

**STAR-CROSSED LOVERS TREADING  
A ROAD LESS TRAVELED:  
A READING OF HOW THE *ESCRITOR* CASE BLAZED A  
LABYRINTHINE TRAIL IN RELIGIOUS FREEDOM JURISPRUDENCE**

MYRA JENNIFER D. JAUD\*

**OUTLINE**

- I. INTRODUCTION
- II. LOVE IN THE TIME OF AFFLICTION: THE CASE OF *ESCRITOR*
- III. THE LANDSCAPE OF FAITH
  - a) Freedom of Religion
  - b) Neutrality Toward Religion
    - i) Strict Separation and Strict Neutrality/Separation
    - ii) Benevolent Neutrality
  - c) Accommodation Under the Religion Clauses
    - i) Mandatory Accommodation
    - ii) Permissive Accommodation
    - iii) Prohibited Accommodation
  - d) To Ensure Neutrality: Compelling State Interest Test
- IV. OF LOVE AND OTHER DEMONS: AN ANALYSIS
  - a) Factual Milieu
  - b) Legal Precedents
- V. CONCLUSION TO A POETIC INJUSTICE



---

\* '07 LL.B. candidate, University of Santo Tomas Faculty of Civil Law. *Articles Editor*, UST Law Review.

*“This case is not an issue of a statute colliding with centrally or vitally held beliefs of a religious denomination. \* \* \* This case is about a religious cover for an obviously criminal act.”<sup>1</sup>*

Theirs is supposed to be a simple love story oblivious to controversies of a macrocosmic character.

*Estrada v. Escritor*,<sup>2</sup> a case of first impression, places in the limelight the story of Soledad Escritor and her partner of twenty years with whom she has a son. Their domestic arrangement is not blessed with marriage because of one legal impediment: they each have their own existing marriages in the eyes of law. The conflict arose when Escritor, a court interpreter, was charged with disgraceful and immoral conduct under the Revised Administrative Code.<sup>3</sup> What made the case unprecedented is Escritor’s defense of religious freedom which apparently justifies her common-law marriage with her partner.

For the first time, the court laid down in this case the doctrine of benevolent neutrality in interpreting the Constitutional religious freedom clauses. This doctrine allows accommodations that will carve out an exemption from laws of general application by invoking religious freedom.

Because of this doctrine, the Court, by applying the compelling state interest test, upheld the defense of religious freedom of Escritor over charges of immorality.

Although some lauded the Supreme Court in its bold stance in upholding the religious freedom of Escritor, others viewed the decision as beclouded by weak legal and logical bases.

---

<sup>1</sup> Justice Antonio T. Carpio in his dissenting opinion in *Estrada v. Escritor* A.M. No. P-02-1651, June 22, 2006.

<sup>2</sup> A.M. No. P-02-1651, June 22, 2006 [hereinafter *Escritor* (2006)].

<sup>3</sup> REV. Adm. CODE, Book V, Title I, Chapter VI, §46 ¶ b(5), viz:

Sec. 46. Discipline: General provisions. – (a) No officer or employee in the Civil Service shall be suspended or dismissed except for cause as provided by law and after due process.

(b) The following shall be grounds for disciplinary action:

xxx

(5) Disgraceful and immoral conduct, xxx.

Religious freedom without doubt is among the enshrined Constitutional rights granted to individuals. While the right to belief is absolute, action arising from this belief is subject to state regulation.

The decision, in light of the legal and social milieu of the country, should be subject to scrutiny because its unorthodox view of sanctioning common-law relationship, as being encompassed by religious freedom, starkly deviated from jurisprudence and avowed state policies.

### LOVE IN THE TIME OF AFFLICTION: THE CASE OF *ESCRITOR*

Soledad Escritor was a picture of a typical wife and mother nurturing a family of three. She has been living for twenty years with Luciano Quilapio Jr. with whom she has a teenage son.

To help fend for her family, she entered the judiciary as a court interpreter in Las Piñas in 1999. Little did she know that her low profile family life would soon pave the way for a legal battle that would either streamline or make more chaotic the religious freedom jurisprudence in our country.

Meanwhile, Alejandro Estrada is not personally related to Escritor or her partner and is a resident of Bacoor Cavite and not Las Piñas<sup>4</sup> where Escritor works. In a sworn letter-complaint dated July 27, 2000, Estrada wrote to Judge Jose F. Caoibes, Jr., presiding judge of Branch 253, Regional Trial Court of Las Piñas City, requesting for an investigation of rumors that Escritor is living with a man not her husband.<sup>5</sup> He said that in his frequent visits to the Hall of Justice of Las Piñas, he learned from conversations about the alleged long-running illicit affair of Escritor. What prompted him to file the complaint for immorality was his belief that “employees of the judiciary should be respectable and Escritor’s live-in arrangement did not command respect.”<sup>6</sup>

When the letter-complaint was referred to Escritor by Judge Caoibes, she defensively denied at first the allegations of Estrada saying that “there is no truth as to the veracity of the allegation” and challenged Estrada to “appear in the open and prove his allegation in the proper

---

<sup>4</sup> *Estrada v. Escritor*, 408 SCRA 1 (2003), at 50 [hereinafter *Escritor* (2003)].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id.*, citing Rollo at 19-26; TSN, October 12, 2000, at 3-10.

forum.”<sup>7</sup> However, during the preliminary conference conducted by Judge Caoibes, Escritor was singing a different tune.

