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**Islamic Law in the Philippines:  
Between Appeasement and Neglect**

**Matthew Stephens**

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**Front Cover Image:**

Photograph by the author: Ma’ahad Jamio Mindanao Al-Islamie, Marawi City.

# Islamic Law in the Philippines: Between Appeasement and Neglect

Matthew Stephens\*

The Philippines is the largest Catholic country in Southeast Asia, with the third-largest number of Catholics of any nation in the world.<sup>1</sup> Yet when Spanish conquistador Miguel Lopez de Legazpi established the capital of the Spanish colony in Manila in 1571, the city that today has more than twelve million was a small Muslim settlement of 2,000 people, led by Rajah Sulaiman, a Malay-speaking son of a Bruneian King.<sup>2</sup> In the south, the Sultanate of Sulu, by contrast, was already 120 years old, with a flourishing Islamic system of governance and social infrastructure of mosques and *madaris* (Islamic schools). Although not as long-established, functioning sultanates were also in place in Maguindanao on the Mindanao mainland.<sup>3</sup>

The Spanish colonialists brought to bear the full ‘friar power’ of the Catholic Church to convert Muslim and non-Muslim Filipinos alike. Calling Muslims *Moros*, after the despised Moors of Spain, they considered Islam a ‘noxious weed’ to be rooted out.<sup>4</sup> Over the subsequent 300 years of Spanish rule, followed by the American occupation of the first half of the twentieth Century and independent rule post-World War II, Muslims in the Philippines suffered systematic neglect and discrimination in a context of hundreds

\* Matthew Stephens BA (Asian Studies), LLB (ANU) LLM (Melb) is a Senior Social Development Specialist with the World Bank in the Philippines, working on conflict, security and development. The views expressed in this article are those of the author rather than the institutions to which he is, or has been, affiliated.

1 Central Intelligence Agency, ‘The World Factbook’, <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html>, accessed 1 October 2011.

2 Abinales, P.N. and Amoroso, D.J. (2005), *State and Society in the Philippines*, Anvil, Manila at 56.

3 See Houben, V.J.H. (2003), ‘Southeast Asia and Islam’, 588 *American Academy of Political and Social Science*, 149 at 161; Abubakar, C.A. (2005), ‘The Advent and Growth of Islam in the Philippines’, in K.S. Nathan and M.H. Kamai (eds), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century*, Institute of Southeast Asian Studies, Singapore at 49-50; and Lingga, Aboud Syed M. (2008), ‘Understanding the Bangsamoro Right to Self-Determination’, in B.M. Tuazon (ed), *The Moro Reader: History and Contemporary Struggles of the Bangsamoro People*, Center for People Empowerment in Governance, Manila at 99.

4 Abinales and Amoroso, above n.2 at 58. Muslims later adopted *Moro* to denote Muslim Filipinos. The term *Bangsamoro* is also used, adding the Malay word *bangsa*, meaning “nation” or “people”.

of years of struggle for self-rule.<sup>5</sup> Indeed, by 1898, when Spain “sold” the Philippines to the United States under the Treaty of Paris, it had never secured full control over Mindanao, particularly Sulu.<sup>6</sup> Armed rebellion still persists, most prominently in the contemporary period through the Moro Islamic Liberation Front (MILF), with whom the government is currently engaged in peace negotiations.<sup>7</sup>

Under independent rule, Philippine government policy towards the so-called “Bangsamoro problem” has oscillated between military action; disastrous attempts at assimilation and integration; and peace negotiations and accommodation. At various times, a range of political concessions have been made to acknowledge Muslim demands for recognition. These have included laws to create an Autonomous Region in Muslim Mindanao, a special national government body established to represent Muslim interests and Islamic financing.<sup>8</sup> Prominent among these concessions was the passage in 1977 of Presidential Decree 1083 (PD 1083), known as the Code of Muslim Personal Laws (CMPL).<sup>9</sup> Promulgated under the martial law government of Ferdinand Marcos, the CMPL built on a history of pre-colonial Codes and long-standing implementation of forms of shari’a at the community level in Muslim villages.<sup>10</sup> More recently, the Moro Islamic Liberation Front has established its own shari’a court system, which functions in MILF-controlled areas of Mindanao.

