supreme Court, this exclusive authority effectively allowed the state to compel Philippine Muslims to accept the state's own interpretation of the Qur'an and Sunnah, thereby encroaching on the religious freedom of Muslim organisations to interpret for Philippine Muslims what food products are fit for their consumption.

In *Ang Ladlad LGBT Party v Commission on Elections* ('*Ang Ladlad*'),[48] basing on religious standards in the Qur'an and the Bible, the Commission on Elections refused to register a group from the LGBT community, i.e*., Ang Ladlad LGBT Party*, as a party-list organisation under the Party-List System Act (Republic Act No. 7941) for purposes of the party-list elections. Such refusal according to the Supreme Court is in violation of the non-establishment clause of the Constitution, specifically, that no law shall be made respecting an establishment of religion.

In *Ebralinag v The Division Superintendent of Schools of Cebu* ('*Ebralinag*'),[49] the Supreme Court sustained as exercise of religious freedom the refusal of the petitioners to salute the Philippine flag, sing the national anthem and recite the patriotic pledge, considering that the petitioners, as members of the Jehovah's Witnesses, believed that the flag is an image which they should not worship according to their religious belief.

B *Second or Subsequent Marriage: A Religious Act?*

To contend on the basis of religious freedom, it is necessary to establish in the first place that the Philippine Muslim converts' act of contracting second or subsequent marriage is in the exercise of the Islamic religion. This is decisive as any act sought to be justified

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46 *Estrada v Escritor (2003)* (n 37) 171.
47 (2003) 405 SCRA 497 ('*Islamic Da'wah Council of the Philippines*').
48 (2010) 618 SCRA 32 ('*Ang Ladlad*').
49 (1993) 219 SCRA 256 ('*Ebralinag*').

under the *Free Exercise Clause* must be shown to be performed out of one's religious belief. If the Philippine Muslim convert's act of contracting polygamous marriage does not arise from his religious belief, then the *Free Exercise Clause* becomes entirely irrelevant.

Marriage, whether first or subsequent, has a special standing in Islam. This is deducible from the Qur'anic verse (*Surah 30:21*) that among the signs or miracles of Allah is the creation of spouses which together with the series of *Signs* or *Miracles* mentioned in *Surah 30:20-25,* according to Yusuf Ali, 'should awaken our souls and lead us to true Reality if we try to understand Allah.'[50] The translation of the verse is follows:

> And among His signs is this: that He created for you spouses from among yourselves, that you may dwell with them in tranquility, and He engendered love and mercy between your hearts. Indeed, in that are signs for those who reflect.[51]

According to Hamid Aminoddin Barra, '[t]he wisdom behind entering a conjugal life in an Islamic perspective is clearly set forth in this *ayah,* that is to create an atmosphere of peace and tranquility, of concern and compassion, of love and affection, of care and understanding, between the spouses.'[52] '[M]arriage is regarded first and foremost as a righteous act, an act of responsible devotion.'[53]

While marriage is characterised by several values and purposes, *e.g.,* sexual control, reproduction, sound health, peace and tranquility, compassion, love and affection, care and understanding between spouses, 'yet, these values and purposes of marriage,' says *Abdalati,* 'would take on a special meaning and be reinforced if they are intertwined with the idea of God, conceived also as religious commitments, and internalised as divine blessings.'[54] 'And [indeed] this seems to be the focal point of marriage in Islam.'[55]

Based on the historical background and context of the Islamic view on polygamy, this author submits that the act of contracting a second or subsequent marriage is within the scope of freedom to act on one's belief. It is an act whose performance is regulated by Islamic rules and regulations embodied in the Qur'an. Thus, whether a Philippine Muslim convert is qualified to have more than one wife is an issue addressed by Qur'anic injunctions directly dealing with that question. Therefore, overlooking momentarily the crime of bigamy, when a Philippine Muslim convert contracts a second or subsequent marriage in accordance with Muslim law, that act is within the sphere of *free exercise of religion.*

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50 *The Holy Qur'an, English translation* (n 44) footnote 3529, 1183.

51 Ibid 1182.

52 Hamid Aminoddin Barra, *The Code of Muslim Personal Laws: A Study of Islamic Law in the Philippines* (MSU College of Law, and KFCIAS, 1988) 70.

53 Hammudah Abdalati, *Islam in Focus* (Damascus, 1977) 114.

54 Ibid 115.

55 Ibid.

V BIGAMOUS MARRIAGES AND BENEVOLENT NEUTRALITY/ACCOMMODATION

After establishing that the act of contracting a second or subsequent marriage by a Philippine Muslim convert is in the exercise of religion, the next issue is whether that religious act should be upheld, even if it contravenes the general penal law of bigamy in the Philippines. Thus, it behoves an inquiry on how far accommodation has been stretched in the Philippines in the name of religious freedom. This is where the landmark Philippine case of *Estrada v Escritor* (2003) – followed up by *Estrada v Escritor* (2006) – becomes the north star of this article in exploring the potential of free exercise of religion as a defense by the Philippine Muslim converts against prosecution – or threat thereof – for the crime of bigamy once they contract a second or subsequent marriage while their civil marriages are subsisting. The case of *Estrada v Escritor* (2003) – together with *Estrada v Escritor* (2006) – is the landmark case in the Philippine jurisprudence, that adopted the Benevolent Neutrality/Accommodation approach in dealing with Religion Clauses cases in the Philippine jurisdiction.