In her testimony, Escritor admitted categorically that she has been living with Quilapio without the benefit of marriage for twenty years and that they have a son. When she entered the judiciary in 1999, she was already a widow, her husband having died in 1998.<sup>8</sup> Aware of the legal infirmity of her common-law marriage, she put up the defense of religious freedom<sup>9</sup> asserting that as a member of the Jehovah’s Witnesses and the Watch Tower and Bible Tract Society, their conjugal arrangement is in conformity with their religious beliefs.

To bolster her claim, she presented a document, a “Declaration of Pledging Faithfulness”<sup>10</sup> which she executed, as did her partner, on July 28, 1991, after living together for ten years. When Escritor executed her pledge, her husband was still alive but living with another woman. Quilapio was likewise married at that time and had been separated in fact from his wife.<sup>11</sup>

In explaining the nature of the “Declaration of Pledging Faithfulness”, Gregorio Salazar, a presiding minister of the Jehovah’s Witnesses

---

<sup>7</sup> *Id.*, citing Rollo at 8.

<sup>8</sup> *Ibid.*

<sup>9</sup> CONST. art. III, §5.

Sec. 5. 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>10</sup> 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 God’s Word. I will continue to seek 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.

<sup>11</sup> *Escritor* (2003) at 52.

since 1991, testified that “the Jehovah’s congregation requires at the time the declarations are executed, that the couple cannot secure the civil authorities’ approval of the marital relationship because of legal impediment.” He said that although in 1998, Escritor was widowed, thereby lifting the legal impediment to marry on her part, her mate was still not capacitated to remarry, thus their declarations remain valid. Once all legal impediments for both are lifted, the couple can already register their marriage with the civil authorities and the validity of the declaration ceases.<sup>12</sup>

Escritor’s ratiocination was found unavailing to warrant the dismissal of the charge of immorality against her by Deputy Court Administrator Christopher Lock. He therefore recommended that Escritor be found guilty of immorality and that she be penalized with suspension for six months and one day without pay.<sup>13</sup>

Escritor posited the same defense of religious freedom during the investigation of her case and insisted that “her congregation allows her conjugal arrangement with Quilapio and it does not consider it immoral.”<sup>14</sup>

Escritor’s case would not be resolved by a simple determination of whether according to the surrounding factual circumstances, she committed acts of immorality. What made her case peculiar and understandably complex is her defense of religious freedom, a preferred right in every democratic society like ours. Because of the coming into play of this issue, the court found itself tasked to delve into the intricacies of religious freedom and determine whether this is applicable in this case making Escritor’s acts not only justified but also safeguarded.

In fine, the court stated the issue in this wise: “Whether or not respondent should be found guilty of the administrative charge of gross and immoral conduct”. To resolve this issue, the court deemed it necessary to determine the sub-issue of whether or not respondent’s right to religious freedom should carve out an exception from the prevailing jurisprudence on illicit relations for which government employees are held administratively liable.<sup>15</sup>

---

<sup>12</sup> *Id.*, citing Rollo, at 163-183; TSN, Minister Gregorio Salazar, May 29, 2002, at 12-32, at 58.

<sup>13</sup> *Id.*, citing Memorandum by DCA Lock dated August 28, 2002, at 62.

<sup>14</sup> *Escritor* (2003) at 53.

<sup>15</sup> *Id.*, at 62.

The Court, in its August 4, 2003 decision, gave a detailed discussion of the origins and development of the religion clauses in the United States and the Philippines<sup>16</sup> because “they are the precursors to the Philippine Religion clauses although we have significantly departed from the U.S. interpretation.”<sup>17</sup>

After the lengthy review of the religious freedom clauses, the court concluded that the Philippines subscribes to the benevolent neutrality doctrine<sup>18</sup> which encompasses both permissive and mandatory accommodations. It then ruled that the benevolent neutrality doctrine requires the application of the compelling state interest test in order to justify the impairment of the religious right of an individual.

The court ruled to dismiss the complaint against Escritor after finding that the state failed to justify and prove its compelling state interest that would warrant the prosecution of Escritor for immorality notwithstanding the curtailment of her claimed religious freedom.