This paper draws on fieldwork in Mindanao, interviews with shari’a practitioners and leading Islamic scholars; case data and records; and a rare interview with judges from the MILF’s Supreme Shari’a Court. It describes the political underpinning and content of PD 1083 and then discusses the operation of the different institutions of shari’a in

5 To demonstrate the extent of neglect of Muslim Filipinos, the five provinces with the lowest life expectancy in the Philippines are all in Muslim Mindanao (life expectancy in Tawi-Tawi is only 51.2, more than twenty years less than Cebu province) and the five Muslim Mindanao provinces are in the bottom ten on the Human Development Index. On prejudice and discrimination, a representative survey showed that 47 percent of Filipinos think Muslims are probably terrorists or extremists and more than half of Manila residents would choose to live in a house with higher rent than live near Muslims. Overall the survey showed that between 33 to 44 percent of Filipinos have an anti-Muslim bias. See Human Development Network (2005), *Philippine Human Development Report: Peace, Human Security and Human Development in the Philippines*, Human Development Network, Manila.

6 Lingga, above n.3 at 100.

7 For more on the peace process, see International Crisis Group (2011), *The Philippines: Back to the Table, Warily, in Mindanao*, Asia Briefing No. 119, 24 March 2011 and International Crisis Group (2011a), *The Philippines: A New Strategy for Peace in Mindanao?*, Asia Briefing No. 125, 3 August 2011.

8 Republic Acts 6734 of 1989 and 9054 of 2001 created the Autonomous Region of Muslim Mindanao. Executive Order 697 of 1981 created the Ministry of Muslim Affairs, followed by Executive Orders 122A of and 295 of 1987 establishing the Office on Muslim Affairs and Republic Act 9997 of 2009 created the National Commission on Muslim Filipinos. Presidential Decrees 264 of 1973 and 542 of 1974 and Republic Act 6848 of 1990 established Islamic financing.

9 The full title of PD 1083 is ‘A Decree to Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for its Administration and for Other Purposes’.

10 Multiple forms of spelling are used globally and in the Philippines, but for this paper I use “shari’a”, as the preferred form of the word used by the Supreme Court of the Philippines.

the Philippines, namely, the government shari’a court system, traditional or non-state justice systems at the community level and the MILF’s parallel court.

The paper concludes that passage of the CMPL was undoubtedly a progressive step. As the only Catholic-majority country in the world to recognise Islamic law, the scope of the Code is more expansive than its equivalents in neighbouring Thailand and even Muslim-majority Indonesia.<sup>11</sup> Yet, driven by political concession and appeasement, the political will necessary to build a fully-functioning system of law has never been present. Combined with weak governance in Mindanao and mixed views within a largely moderate Muslim community as to the importance of shari’a, the promise of the Code to be a major breakthrough in the recognition of the role of Muslims in Philippine society remains only partially attained at best.

## The Origins of Shari’a in the Philippines

While Muslim traders began visiting the Philippines from as early as the ninth Century, the first documented Islamic settlement in the country was recorded in the 1200s, in the southern island of Sulu.<sup>12</sup> By the fourteenth Century, the Sulu Sultanate had been established, with others following in Central Mindanao over the next century. Islam brought the benefit of trade links with the rest of Southeast Asia, and the promise of a system of norms that could promote equity, order and security. It would also come to serve as a unifying form of identity for the thirteen distinct ethno-linguistic communities living in Muslim areas of Mindanao.<sup>13</sup>

As a natural consequence of the spread of Islam, shari’a codes were promulgated in Sulu and Maguindanao in the pre-colonial era.<sup>14</sup> Through local leaders, versions of shari’a that were inter-mingled with local custom (known as *adat*) began to be implemented at the community level.

As mentioned, the Spanish colonialists were strongly opposed to Islam and began what would be several hundreds of years of discrimination against Muslim communities. This was met with armed struggle, with Muslim Mindanao never fully under Spanish control. Thus, when the Treaty of Paris was signed in 1898, most Moros acknowledged neither Spanish nor American sovereignty. As Abhoud Lingga, a prominent Muslim scholar, has observed, ‘Based on the logic that you cannot sell something you do not possess ... the Bangsamoro territories are not part of what was ceded by Spain to the

11 See National Reconciliation Commission of Thailand (2006), ‘Overcoming Violence Through the Power of Reconciliation’, National Reconciliation Commission, Bangkok at 88. On Indonesia, see Instruksi Presiden No. 1/1991 Kompilasi Hukum Islam [*Presidential Instruction No.1/1991, Compilation of Islamic Law*].