A *Brief Background of* Estrada v Escritor (2003) *and* Estrada v Escritor (2006)

To appreciate the relevance of the *Estrada v Escritor* doctrine to this article, a brief factual background of the case is in order.

Estrada lodged a complaint against Soledad Escritor, a court employee for living with a man (Luciano Quilapio, Jr.), who is not her husband and who himself had a subsisting marriage with another woman. Out of this live-in arrangement she gave birth to a son. Escritor did not deny these allegations. In fact, she admitted to have cohabited with that man for more than twenty years without the benefit of marriage. Her own legal husband was still alive but also living with another woman. The complainant Estrada believed that Escritor's conduct tarnished the image of the court for her "disgraceful and immoral conduct", a ground for disciplinary action under Book V, Title I, Chapter VI, Sec. 46(b) (5) of the Revised Administrative Code. Therefore, Estrada prayed that Escritor should be dismissed from service as it might appear that the court tolerates her disgraceful and immoral conduct.

However, Escritor was a member of the Jehovah's Witness religion and the Watch Tower and Bible Tract Society. Escritor's conjugal arrangement conforms with the religious beliefs of their congregation. In fact, after ten years of cohabitation, Escritor executed a "Declaration of Pledging Faithfulness", which allows members of the Jehovah's Witness religion, who were abandoned by their spouses, to enter into marital relations. Thus, Escritor's conjugal union with a married man who is not her legal husband is moral and binding within their congregation all over the world except in countries that allow divorce.

Escritor pleaded for exemption, based on the *Free Exercise Clause*, from administrative liability for "disgraceful and immoral conduct". In its *Estrada v Escritor* (2003) ruling, the Supreme Court of the Philippines subjected Escritor's invocation of

religious freedom to the "*compelling state interest"* test from a *benevolent neutrality stance.* This is equivalent to –

> entertaining the possibility that [Escritor's] claim to religious freedom would warrant carving out an exception from the Civil Service Law; necessarily, her defense of religious freedom will be unavailing should the government succeed in demonstrating a more compelling state interest.[56]

'*In applying the test, the first inquiry is whether respondent's right to religious freedom has been burdened.*'[57] For the first inquiry, the Supreme Court held that Escritor's religious freedom has been burdened. '[C]hoosing between her keeping her employment and abandoning her religious belief and practice and family on the one hand, and giving up her employment and keeping her religious practice and family on the other hand, puts a burden on her free exercise of religion.'[58]

'The second step is to ascertain respondent's sincerity in her religious belief.'[59] For the second inquiry, the Supreme Court was convinced that Escritor 'appears to be sincere in her religious belief and practice and is not merely using the "Declaration of Pledging Faithfulness" to avoid punishment for immorality.'[60]

However, the *Estrada v Escritor* (2003) could not be decided using the *compelling state interest* test as of yet because, as the case is 'of first impression […], the parties were not aware of the burdens of proof they should discharge in the Court's use of the "compelling state interest" test.'[61] 'To properly settle the issue,' said the Court, 'the government [through the Office of the Solicitor General] should be given the opportunity to demonstrate the compelling state interest it seeks to uphold in opposing [Escritor's] stance that her conjugal arrangement is not immoral and punishable as it comes within the scope of free exercise protection.'[62] Thus, the case was remanded over to the Office of Court Administrator on August 4, 2003.

After almost three years later, the case came back from the Office of Court Administrator to the Supreme Court and was finally decided in its entirety in *Estrada v Escritor* (2006). In this later ruling, the Supreme Court affirmed its findings in the earlier *Estrada v Escritor* (2003) ruling that Escritor's right to religious freedom had been burdened and that her sincerity in her religious belief was established. However, this time the Supreme Court also ruled that the government, represented by the Office of the Solicitor General, had failed to satisfy the *compelling state interest* test.