In the June 22, 2006 decision resolving the case after its remand to the Office of the Court Administrator, the court ruled in this wise:

We find that in this particular case and under these distinct circumstances, respondent Escritor’s 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 recognizes that state interests must be upheld in order that freedoms—including religious freedom—maybe 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.<sup>19</sup>

### THE LANDSCAPE OF FAITH

The unorthodox view enunciated by the Supreme Court in this case of first impression opened a Pandora’s box in the jurisprudential

---

<sup>16</sup> *Escritor* (2006).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Infra.*

<sup>19</sup> *Escritor* (2006).

interpretation of the religious freedom clauses. The doctrine may seem a reinforcement of the commitment of the judiciary to protect this fundamental right in line with the trend of pluralism in our democratic society. More than anything else, however, it laid down a dangerous precedent which, in the guise of protecting this liberty, defeats the very purpose why this right, and all other rights enshrined in the constitution are protected—a sound interplay of state powers with individual rights.

### *Freedom of Religion*

American Jurisprudence on the Free Exercise Clause, which our own free exercise clause jurisprudence took after lengthily, has a “history of contradictory decisions and doctrinal uncertainty.”<sup>20</sup> Some criticize that the “US Supreme Court’s religious liberty jurisprudence is a disaster. No single rule exists to guide decision making. The various doctrines employed are, at best, inconsistent and, at worst, blatantly contradictory. \*\*\* The result is an ever shifting, case-by-case jurisprudence based on narrow factual questions that encourages neither the rule of law nor a robust protection of religious freedom.”<sup>21</sup>

What made the court’s interpretation more “volatile and fraught with inconsistencies is the broad disagreement on what the mandated free exercise and non-establishment clauses specifically require, permit and forbid. No agreement has been reached by those who have studied the religion clauses as regards its exact meaning and the paucity of records in the U.S. Congress renders it difficult to ascertain its meaning.”<sup>22</sup>

Religion, in its broadest sense, includes all forms of belief in the existence of superior beings exercising power over human beings and imposing rules of conduct with future state of rewards or punishments.<sup>23</sup> It has reference to one’s views of his relations to his Creator, and to the obligations they impose of reverence to His being and character and of

---

<sup>20</sup> V. Munoz, *Establishing Free Exercise Clause*, First Things (v. 138) December 2003, at 14.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Escritor* (2006) citing Beth L. American Theory of Church and State at 71 (1958).

<sup>23</sup> H. De Leon, *Philippine Constitutional Law* at 373 (1991) citing *Cantwell vs. Connecticut*, 310 US 296.

obedience to His will.<sup>24</sup> One's religion may doubt or even deny the existence of God.<sup>25</sup>

The constitutional guarantee of religious freedom is the right of a man to worship God, and to entertain such religious views as appeal to his individual conscience, without dictation or interference by any person or power, civil or ecclesiastical.<sup>26</sup> It forbids restriction by law or regulation of freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose.<sup>27</sup>

The constitution provides for several provisions on religion<sup>28</sup> but the most important guarantee with respect to religion is Article III Section 5, *viz*:

“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.”

As guaranteed by the Constitution, religious freedom has a dual aspect:

1. The separation of Church and State secured in the first sentence of the provision; and
2. The freedom of religious profession and worship, in the second sentence of the provision.<sup>29</sup>

These two religion clauses—Free Exercise Clause and the Establishment Clause—may overlap, but they also share a serious tension. Thus, the constitutional jurisprudence of the religion clauses must seek “to find a neutral course between the two Religion clauses, both of which are cast

---

<sup>24</sup> *Id.*, citing *Aglipay vs. Ruiz*, 64 Phil. 201 (1937).

<sup>25</sup> *Id.*, at 373.

<sup>26</sup> *Id.*, citing 16 AM JUR 648.

<sup>27</sup> *Id.*, citing *Cantwell v. Connecticut* 310 us 296.

<sup>28</sup> M. Santiago, *Constitutional Law* (1994) at 636 citing CONST. art. VI § 29 ¶ 2 on prohibition of the use of public money or property for any system of religion; CONST. art. XIV, § 3 ¶ 3 on religious instruction.

<sup>29</sup> *Id.*, de Leon at 373.

in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.”<sup>30</sup>

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>31</sup>

### *Neutrality Toward Religion*

American jurisprudence has produced two identifiably different, even opposing, strains of jurisprudence on the religion clauses. First is the standard of separation, which may take the form of either (a) strict separation or (b) the tamer version of strict neutrality or separation. Although the latter form is not as hostile to religion as the former, both are anchored on the Jeffersonian premise that a “wall of separation” must exist between the state and the Church to protect the state from the church.<sup>32</sup> On the other hand, the second standard, the benevolent neutrality or accommodation, is buttressed by the view that the wall of separation is meant to protect the church from the state.<sup>33</sup>

#### **a) Strict Separation and Strict Neutrality/Separation**

The Strict Separationist believes that the Establishment Clause was meant to protect the state from the church, and the state’s hostility towards religion allows no interaction between the two. According to this Jeffersonian view, an absolute barrier to formal interdependence of religion and state needs to be erected. Religious institutions could not receive aid, whether direct or indirect, from the state. Nor could the state

---

<sup>30</sup> Santiago (1994) at 636 citing *Walz v. Tax Commission*, 397 U.S. 664 (1970).