12 See Houben, above n.4 at 161 & Abubakar, above n.4 at 48.

13 Abubakar, above n.4 at 50. In a recent survey of over 2700 people in Central Mindanao, 82 percent of Muslim respondents said religion was the main factor defining their identity (as opposed to clan, ethnicity and nationality), compared to 46 percent for Christians and 17 percent for other religions: World Bank/World Food Program (2012, forthcoming) *Violent Conflict and Displacement in Central Mindanao: Challenges to Recovery and Development*, World Bank/WFP: Manila.

14 Asian Institute of Journalism and Communication (n.d.), ‘A Primer on the Muslim Personal Laws of the Philippines’, The Asia Foundation, Manila at 3.

United States ... because Spain had never exercised sovereignty over these areas.<sup>15</sup> While American colonial attitudes were more accommodating of Islam than the overt attempts at conversion of the Spanish, discriminatory practices continued (and in an economic sense perhaps even intensified) during the American period. A series of laws passed during the first half of the twentieth century vitiated customary land rights and introduced a modern system of land titling that was both alien to Muslim communities and overtly favoured Christians over Muslims and indigenous peoples.<sup>16</sup>

After the Philippines gained independence in 1946, the newly installed government favoured a policy of legal uniformity. Referring to the prospect of Religious Courts, President Manuel Quezon had remarked, 'these datos and sultans should never be allowed to have anything to do with functions that are official.'<sup>17</sup> Nonetheless, some concessions to the historical importance and ongoing relevance of shari'a were made by the new Republic. In 1949, for instance, a law was passed allowing divorce for Muslims, albeit with a 'sunset clause' of twenty years (divorce is not legal for non-Muslims in the Philippines).<sup>18</sup> The limited time period was apparently introduced on the assumption that the practice would eventually be killed off by policies of integration and assimilation.<sup>19</sup> Such policies were pursued with vigour. In particular the promotion of Christian settlement into Mindanao saw the Muslim population drop from 76 percent of the island in 1903 to below twenty percent today.<sup>20</sup>

Faced with discrimination and "minoritization", a Muslim separatist movement emerged in Mindanao. Building on a local tradition of armed struggle and inspired by regional and global Islamic revivalism, the movement culminated in the formation of the Moro National Liberation Front (MNLF) in the late 1960s. This was incontrovertible proof that the Philippine state's policies of assimilation had failed.<sup>21</sup>

In the face of an organized, trained and well-funded separatist movement, government policy shifted from a pure military and assimilationist approach. Interestingly, this was facilitated by the imposition of martial law by Ferdinand Marcos in September 1972, which freed the government of legislative obstacles to reform. Over the ensuing years, a number of concessions were made to Muslim Filipinos in the hope of bringing an end to violent conflict in Mindanao. This included, most notably for the purposes of this paper, state recognition of shari'a law.

15 Lingga, above n.4 at 100.

16 These laws include the Land Regulation Act 1902, Philippine Commission Act 1903, Public Land Act 1903, Mining Act 1905 and the Cadastral Act 1913. The 1903 Public Land Act, for instance, allowed 'homesteaders' to own 16 hectares of land and Corporations 1024 hectares. Non-Christians were given no provision. See Rodil, R.B. (2010), 'Achieving Peace and Justice in Mindanao through the Tri-People Approach', 1(2010-01) *Mindanao Horizons*.

17 While this quote was from before independence, it reflects view of leading political figures of the time. See Carter Bentley, G. (1981), 'Islamic Law in Christian Southeast Asia: The Politics of Establishing Shari-a Courts in the Philippines', 29 *Journal of Philippine Studies* 45 at 47.