Thus, applying the *Benevolent Neutrality/Accommodation* and the *strict scrutiny-compelling state interest* test*,* Escritor's plea for exemption was granted and the

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56 *Estrada v Escritor (2003)* (n 37) 188.
57 Ibid.
58 Ibid 188, 189.
59 Ibid 189.
60 Ibid.
61 Ibid 190.
62 Ibid 190, 191.

administrative complaint against her was dismissed. The Supreme Court concluded as follows:

> Thus, we find that in this particular case and under these distinct circumstances, respondent Escritor's conjugal arrangement cannot be penalised as she has made out a case for exemption from the law based on her fundamental right to freedom of religion. The Court recognises that state interests must be upheld in order that freedoms - including religious freedom - may be enjoyed. In the area of religious exercise as a preferred freedom, however, man stands accountable to an authority higher than the state, and so the state interest sought to be upheld must be so compelling that its violation will erode the very fabric of the state that will also protect the freedom. In the absence of a showing that such state interest exists, man must be allowed to subscribe to the Infinite.[63]

B *Benevolent Neutrality/Accommodation*

Confronted with what theory to choose for the Philippines in resolving *Religion Clauses* cases – between *Strict Neutrality/Separation* and *Benevolent Neutrality/Accommodation* – the Supreme Court spoke with conviction as follows:

> We here lay down the doctrine that in Philippine jurisdiction, we adopt the benevolent neutrality approach not only because of its merits […], but more importantly, because our constitutional history and interpretation indubitably show that benevolent neutrality is the launching pad from which the Court should take off in interpreting religion clause cases. The ideal towards which this approach is directed is the protection of religious liberty "not only for a minority, however small- not only for a majority, however large but for each of us" to the greatest extent possible within flexible constitutional limits.[64]

Parenthetically, even though the *Benevolent Neutrality/Accommodation* is a result of American experiment on religion clauses, there is no necessity to elaborate exhaustively on the American jurisprudence relating to this matter prior to the Philippine case of *Estrada v Escritor* (2003). The Supreme Court of the Philippines stated:

> While the U.S. and Philippine religion clauses are similar in form and origin, Philippine constitutional law has departed from the U.S. jurisprudence of employing a separationist or strict neutrality approach. The Philippine religion clauses have taken a life of their own, breathing the air of benevolent neutrality and accommodation. […] While the religion clauses are a unique American experiment which understandably came about as a result of America's English background and colonisation, the life that these clauses have taken in this jurisdiction is the

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63 *Estrada v Escritor (2006)* (n 38) 91.

64 *Estrada v Escritor (2003)* (n 37) 168.

> Philippines' own experiment, reflective of the Filipino's own national soul, history and tradition.[65]

This Philippine constitutional law's departure from a separationist or strict neutrality approach of U.S. jurisprudence was confirmed by the Supreme Court in *Estrada v Escritor* (2006). The Court held:

> There is no ambiguity with regard to the Philippine Constitution's departure from the U.S. Constitution, insofar as religious accommodations are concerned. It is indubitable that benevolent neutrality-accommodation, whether mandatory or permissive, is the spirit, intent and framework underlying the Philippine Constitution.[66]

In *benevolent neutrality*, religion is 'looked upon with benevolence and not hostility'[67] thereby 'allow[ing] *accommodation* of religion under certain circumstances.'[68] The Court held that '[a]ccommodations are government policies that take religion specifically into account[.]'[69] Further, '[t]he benevolent neutrality theory believes that with respect to these governmental actions, accommodation of religion may be allowed, not to promote the government's favoured form of religion, but to allow individuals and groups to exercise their religion without hindrance.'[70] The Supreme Court also stated that the purpose of accommodations is to remove a burden on, or facilitate the exercise of, a person's or institution's religion.[71]

Parenthetically, *accommodation* has been referred to in *Re: Letter of Tony Valenciano, Holding of Religious Rituals at the Hall of Justice Building in Quezon City* ('*Re: Letter of Tony Valenciano*')[72] as a recognition of the reality that some governmental measures may not be imposed on a certain portion of the population for the reason that these measures are contrary to their religious beliefs.[73] Indeed, for the state to be realistic, it has to afford a degree of accommodation by giving consideration to people who merely want to exercise their religion without hindrance.

The *Estrada v Escritor* rulings effectively established that all cases involving the interpretation of the *Religion Clauses* of the Constitution must be resolved with the *benevolent neutrality/accommodation* as the framework or approach. Therefore, the act of contracting a second or subsequent marriage by Philippine Muslim converts – under the specific context presented in this article – involving as it does an interpretation of the *Free Exercise* clause of the Constitution, must be resolved through the same framework.

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65 Ibid, 169.
66 *Estrada v Escritor (2006)* (n 38) 66.
67 *Estrada v Escritor (2003)* (n 37) 121.
68 Ibid.
69 Ibid.
70 *Estrada v Escritor (2006)* (n 38) 42.
71 Ibid.
72 (2017) 819 SCRA 313 ('*Re: Letter of Tony Valenciano*').
73 See ibid, 350.