<sup>31</sup> *Escritor* (2006) citing Cohen, William and Danelski, David J. *Constitutional Law: Civil Liberty and Individual Rights* 575 (4th ed. 1997).

<sup>32</sup> *Id.*, citing Beth L. *American Theory of Church and State*.

<sup>33</sup> *Ibid.*

adjust its secular programs placed on believers.<sup>34</sup> Only the complete separation of religion from politics would eliminate the formal influence of religious institutions and provide for a free choice among political views, thus a strict “wall of separation” is necessary.<sup>35</sup>

The strict neutrality approach, the tamer version of the strict separationist view, is not hostile to religion, but it is strict in holding that religion may not be used as a basis for classification for purposes of governmental action, whether the action confers rights or privileges or imposes duties or obligations. Only secular criteria may be the basis of government action. It does not permit, much less require accommodation of secular programs to religious belief.<sup>36</sup>

#### **b) Benevolent Neutrality**

The theory of benevolent neutrality or accommodation is premised on a different view of the “wall of separation”. Unlike the Jeffersonian wall that is meant to protect the state from the church, the wall is meant to protect the church from the state.<sup>37</sup>

This 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>38</sup>

In the Philippine context, the court categorically ruled that, “the Filipino people, in adopting the constitution, manifested their adherence to the benevolent neutrality approach that requires accommodations in interpreting the religion clauses.”<sup>39</sup> This conclusion was made by juxtaposing US Constitution to that of the Philippines. While our religion clauses were largely based on the former, it does not *ipso facto* follow that we have adopted from our US counterpart hook, line and sinker.

The Court said that unlike in the U.S. where legislative exemptions of religion had to be upheld by the U.S. Supreme Court as constituting

---

<sup>34</sup> *Id.*, at 515.

<sup>35</sup> *Id.*, citing the Constitution and Religion 1541, at 11.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Escritor* (2006).

<sup>39</sup> *Ibid.*

permissive accommodations, similar exemptions for religion are mandatory accommodations under our own constitutions. Thus, it said, our 1935, 1973 and 1987 Constitutions contain provisions on tax exemption of church property,<sup>40</sup> salary of religious officers in government institutions,<sup>41</sup> and optional religious instruction.<sup>42</sup> It further said that our own preamble also invokes the aid of a divine being.<sup>43</sup> These features of our Constitution are not found in the US Constitution, hence the court came up with said conclusion, which is also an affirmation that our constitution has deviated from and breathe new meaning into the US religion clauses.

### *Accommodation Under the Religion Clauses*

The purpose of accommodations is to remove a burden on, or facilitate the exercise of, a person's or institution's religion.<sup>44</sup> A free exercise claim could result in 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.<sup>45</sup>

#### **a) Mandatory Accommodation**

This is based on the premise that when religious conscience conflicts with a government obligation or prohibition, the government sometimes may have to give way.<sup>46</sup> This results when the Court finds that accommodation is required by the Free Exercise Clause, i.e. when the

---

<sup>40</sup> CONST. (1935), art. VI, § 22 ¶3(b), CONST. (1973), art. VI § 22 ¶3 and CONST. art. VI § 28 ¶3.

<sup>41</sup> CONST. (1935), art. VI § 23 ¶3, CONST. (1973), art. VIII § 18 ¶2 and CONST. art. VI, § 9 ¶2.

<sup>42</sup> CONST. (1935), art. XIII, § 5, CONST. (1973), art XV, § 8 ¶8 and CONST. art. XIV, § 3 ¶3.

<sup>43</sup> "Divine Providence" in the 1935 and 1973 Constitutions, and "Almighty God" in the 1987 Constitution.

<sup>44</sup> *Escritor* (2006) citing McConnel, M. Accommodation of Religion: An Update and a Response to Critics, 60, THE GEORGE WASHINGTON LAW REVIEW 685, 686.

<sup>45</sup> *Escritor* (2006).

<sup>46</sup> D.A. Hess, *The Undoing of Mandatory Free Exercise Accommodation-Employment Division, Department of Human Resources v. Smith*, 110 S. Ct. 1595 (1990), 66 Washington Law Review (1991), at 587 citing McConnell, *Neutrality Under the Religion Clauses*.

court carves out an exemption. This accommodation occurs when all three conditions of the compelling state interest test<sup>47</sup> are met.<sup>48</sup>

**b) Permissive Accommodation**

Here, the Court finds that the State may, but is not required to, accommodate religious interests. It cites the *Walz v. Tax Commission*<sup>49</sup> as one illustrative case where the US Supreme Court upheld the constitutionality of tax exemption given by New York to church properties but did not rule that the state was required to provide tax exemptions.<sup>50</sup>

**c) Prohibited Accommodation**

This 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. In this case, the Court finds that establishment concerns prevail over potential accommodation interests.<sup>51</sup>

Based on the foregoing, and after holding that the Philippine Constitution upholds the benevolent neutrality doctrine which allows for accommodation, the court laid down the rule that in dealing with cases involving purely conduct based on religious belief, it shall adopt the strict scrutiny-compelling state interest test because it is most in line with the benevolent neutrality-accommodation.