18 Republic Act No. 394 of 1949.

19 Carter Bentley, above n.18 at 47.

20 Human Development Network, above n.6 at 29.

21 Carter Bentley, above n.18 at 49-50.

## The Code of Muslim Personal Laws

While passage of the Code was unquestionably a progressive step, it was largely motivated by political and diplomatic considerations rather than a genuine recognition of Muslim identity. As Carter Bentley has observed, 'codification of Muslim laws and incorporation of them into the national judicial system was to be a key element in an accommodation policy towards Muslims, complementing the military oppression of martial law.'<sup>22</sup> Solamo-Antonio describes Marcos' initiative as 'an attempt to appease Muslim separatists.'<sup>23</sup> Carter Bentley also noted that the move was intended to diplomatically off-set criticism from regional neighbours, the oil-rich Middle-Eastern countries (some of whom were funding the separatists) and the Philippines' most important partner, the United States.

In 1973, Marcos established the Research Staff for the Codification of Philippine Muslim Laws, headed by Michael Mastura, who would later be involved in drafting the post-Marcos 1987 Constitution and is currently a member of the negotiating panel for the MILF. In 1974, the Research Staff submitted a draft Code of Muslim Personal Laws that drew heavily on local *adat* (traditional customary law), reflecting practice in Muslim areas. However, the Code received 'a chilly reception in Manila'.<sup>24</sup> A Presidential Commission established to review the draft Code submitted a revised version in 1975 that reinforced Constitutional supremacy and was aligned more closely with practice in the middle-east. In the process, it eliminated most vestiges of *adat*.<sup>25</sup>

Demonstrating that the introduction of shari'a was being used a political bargaining chip, Marcos sat on the revised Code until the 1976 Tripoli Agreement between the MNLF and the government was signed. The Agreement stipulated that Muslims in Muslim areas were to be given the right to set up their own courts to implement shari'a law. This right was partially realised when, on 4 February 1977, Presidential Decree 1083 was signed into law. Constitutionally, the Decree drew on Article XV, Section 11 of the 1973 Constitution – 'the State shall consider the customs, traditions, beliefs and interests of national cultural communities in the formulation and implementation of state policies.'

Per Article 2, the CMPL has three main functions – to recognize elements of Islamic law as part of the law of the Philippines, to codify Muslim personal law, and to provide a system for its administration and enforcement. As the title suggests, the Code does not cover the entirety of shari'a, only elements of personal laws<sup>26</sup> and does not recognise shari'a as a separate, autonomous system of law. It is, rather, a part of the wider justice

22 Ibid.

23 Solamo-Antonio, I. (2003), *The Shari'a Courts in the Philippines: Women, Men & Muslim Personal Laws*, Pilipina Legal Resources Center, Inc., Davao at 4.

24 Carter Bentley, above n.18 at 57-58.

25 Ibid.

26 Mastura, M.O. (1994), 'Legal Pluralism in the Philippines', 28(3) *Law and Society Review* at 463.

system of the state.<sup>27</sup>

Comprised of 190 articles in five books, the Code covers personal status, marriage and divorce, matrimonial and family relations, succession and inheritance, and property relations between spouses.<sup>28</sup> It is applicable only to Muslims.<sup>29</sup> Rather than describe the Code in detail, the next section covers some of its more prominent features.

### **Marriage**

The Code establishes the supremacy of state over religious authority by stipulating that all marriages must be registered in the Shari'a Court.<sup>30</sup>

Controversially, the Code establishes a low minimum age for marriage. For non-Muslim Filipinos, the legal age for marriage is eighteen.<sup>31</sup> However, under the CMPL, males may marry from the age of fifteen. Females who have reached puberty acquire the legal capacity to marry. Puberty is presumed to be fifteen but can be as low as twelve.<sup>32</sup> While not common, court records from the Zamboanga Shari'a District Court show that the youngest male marrying was eleven years old, with the youngest female only seven.<sup>33</sup> The issue of early marriage is regularly raised, particularly by women's groups, as a potential area for reform.<sup>34</sup>

### **Divorce**

In a country where it is impossible for the majority Christian population, the mere fact the CMPL permits divorce for Muslims is, as advocate Isabela Solamo-Antonio has said, 'very liberating'.<sup>35</sup> Under Article 45 of the Code, there are seven ways in which a divorce can be effected, namely repudiation of the wife by the husband (*talaq*); vow of continence by the husband (*ila*); injurious assimilation of the wife by the husband, that is, an insult by a husband to his wife which likens her to a female relation of his who is sexually prohibited to him (*zihar*); acts of imprecation (*li'an*); redemption by the wife (*khul*); exercise by the wife of the delegated right to repudiate (*tafwid*); or judicial decree (*faskh*).