C *Strict Scrutiny-Compelling State Interest Test*

After establishing that the *Benevolent Neutrality-Accommodation* is the framework by which *Free Exercises* cases should be resolved, the Supreme Court in *Estrada v Escritor* then proceeded to determine the test to ascertain the limits of free exercise of religion. There are several tests used in the Philippine jurisprudence to determine these limits: the "clear and present danger" test, the "immediate and grave danger" test, and the "compelling state interest" test.[74]

The "clear and present danger" and "grave and immediate danger" tests are often used and are appropriate in cases on freedom of expression as speech has easily discernible or immediate effects.[75] On the other hand, '[t]he "compelling state interest" test is proper where conduct involved for the whole gamut of human conduct has different effects on the state's interests: some effects may be immediate and short-term while others delayed and far-reaching.'[76] Considering that the *Escritor's* case involved purely conduct arising from religious belief, the *compelling state interest* test is proper according to the Supreme Court. This is because 'only a compelling interest of the state can prevail over the fundamental right to religious liberty.'[77] The Court elaborated in part, as follows:

> The test requires the state to carry a heavy burden, a compelling one, for to do otherwise would allow the state to batter religion, especially the less powerful ones until they are destroyed. In determining which shall prevail between the state's interest and religious liberty, reasonableness shall be the guide. The "compelling state interest" serves the purpose of revering religious liberty while at the same time affording protection to the paramount interests of the state.[78]

Elsewhere in the *Estrada v Escritor* (2006) ruling, the Supreme Court said that what underlies 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.[79] In the earlier *Estrada v Escritor* (2003) case, the Court summarised the three-step process of the application of the test, thus:

> If the plaintiff can show that a law or government practice inhibits the free exercise of his religious beliefs, the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or 'compelling') secular objective and that it is the least restrictive means of achieving that objective. If the plaintiff meets this burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue. In order to be protected, the claimant's beliefs must be 'sincere', but they need not necessarily be consistent, coherent, clearly articulated, or congruent with those of the claimant's

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74 See generally *Estrada v Escritor (2003)* (n 37); *Estrada v Escritor (2006)* (n 38).

75 See *Estrada v Escritor (2003)* (n 37) 170.

76 Ibid.

77 Ibid 171.

78 Ibid.

79 *Estrada v Escritor (2006)* (n 38) 63.

> religious denomination. 'Only beliefs rooted in religion are protected by the Free Exercise Clause'; secular belief, however sincere and conscientious, do not suffice.[80]

The Court likewise declared that it is the *strict scrutiny-compelling state interest* test which is most in line with the benevolent neutrality-accommodation approach.[81] Considering that it is the latter approach that applies in the specific problem that this article presents, namely – a Philippine Muslim convert's act of contracting a second or subsequent marriage in contravention of Article 349 (Bigamy) of the *RPC* – then it follows that it is the *strict scrutiny-compelling state interest* test which must likewise apply.

Applying this test, the Supreme Court declared in *Estrada v Escritor* (2006) that the state through the Solicitor General failed to establish that *Escritor* was not entitled to exemption from the law with which she was administratively charged for her conjugal cohabitation with a man who himself is married to another woman, an act which the *dissent*[82] believed has violated Article 334 of the *Revised Penal Code* penalising concubinage. The Supreme Court clarified though that:

> There has never been any question that the state has an interest in protecting the institutions of marriage and the family, or even in the sound administration of justice. Indeed, the provisions by which respondent's relationship is said to have impinged, e.g., Book V, Title I, Chapter VI, Sec. 46(b)(5) of the Revised Administrative Code, Articles 334 and 349 of the Revised Penal Code, and even the provisions on marriage and family in the Civil Code and Family Code, all clearly demonstrate the State's need to protect these secular interests.[83]

Be that as it may, the Supreme Court rejoined on this in that 'it is not enough to contend that the state's interest is important, because our Constitution itself holds the right to religious freedom sacred.'[84] The Court emphasised that '[t]he State must articulate in specific terms the state interest involved in preventing the exemption, which must be compelling, for only the gravest abuses, endangering paramount interests can limit the fundamental right to religious freedom.'[85] 'To rule otherwise would be to emasculate the Free Exercise Clause as a source of right by itself.'[86]

VI SUMMATIVE APPLICATION

Thus far, this article has put forward that the Philippine Muslim converts' act of contracting a second or subsequent marriage is an act in the exercise of religious belief, thus inviting the application of the *benevolent neutrality-accommodation* approach using the *strict*

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80 *Estrada v Escritor (2003)* (n 37) 126, *citing* McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion,' *Harvard Law Review* Vol. 103 (1990) 1410, 1416-7.

81 *Estrada v Escritor (2006)* (n 38) 62.

82 *Estrada v Escritor (2003)* (n 37) 234.

83 *Estrada v Escritor (2006)* (n 38) 84.

84 Ibid.

85 Ibid.

86 Ibid.

scrutiny-compelling state interest test to determine if that act has exceeded the limits of religious freedom.