***To Ensure Neutrality: Compelling State Interest Test***

The Free exercise Clause and the Establishment Clause were never viewed as absolute. Freedom to believe is absolute, but freedom to practice that belief may be circumscribed by government under certain conditions. Government may not directly aid religion, but secular programs that indirectly benefit religious institutions may be permissible.<sup>52</sup>

---

<sup>47</sup> *Infra*.

<sup>48</sup> *Escritor (2006)*

<sup>49</sup> 397 US 664 (1970).

<sup>50</sup> *Escritor (2006)*.

<sup>51</sup> *Ibid*.

<sup>52</sup> E. Witt, *The Supreme Court and Individual Rights* (1979), at 79.

The court's task has been to ensure that government remains neutral toward religion. As Chief Justice Warren E. Burger explained in 1970:

"The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or government restraint on religious practice."<sup>53</sup>

To maintain this neutrality, the court has developed tests that it applies to the circumstances of each case challenging a supposed violation of the religion clauses.<sup>54</sup>

The test applied by the US Supreme Court to balance the free exercise claims of individuals against the interests of society has varied substantially over the past one hundred years<sup>55</sup>—From the moral test in *Reynolds v. United States* where the court rejected a Mormon's claim that an anti-polygamy statute unconstitutionally infringed upon his free exercise rights because polygamy was morally repulsive and destructive to American society, to the two-part test laid down in the landmark case

---

<sup>53</sup> *Id.* citing *Walz v. Tax Commission*.

<sup>54</sup> *Id.* at 79.

<sup>55</sup> S. Juster, *Free Exercise—or the Lack Thereof? Employment Division v. Smith*. 24 *Creighton Law Review* (1990), at 245.

of *Cantwell vs. Connecticut*,<sup>56</sup> to the threefold process of compelling state interest enunciated in *Sherbert v. Verner*.<sup>57</sup>

The court in *Escritor* following the test established in *Sherbert v. Verner*<sup>58</sup> explained this process in detail by showing the questions which must be answered in each step, *viz*:

First, "Has the statute or government action created a burden on the free exercise of religion?" the courts often look into the sincerity of the religious belief, but without inquiring into the truth of the belief because the Free exercise Clause prohibits inquiring about its truth \*\*\* The sincerity of the claimant's belief is ascertained to avoid the mere claim of religious beliefs to escape a mandatory regulation. \*\*\*

Second, "Is there a sufficiently compelling state interest to justify this infringement of religious liberty?" In this step, the government has to establish that its purposes are legitimate for the state and that they are compelling. 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. \*\*\*

Third, "has the state in achieving its legitimate purposes used the least intrusive means possible so that the free exercise is not infringed any more than necessarily to achieve the legitimate goal of the state?" The analysis requires the state to show that the means in which it is achieving its legitimate state objective is the least intrusive means, i.e. it has chosen a way to achieve its legitimate state end that imposes as little as possible on religious liberties. \*\*\*<sup>59</sup>

In a relatively more recent case decided by the US Supreme Court however, the compelling state interest test in *Sherbert* was abandoned. In *Employment Division v. Smith*, the court asserted that it had never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to

---

<sup>56</sup> First, Does the government action in question limit religious belief or activity? And Second, If a regulation of activity, is the government action necessary to protect the peace, good order, and comfort of the community?

The court noted that the first amendment "embraces two concepts-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.

<sup>57</sup> *Infra*.

<sup>58</sup> 374 US 398 (1963).

<sup>59</sup> *Escritor* (2006).

regulate.<sup>60</sup> Therefore, in *Smith*, the court saw no reason to apply strict scrutiny. The Court also rejected the *Sherbert* test on grounds that:

“if ‘compelling interest’ really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such system would be courting anarchy, but that danger increases in direct proportion to the society’s diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because ‘we are a cosmopolitan nation made up of people of almost every conceivable religious preference,’ ... and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.”<sup>61</sup>

The court held that strict scrutiny had been used to review the validity of state action only in “hybrid” cases involving the Free Exercise Clause in conjunction with other constitutional protections, such as the protection of speech and free press.

The *Smith* decision drew hostile reactions from different sectors. Some said that “it is perhaps the most threatening move away from court-mandated free exercise accommodation.”<sup>62</sup>

The court itself did not adopt this 1990 ruling in resolving the *Escritor* case holding that *Smith* is in “effect contrary to the benevolent neutrality or accommodation approach” and it is a “dangerous precedent because it subordinates fundamental rights of religious belief and practice to all neutral, general legislation.”

### OF LOVE AND OTHER DEMONS: AN ANALYSIS

*Escritor* laid down for the first time that the Philippine Constitution adheres to the principle of benevolent neutrality as regards the freedom of religion. Under this principle, accommodations can be had by virtue of a legislative act (permissive accommodation) or through the courts (mandatory accommodation) by invoking the religion clause indepen-

---

<sup>60</sup> *Id.* citing *Smith*.

<sup>61</sup> *Id.* citing *Braunfeld v. Brown*, 366 US at 606.

<sup>62</sup> *Id.* D. Hess (1991), at 587.

dently as a source of right. In order to ascertain the conflicting claims of the state and the individual, courts will adopt the compelling state interest test as it did in this case. By ruling in favor of Escritor, the court pinned the blame on the state for failing to prove its compelling interest to justify the indictment of Escritor.

The court in the decision took into consideration the 1990 case of *Smith* which caused widespread opposition in the United States after it abandoned the compelling state interest test doctrine. The current jurisprudence therefore is “in order to outweigh an individual’s free exercise claim a facially neutral law must simply be reasonably related to a legitimate state goal.”<sup>63</sup>

The Supreme Court deviated from this ruling and henceforth declared that while US laws are the precursors to our Religious Freedom clause, there is a marked difference between the two because our constitution has allowed certain accommodations which have no counterpart in the US.

By sticking it out with the compelling state interest test, the court became a staunch defender of religious freedom, thereby frustrating the move by the state to prosecute Escritor for immorality.

There is no doubt that religious freedom is a preferred right which must be accorded deference and protection. However, it is also settled that this right, when translated into action, is never absolute but can be validly regulated by the state for legitimate purposes and in line with its avowed public policy.

The dilemma in this case arose when this preferred right is pitted against an equally important state responsibility. That is why a meticulous understanding and scrutiny of the facts of the case is essential in its judicious appreciation and resolution.

It is the court’s duty to protect at all times the constitutional freedom grants, including religious freedom. The court in this case can be credited for its scholarly discussion of the origins and developments of religious freedom and for laying down a very important jurisprudential doctrine.

---

<sup>63</sup> S. Juster (1990) citing *Smith* 110 S.Ct. at 1595.

The resolution of the case however posed more questions than answers. The noble end is not enough to dispel doubts as to the correct appreciation of the case because although this decision may come less a controversy than a surprise, it nonetheless changed, albeit adversely, the landscape of viewing marriage *vis-à-vis* religious freedom.

### *Factual Milieu*

The crux of religious freedom is the protection of the right to believe in a religion and to act in accordance with such belief—the former is absolute, the latter is not. To constitute religious practice, it must be of such a character that relates to the faith of the person and his relations to his Creator.

The execution of the “Declaration of Pledging Faithfulness” by Escritor and her partner does not appear to be deeply ingrained in the exercise of their faith as Jehovah’s witnesses as characterized by the nature and effects of said declaration.

The nature of the declaration is a mere form of accommodation of a domestic arrangement that is not sanctioned by law. It is meant to temporarily imbue the partnership with a religious blessing in the meantime that the couples are legally impeded from contracting marriage. Although this practice has scriptural basis<sup>64</sup> according to Jehovah’s Witnesses, it cannot be categorically held that said practice is deeply rooted in their faith. If the members of the congregation truly consider it as an essential manifestation of their faith, the validity and effectivity of the declaration would not merely be temporary. However, it is provided in the agreement that the couple, once the impediments are removed, **must** secure legal recognition of the marriage.

From this, it can be implied that the declaration itself reflects the intention of the congregation to give to the state its power to regulate this civil union; the state thus becomes the final arbiter of such domestic arrangement. The fact that the congregation has in effect recognized and yielded the regulation of this union to the final judgment of the courts, it cannot be characterized as purely within the realm of religious practice. The union is principally a civil arrangement subject to legal rules but only adopted incidentally by the Jehovah’s Witnesses as a form

---

<sup>64</sup> Matthew 5:32.

of provisional sanctuary for hapless couples. By this reason alone, Escritor's defense should fail.

### *Legal Precedents*

The court ruled in this case that benevolent neutrality encompasses both permissive and mandatory accommodations. Since there is still no law accommodating such domestic arrangement adopted by the Jehovah's witnesses, the court deemed it appropriate to carve out an exception by judicial fiat.

What is problematic in the resolution of the case is that the court relied on the cases of *American Bible Society*,<sup>65</sup> *Ebranilag*,<sup>66</sup> and *Victoriano*<sup>67</sup> and held that these "demonstrate that our application of the doctrine of benevolent neutrality-accommodation covers not only the grant of permissive or legislative accommodations but also mandatory accommodations"<sup>68</sup> and thus "an exemption from a law of general application is possible, even if anchored directly on an invocation of the Free Exercise Clause alone, rather than legislative exemption."<sup>69</sup>

Yet, it declared thereafter that "while there is no Philippine case as yet wherein the court granted an accommodation exemption to a religious act from the application of general penal laws, permissive accommodation based on religious freedom has been granted with respect to one of the crimes penalized under the Revised Penal Code, that of bigamy."<sup>70</sup>

---

<sup>65</sup> *American Bible Society v. City of Manila* 101 Phil. 386 (1957). The Court held that the ordinance passed by the city of Manila requiring the mayor's permit and a license for any business, trade or occupation was not applicable to plaintiff corporation which sold bibles without making profit.