Therefore, it is now an opportune moment to clarify as to what kind of accommodation under which the said *religious act* may be scrutinised. Reiterating *Estrada v Escritor* (2003), the Supreme Court mentioned three kinds of accommodation in *Estrada v Escritor* (2006):

> A free exercise claim could result to three kinds of accommodation: (a) those which are found to be constitutionally compelled, i.e., required by the Free Exercise Clause; (b) those which are discretionary or legislative, i.e., not required by the Free Exercise Clause but nonetheless permitted by the Establishment Clause; and (c) those which the religion clauses prohibit.[87]

The first kind of accommodation refers to mandatory accommodation which 'results when the Court finds that the accommodation is required by the Free Exercise Clause, i.e., when the Court itself carves out an exemption.'[88] The second kind refers to permissive accommodation in which 'the Court finds that the State may, but is not required to accommodate religious interests.'[89] And finally, the third kind refers to prohibited accommodation which results 'when the Court finds no basis for a mandatory accommodation, or it determines that the legislative accommodation runs afoul of the establishment or the free exercise clause.'[90]

There is no question as to the third kind of accommodation as it is prohibited by the Constitution, upholding the non-establishment clause in that no law shall be passed respecting the establishment of religion. Thus, we are left with only two options to choose from, i.e., mandatory and permissive accommodations. This requires careful attention, for the Supreme Court in *Estrada v Escritor* cited Article 180 of the *Muslim Code* as an instance of permissive accommodation.[91] The provision states as follows:

> Art. 180. *Law applicable.* – The provisions of the Revised Penal Code relative to the crime of bigamy shall not apply to a person married in accordance with the provisions of this Code or, before its effectivity, under Muslim law.

It is submitted that this provision does not apply to the specific problem raised in this paper. It must be recalled that the Philippine Muslim converts which the author refers to are those who have subsisting **civil marriages**. This means that their subsisting marriages were not solemnised in accordance with Muslim law or the *Muslim Code*. To be specific, they were married **not** in accordance with the *Muslim Code* or Muslim law prior to their conversion to Islam. Article 180 cited above is clear in that the exemption from bigamy applies only to a person married **in accordance** with the provisions of the *Muslim Code*

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87 Ibid 60.
88 Ibid 61.
89 Ibid.
90 Ibid 62.
91 See ibid 76.

or, before its effectivity, under Muslim law**.** Therefore, it is submitted that the Philippine Muslim converts' act – in contracting a second or subsequent marriage while they have subsisting civil marriages – is not within the scope of the permissive accommodation in Article 180 of the *Muslim Code*. Consequently, this analysis, as in *Estrada v Escritor*, must focus on mandatory accommodation.

To recall, a mandatory accommodation results when the Court finds that accommodation is required by the Free Exercise Clause, i.e., when the Court itself carves out an exemption.[92] *Escritor*'s case was not anchored on permissive accommodation as there was no legislative exemption granted for her under the Revised Administrative Code on administrative liability for *disgraceful and immoral conduct* and Article 334 (Concubinage) of the *RPC*. Nonetheless, the Supreme Court granted her plea for exemption on the basis of her religious freedom as a member of the Jehovah's Witnesses, a religious sect that approves as moral her cohabitation with a married man.

Lest it be inaccurately taken that *disgraceful and immoral conduct* is allowed in the Philippine civil service, 'the [Supreme] Court,' in a number of cases, 'has ruled that government employees engaged in illicit relations are guilty of disgraceful and immoral conduct for which he/she may be held administratively liable.'[93] In fact, '[i]n these cases there was not one dissent to the majority's ruling that their conduct was immoral.'[94] Furthermore, '[t]he respondents themselves did not foist the defense that their conduct was not immoral, but instead sought to prove that they did not commit the alleged act or have abated from committing the act.'[95] 'However, there is a distinguishing factor that sets [*Escritor's* case] apart from the cited precedents, i.e.*,* as a defense, the respondent invoked religious freedom since her religion, the Jehovah's Witnesses, has, after thorough investigation, allowed her conjugal arrangement with Quilapio based on the church's religious beliefs and practices.'[96] Thus, the Supreme Court said '[t]his distinguishing factor compels the Court to apply the religious clauses to the case at bar [i.e*., Escritor's* case].'[97]

This is actually the cue that signals the potential of placing the *free exercise of religion* at the centrality of the defense of Philippine Muslim converts against prosecution, or threat thereof, for the crime of bigamy once they contract a second or subsequent marriage while they have subsisting civil marriages. By granting Escritor *a mandatory accommodation/exemption* from the law sanctioning *disgraceful and immoral conduct*, the Supreme Court effectively confirmed that in the Philippines, accommodation of religious freedom is possible even in the absence of legislative exemption in the law which collides with a religious act. The Court stated, '[T]his precisely is the protection afforded by the religion clauses of the Constitution, i.e., that in the absence of legislation granting

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92 Ibid 61.

93 *Estrada v Escritor (2003)* (n 37) 171, 172. [These cases are the following: (2002) 387 SCRA 1 (*Liguid v Camano*); (2000) 323 SCRA 578 (*Bucatcat v Bucatcat*); (2000) 339 SCRA 709 (*Navarro v Navarro*); (1997) 273 SCRA 320 (*Ecube-Badel v Badel*); (1993) 220 SCRA 505 (*Nalupta v Tapec*); (1985) 135 SCRA 361 (*Aquino v Navarro*)].