<sup>66</sup> *Ebranilag v. Division Superintendent* 219 SCRA 256 (1993). In this case, the court annulled the expulsion orders on schoolchildren, members of Jehovah's witnesses, who refused on account of their religious beliefs to take part in the flag ceremony.

<sup>67</sup> *Victoriano v. Elizalde Rope Workers Union* 59 SCRA 54 (1974). The constitutionality of Republic Act No. 3350, a law which exempts employees from the application and coverage of closed shop agreement based on religious belief, was upheld by the Court.

<sup>68</sup> *Escritor* (2006).

<sup>69</sup> *Ibid.*

<sup>70</sup> P.D. No. 1083 or the Code of Muslim Personal Laws of the Philippines is a body of law established by legislative authority of the state which applies only to Muslims in matters relating to their persons and family matters among others. The law grants Muslims

It should be noted that the three cited cases did not involve an act which is punishable under our penal laws. These cases should not be the bases of granting the same mandatory exemption in this instant case because what is involved here is an act not only punishable by penal law but also a subject that is a social institution which the state and the public is highly interested. Precisely because there has yet been no legislative exemption covering this act of *Escritor*, it cannot be granted such exemption outside the ambit of a statutory grant.

The caveat that “in the ideal world, the legislature would recognize the religions and their practices and would consider them, when practical in enacting laws of general application, but when the legislature fails to do so, religions that are threatened and burdened may turn to the courts for protection”<sup>71</sup> cannot be invoked to justify judicial exemptions because there is an existing machinery—the legislature—that could grant such right, and has in fact granted a similar right.

In the case of *Escritor*, there is no legislative exemption applicable yet, not because the legislature failed in its duty to protect religion, but because it doesn’t see the need to grant similar exemption from a penal law to legitimize this particular domestic arrangement.

Justice Carpio in his dissenting opinion is correct in asserting that “making a distinction between permissive and mandatory accommodation is more critically important in analyzing free exercise exemption claims because it forces the Court to confront how far it can validly set the limits of religious liberty under the Free Exercise Clause \*\*\*.”<sup>72</sup> But the majority opinion dismissed Justice Carpio’s view as effectively rendering the Free Exercise protection—a fundamental right under our constitution—nugatory because he would deny its status as an independent source of right.

The necessity of making the distinction is not to render nugatory the constitutional free exercise right, but to make a demarcation between what can be subject of permissive accommodation on one hand and

---

the right to practice polygamy and to secure absolute divorce in accordance to their customs and practices.

<sup>71</sup> *Escritor* (2003) citing Carter S. The Resurrection of Religious Freedom. Harvard Law Review 118, 1280 (1993).

<sup>72</sup> *Escritor* (2006).

mandatory accommodation on the other so as not to defeat the well-recognized limitations of this right and run counter to other equally avowed policies of the state.

As it stands, before the *Escritor* case, mandatory exemption was allowed by court in laws of general application but not with general penal laws which only allow exemption by legislative action. And that should be the case because the legislature is equipped with mechanisms in aid of legislation so that it knows which laws to legislate. In courts, the probing lens would be limited to the pleadings and oral arguments. The kind of exemption sought for in this case has widespread repercussions that a more in-depth and extensive investigation is needed. Exemption from a penal law should never be, and has never been, taken lightly, for crimes are legally and morally repulsive.

The court however may posit that in granting mandatory exemptions, it laid down safeguards by using the compelling state interest test. This test, criticized as an “almost impossible burden”<sup>73</sup> is described as follows:

It 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 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.

Thus, it is not the State’s broad interest in “protecting the institutions of marriage and the family” or even “in the sound administration of justice” that must be weighed against respondent’s claim, but the state’s narrow interest in refusing to make an exception for the cohabitation which respondent’s faith finds moral. In other words, 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.

This the Solicitor General failed to do so.”<sup>74</sup>

It is hard to fathom what exactly the court is driving at with this declaration. By requiring a more concrete and specific basis of interest,

---

<sup>73</sup> M. Uhlmann. *The Supreme Court Rules*, First Things (Oct. 2003) at 27.

<sup>74</sup> *Escritor* (2006).

it ironically require an abstract and speculative rationale for the state's interest in marriage and family.

By declaring in the constitution that "marriage, as an inviolable social institution, is the foundation of the family and shall be protected by the State,"<sup>75</sup> the state is mandated by the supreme law to protect and uphold marriage. This commitment is further reinforced in the enactment of the Family Code which defines marriage as a "special contract of permanent union between a man and a woman entered into in accordance with law for the establishment of conjugal and family life. It is the foundation of the family and an inviolable social institution whose nature, consequences and incidents are governed by law and not subject to stipulation \*\*\*".<sup>76</sup>

It shows that a paramount state interest which the government is directly responsible to protect and uphold is at stake. Thus, there exists a compelling interest to justify an act of the state to suppress any offense that goes against its legal mandate.

A manifestation of this commitment is the enactment of penal laws punishing bigamy and adultery as social ills which the state deems contrary to common good. This fact establishes the seriousness of the state to protect marriage. Moreover, in several cases decided by the court, it unequivocally speaks of marriage as a very important feature of social life which the state ought to protect and regulate. Accordingly, the state is mandated to strengthen the family as the foundation of the nation and to protect the marriage institution as the foundation of the family.<sup>77</sup>

These considerations are more than enough to convince the court of the compelling state interest in marriage. But the court is unconvinced and would rather hold that the state has no compelling interest because "the state has not evinced any concrete interest in enforcing the concubinage or bigamy charges against respondent or her partner" and "the state has never sought to prosecute respondent nor her partner" so "the state's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition."

---

<sup>75</sup> CONST. art. XV, § 2.

<sup>76</sup> FAMILY CODE, art. 1.

<sup>77</sup> De Leon at 682.

The court is misplaced and mistaken in requiring this action from the state to prosecute respondent for bigamy or concubinage. There is no crime of bigamy involved because there is no second or subsequent marriage to speak of. On the other hand, concubinage (or adultery for that matter) is a private crime which can only be prosecuted upon a complaint-affidavit by the offended spouse.<sup>78</sup> Without the offended spouse, the state cannot choose to unilaterally file charges. The state therefore cannot legally prosecute these cases not because it is remiss in its task to enforce state interest, but only because its hands are tied by rules of procedure. This omission should never be taken to mean lack of compelling state interest.

If this were the kind of “specific interest” that the court requires, then all state interests would merely be hypothetical and speculative and would therefore not be allowed by the courts. Clearly, the parameter laid down by the court in order to assert compelling state interest leads to a dead-end.

Based on the foregoing, it appears that the decision is really bent on justifying this common-law marriage against all odds. The propensity of the Court to overhaul the jurisprudential history on marriage is apparent in its statement citing Messrs. J. Bellosillo and Vitug in their concurring opinion in the August 4, 2003 decision that “to deny the exemption would effectively break-up an otherwise ideal union of two individuals who have managed to stay together as husband and wife (approximately twenty-five years) and have the effect of defeating the very substance of marriage and the family.”

Perhaps the Court missed the fact that this is not a simple love story. This is not just a case of common-law marriage—which is not recognized in our jurisdiction. This is a case of adultery and concubinage which are crimes against God and man. Religious freedom was never meant to cover up for an obviously criminal act. The Court’s heart may grieve for this “ideal union” but as they say, *Dura Lex Sed Lex*.

---

<sup>78</sup> “The crimes of adultery and concubinage shall not be prosecuted except upon a complaint filed by the offended spouse.” Rule 110, § 5 ¶ 2, Rules of Court.

### CONCLUSION TO A POETIC INJUSTICE

One difficulty encountered in this case of first impression is that the parties were not aware of the burden of proof that they should discharge in the Court's use of the compelling state interest test.<sup>79</sup>

More than that however, it appears that the Court itself was not sharp and adept in its ruling. While it gave a detailed historical discussion of religious freedom clauses, its inference and construction as regards the Philippine context did not have a strong and stable foothold.

There is much to learn from and fear for in this case. True, the decision espouses a system conducive to pluralism and multiperspectivism that to rule otherwise would be a historical anachronism. True also that "while man is finite \*\*\* he must be allowed to subscribe to the infinite." However, there is a danger if we forget the bounds that remind us that an unhampered centripetal movement is a sure way to scattered extremism and social and political anarchy. Our diverse political and religious orientation shouldn't easily excuse us from the center that holds—a society run by the rule of law.

Freedom of religion is a preferred right that must be accorded any individual. But this is not absolute and its mere invocation is not enough to tilt the balance towards it and forget about other equally protected interests: Sovereignty of the state; separation of Church and State; and power and duty of the state to punish crimes.

As feared by Justice Jorge R. Coquia in his annotation<sup>80</sup> to the August 2003 decision, this case "will open the floodgates for people to violate the law and claim exemption from liability on the good pretext that the act is an exercise of freedom and religion." Indeed, he said that the situation is now even worse "when religious fundamentalists and militants commit suicidal bombing killing innocent people and international terrorism has now committed magnitude in the name of religious beliefs."

This foreboding danger is not a mere stretch of the imagination but a logical consequence of the case hailed by the court as "one that will

---

<sup>79</sup> A. Nachura, *Outline Reviewer in Political Law* (2006) at 152.

<sup>80</sup> 408 SCRA 246, at 248 and 254.

decide not only the fate of *Escritor* but of other believers coming to court bearing grievances on their free exercise of religion.”

The case opened a door to a lot of possibilities that may change the concept of marriage and freedom of religion. *Escritor* was not only a story of two star-crossed lovers who have the world against them but persistently pursued the road less traveled. They were successful in their journey though. Ironically, that same door opened to a labyrinth trail abounding with traps, misses, and turns for the rest of the travelers tracing the same path. It may take a long way to see the light out of this maze. Until then, it would be a journey of a blind leading another blind.