94 Ibid 172.

95 Ibid.

96 Ibid.

97 Ibid.

exemption from a law of general applicability, the Court can carve out an exception when the religion clauses justify it.'[98]

This is interesting because the issue of mandatory accommodation to a religious act from the application of general penal laws is still an open question in the Philippines. The reason is that there is no Philippine case yet granting a religious act mandatory accommodation/exemption from the application of general penal laws like Article 349 (Bigamy) of the *RPC*.[99] Incidentally, this is not the case in the United States of America (U.S.) where such a question had already been settled in *Reynolds v United States*[100] where the U.S. Supreme Court held that the Mormons' religious duty to practise polygamy is not a valid defense or exemption from the general federal law criminalising polygamy.[101] Thus, McDermott's predicament – the road to the full recognition of Islamic [polygamous] marriages will not be an easy one as it will require the U.S. Supreme Court to overrule or somehow distinguish *Reynolds v. United States*, something it has shown no interest in doing[102] – is understandable.

A *Applying the Mandatory Accommodation/Exemption*

There is no question that two cases *(Juliano-Llave v Republic and Zamoranos v People)*[103] have already been decided by the Supreme Court involving Philippines Muslims embroiled in litigation that demonstrated the interplay of the *Muslim Code*'s applicability and the *RPC*'s criminalisation of bigamy. However, as in other cases on *disgraceful and immoral conduct* preceding *Estrada v Escritor* that did not involve the defense of religious freedom, *Juliano-Llave v Republic* and *Zamoranos v People* also did not directly involve a deliberate and point-blank invocation of the *Free Exercise Clause* of the Constitution to avoid criminal liability for bigamy.

In other words, this article has the liberty to vet the Philippine Muslim converts' second or subsequent marriages (considered to be bigamous under Article 349 of the *RPC*) through the process of mandatory accommodation/exemption. This process was summarised by the Supreme Court as follows:

> Mandatory accommodation results when the Court finds that accommodation is required by the Free Exercise Clause, i.e, when the Court itself carves out an exemption. This accommodation occurs when all three conditions of the compelling interest test are met, i.e, a statute or government action has burdened claimant's free exercise of religion, and there is no doubt as to the sincerity of the religious belief; the state has failed to demonstrate a particularly important or compelling governmental goal in preventing an exemption; and that the state has failed to demonstrate that it used the least restrictive means. In these cases, the Court finds that the injury to religious conscience is so great and the advancement of public

98 Ibid 167.
99 *Estrada v Escritor (2006)* (n 38) 75.
100 98 U.S. 145 (1878).
101 Ibid.
102 McDermott (n 28) 74.
103 See Part III(B) above.

> purposes is incomparable that only indifference or hostility could explain a refusal to make exemptions. Thus, if the state's objective could be served as well or almost as well by granting an exemption to those whose religious beliefs are burdened by the regulation, the Court must grant the exemption.[104]

To determine if the Philippine Muslim converts can be granted mandatory accommodation/exemption under Article 349 (Bigamy) of the *RPC*, all the conditions of *compelling state interest* test mentioned above must be met, with the *benevolent neutrality/accommodation* as the framework or approach.

1 *Burden on free exercise of religion and sincerity of religious belief*

The first condition that shall be met is the existence of a statutory or government action that burdens the claimant's free exercise of religion together with the presence of sincerity of his/her religious belief. It is submitted that Article 349 of the *RPC* burdens those Philippine Muslim converts who want to marry subsequently. Once a person has entered the folds of Islam, there is no distinction between a Muslim by birth and a Muslim by conversion. Both are subject to the same rights, privileges and obligations arising from the fact and status of being a Muslim. Overlooking in the meantime the subsisting civil marriage, a Muslim convert who can prove that he can give equal and just treatment to his wives and the proposed second marriage is only in exceptional cases may be permitted to have more than one wife. However, because of Article 349, he is under the threat of criminal prosecution if he pursues that option. Therefore, Article 349 burdens the free exercise of his religious belief.

An incidental issue that arises here is the issue of non-applicability of the *Muslim Code* to the Muslim convert's subsisting civil marriage. Article 13 of the *Muslim Code*,[105] as discussed in Part II (B) above, is clear that marriages solemnised not in accordance with Muslim law or the *Muslim Code* are governed by the Civil Code (or the *Family Code of the Philippines*).[106] Thus, the subsisting civil marriages of Muslim converts are governed not by the *Muslim Code* but the Civil Code or, to be accurate, by the *Family Code of the Philippines* after the latter's enactment. Neither had their conversion to Islam brought their civil marriages under the scope of the *Muslim Code*. As discussed in Part II (B) above, the conversion to Islam under Article 178 of the *Muslim Code*[107] must be on the part of both non-Muslim spouses to produce the provision's legal effect of ratification

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104 *Estrada v Escritor (2006)* (n 38) 61.

105 Art. 13. *Application.* – (1) The provisions of this Title [Marriage and Divorce] shall apply to marriage and divorce wherein both parties are Muslims, or wherein only the male party is a Muslim and the marriage is solemnized in accordance with Muslim law or this Code in any part of the Philippines. (2) In case of marriage between a Muslim and a non-Muslim, solemnized **not** in accordance with Muslim law or this Code, the **Civil Code of the Philippines shall apply**. (*Muslim Code* (n 1) art 13). [emphasis added].

106 The provisions of the Civil Code on marriage, legal separation, rights and obligations between husband and wife, the family, paternity and filiation, and support were all repealed by the Family Code of the Philippines (E.O. No. 209).

107 Art. 178. *Effect of conversion to Islam on marriage.* – The conversion of non-Muslim spouses to Islam shall have the legal effect of ratifying their marriage as if the same had been performed in accordance with the provisions of this Code or Muslim law, provided that there is no legal impediment to marry under Muslim law. (*Muslim Code* (n 1) art 178).

of the non-Muslim marriage as if the same had been performed in accordance with the *Muslim Code* or Muslim law. If the conversion is only on the part of the non-Muslim spouse – in our specific problem, the husband – Article 178 does not apply.

This calls for a classification of the accommodation of the religious belief of Muslims upon the Qur'anic permission of having more than one wife but not more than four at a time. For Philippine Muslims who are married under the *Muslim Code*, there is permissive accommodation/exemption from bigamy when they contract a second or subsequent marriage in accordance with Article 180 of the *Muslim Code*. But Philippine Muslim converts who have subsisting civil marriages are not granted the same permissive accommodation/exemption. Consequently, the only option left is mandatory accommodation/exemption upon an invocation of religious freedom in a proper case. The author believes that the court is not precluded from granting mandatory accommodation/exemption if it could be justified under the *Free Exercise Clause,* notwithstanding that there is permissive accommodation already granted to Muslims whose subsisting marriages are governed by the *Muslim Code*. As pointed out by the Supreme Court, 'a "permissive accommodation-only" stance is the antithesis to the notion that religion clauses, like the other fundamental liberties found in the Bill of Rights, is a preferred right and an independent source of right.'[108]

Back to the first step of the process of accommodation, it is not enough that the free exercise of religion is burdened by a statute or government action. There must also be sincerity of religious belief on the part of the claimant. In democratic countries where separation of the church and the state is observed like in the Philippines, laws of general application are religion neutral. Following *Estrada v Escritor,* sincerity of religious belief must be demonstrated, otherwise such a belief becomes an easy and accessible excuse for exemption even if the burden to free exercise of religion is superficial. In *Estrada v Escritor* (2006)*,* the Solicitor General no less conceded that Escritor's claim of sincerity of her religious belief was 'beyond serious doubt.'[109]

In the case of a Muslim, this article submits that the sincerity of his religious belief vis-à-vis the Qur'anic permission to have more than one wife, can be demonstrated by his compliance with the conditions of such permission. The Qur'an demands of him to give justice to his wives in the form of equal and just treatment. If he insists to have more than one wife despite utter lack of financial means – along the lines of Justice Saaduddīn A. Alauya – to give equal and just treatment to his wives, then his sincerity is in doubt. Being desirous to contract a second or subsequent marriage just for the sake of having more than one wife at the expense of justice to the wives, which the Qur'an enjoins, can hardly make out a case of adequate sincerity. In Malaysia, for instance, in the case of *Re Ruzaini bin Hassan*,[110] the application for polygamy was rejected by the court because the financial condition of the applicant did not substantiate his claim that he can support two families.

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[108] *Estrada v Escritor (2006)* (n 38) 76-7.

[109] Ibid 81.

[110] See Part II(A) above.

However, if the Philippine Muslim convert can prove that he has the financial means to give equal and just treatment to his wives (wife in his civil marriage and wife in the proposed second Muslim marriage) and that he is only seeking the second or subsequent marriage in an exceptional case, then a claim for exemption from bigamy should not be dismissed outright for he has shown sincerity in his religious belief. Hence, the *compelling state interest* test shall be applied.

2 *Finding out if there is compelling state interest*

When the claimant is able to prove the existence of a burdening of the free exercise of religious beliefs and his sincerity in that religious beliefs, 'the burden shifts to the government to demonstrate that the law or practice is necessary to the accomplishment of some important (or 'compelling') secular objective and that it is the least restrictive means of achieving that objective.'[111] If the plaintiff meets this burden and the government does not, the plaintiff is entitled to exemption from the law or practice at issue.[112]

Thus, if the Philippine Muslim converts can prove that there is a burden on their religious belief on the Qur'anic permission to have more than one wife and the sincerity in that belief as discussed in Part VI(A)(1) above, the burden then shifts to the government that not granting them permissive accommodation – like those granted to Philippine Muslims married under the *Muslim Code* – is *necessary* to the accomplishment of compelling secular objectives. One of the *dissents* in *Estrada v Escritor* (2006) asserted that 'the State has a compelling interest in the preservation of marriage and the family as basic social institutions, which is ultimately the public policy underlying the criminal sanctions against concubinage and bigamy.'[113] This dissent also argued that 'the majority opinion effectively condones and accords a semblance of legitimacy to [*Escritor's*] patently unlawful cohabitation…' and 'facilitates the circumvention of the Revised Penal Code.'[114] In addition, the dissent stated that the majority '[chose] to turn a blind eye to respondent's criminal conduct, the majority is in fact recognising a practice, custom or agreement that subverts marriage.'[115]

The *ponencia* brushed these aside by invoking that the free exercise of religion 'is a fundamental right that enjoys a preferred position in the hierarchy of rights – "the most inalienable and sacred of human rights," in the words of Jefferson.'[116] Hence, according to the majority opinion –

> [I]t is not enough to contend that the state's interest is important, because our Constitution itself holds the right to religious freedom sacred. The State must articulate in specific terms the state interest involved in preventing the exemption, which must be *compelling*, for only the gravest abuses, endangering paramount

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111 *Estrada v Escritor (2003)* (n 37) 126, *citing* McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion,' Harvard Law Review, vol. 103 (1990), pp. 1410, 1416-7.

112 Ibid.

113 *Estrada v Escritor (2006)* (n 38) 83.

114 Ibid 83.

115 Ibid.

116 Ibid 84.

> interests can limit the fundamental right to religious freedom. To rule otherwise would be to emasculate the Free Exercise Clause as a source of right by itself.[117]

It is correct for the dissent to say that the *State has a compelling interest in the preservation of marriage and the family as basic social institutions*. However, based on the discussions on the Islamic point of view of polygamy in Part II above, it would be hasty to conclude that the preservation of marriage and the family, in every case, would be compromised if the court grants mandatory accommodation/exemption to a religious act – for instance, the Philippine Muslim convert's act of contracting a second or subsequent marriage under Muslim law – that collides with penal laws designed to protect marriage and the family. The benefits of allowing polygyny, when the specific context is present and the Qur'anic requisites are complied with, may outweigh the reasons for outlawing it. The available statistics in the Philippines on the ratio of legitimate and illegitimate children speaks for itself. Besides, the preservation of every marriage and family, i.e., wife and children, will be achieved by the Qur'anic injunction that they will all receive equal and just treatment as enjoined by Islamic law.

Since Article 349 (Bigamy) of the *RPC* burdens the fundamental right to the free exercise of religion of Philippine Muslim converts, 'the government must do more than assert the objectives at risk if exemption is given; it must precisely show how and to what extent those objectives will be undermined if exemptions are granted.'[118] However, whether the government would be able to prove this is ultimately an issue for the courts to resolve in an appropriate case. On one hand, there is no assurance that in an appropriate case before the Supreme Court, Philippine Muslim converts vis-à-vis the crime of bigamy will receive the same degree of mandatory accommodation/exemption accorded in *Escritor*. On the other hand, since only the question of mandatory accommodation/exemption from the application of general penal laws is uncertain,[119] it is still possible that the Supreme Court can carve out a mandatory accommodation/exemption for the Philippine Muslim converts.

VII CONCLUSION

The Islamic approach to polygamy is a realistic approach to eradicating polygamy's traditional evils and ensuring its benefits, by regulating it instead of totally prohibiting its practice. Islam did not invent polygamy as it was already a pre-existing social phenomenon before the Qur'anic injunctions to regulate its practice were imposed.

The permission to have more than one wife but not more than four at a time is applicable generally to the Philippine Muslims provided that the requirements and conditions imposed by the *Muslim Code* for its practice are satisfied. However, Philippine Muslim converts with subsisting civil marriages are at the risk of prosecution for bigamy in Philippine penal law once they contract a second or subsequent marriage under Muslim law after their conversion to Islam. By exploring this specific problem, this article was

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117 Ibid.

118 Ibid 84-5.

119 Ibid 77.

able to highlight significant lessons on the extent of the *Religion Clauses* of the Philippine Constitution. This was useful in analysing the tension of the Islamic practice of polygamy of Philippine Muslim converts and bigamy under the *RPC*.

The significant lessons that emerge from this article paves the way for the Muslim converts (affected by the specific problem presented) the option to invoke *free exercise of religion* to claim a mandatory accommodation/exemption from the application of the general penal law of bigamy. This is an open question, which may be decided by the court in *two ways*, namely under the *Benevolent Neutrality/Accommodation* approach and using the *Strict Scrutiny-Compelling State Interest* test laid down by the Supreme Court in the landmark *Religion Clauses* case of *Estrada v Escritor*. First, there is no assurance that the court would carve out a mandatory accommodation/exemption for them. Secondly, a mandatory accommodation/exemption is possible, especially so that once it is established that religious liberty is burdened by a statute or government action and there is sincerity of religious belief, the burden then shifts to the government to prove compelling state interest to override the free exercise of religion. However, the resolution of this question – of which of the two ways the Court would take to resolve the specific problem of this article – will perhaps unfold in an appropriate case that may possibly reach the Court in a matter of time.