27 See Guerrero, L.L., Barra, H., Mangahas, M. and Licudine, V.L. (2007), *The Code of Muslim Personal Laws in Practice: What Influential Muslims and Shari'a Lawyers Think*, Social Weather Stations, Manila at 4.

28 Article 7(i) CMPL.

29 Article 3(3) CMPL. The Code could, however, apply to a marriage between a Muslim man and a non-Muslim woman if it was consecrated pursuant to shari'a law: Article 13(1) CMPL.

30 Article 17 CMPL.

31 See Executive Order 209, The Family Code of the Philippines 1987, Article 5.

32 Article 16, CMPL. By contrast, under Indonesia's Compilation of Islamic Law the limits are 19 for men and 16 for women: Article 15(1).

33 Solamo-Antonio, above n.24 at 33.

34 See Guerrero et al, above n.27 at 116 and Solamo-Antonio, above n.24 at 104; and Interview with Raissa Jajurie, Manila, 15 August 2011.

35 Interview, Davao City, 18 April 2011. It has been suggested that, besides the Vatican, the Philippines is the only country in the world where divorce remains illegal. See Jimenez-David, R. (2011) at <http://opinion.inquirer.net/5801/divorce-and-the-status-quo>, accessed 1 October 2011.

### **Spousal/Child Support**

The Code sets out the obligations of a husband to support his wife and children through marriage and in case of divorce. During marriage, he must provide for 'everything that is indispensable for sustenance, dwelling, clothing and medical attendance according to the social standing of the person'. In case of divorce, these obligations extend only until the expiry of the waiting period or *'idda* (four months and ten days). If the wife is pregnant, then support is required until delivery. If she is nursing, the husband's obligation extends until the time of weaning.<sup>36</sup> As discussed below, however, execution of judicial orders to provide even this limited form of spousal and child maintenance is extremely problematic.

### **Custody**

In case of divorce, the Code determines that custody of children under the age of seven years will always be awarded to the mother or, if she is dead, the maternal grandmother, paternal grandmother, sister or aunts.<sup>37</sup> Unmarried girls who have reached puberty shall stay with the father, with sons in the same circumstances staying with the mother. Despite these provisions, a review of case law and interviews with experts suggest that custody is granted without exception to the mothers, so long as they are still alive.<sup>38</sup>

### **Rights and Obligations of Husband and Wife**

The respective rights and obligations of husbands and wives are defined largely along traditional lines of the husband as bread-winner and the wife as home-maker and care-giver. Women are entitled to purchase property and seek employment, but only with the consent of their husbands.<sup>39</sup> A level of protection is provided for women's property rights as both spouses are entitled to keep property they bring to the marital relationship. All income derived from employment during the marriage also remains the exclusive property of each spouse.<sup>40</sup>

### **Succession**

Standard Islamic law regulations on succession are reflected in the Code, including the right of a brother to inherit double the share of a sister: Article 122.

### **Polygyny**

As in other Muslim jurisdictions, the right of a husband under Islamic Law to marry up to four wives is acknowledged in PD 1083.<sup>41</sup> However, the Code restricts the right of polygyny to 'exceptional circumstances' and only if the husband can ensure 'equal

36 Articles 65 and 67 CMPL.

37 Article 78(1) CMPL.

38 Solamo-Antonio, above n.24 at 44.

39 Article 36(2) & (3) CMPL.

40 Article 41 CMPL.

41 Tunisia is the only Muslim country in the world where polygyny is not legal: see Glenn, H. Patrick (2000), *Legal Traditions of the World*, Oxford University Press, Oxford at 167.

companionship and just treatment as enjoined by Islamic law.<sup>42</sup>

### ***Criminal offences***

Unlike some Muslim codes elsewhere in the world, PD 1083 includes a set of criminal offences, albeit only those related to personal laws. Offences including illegal solemnization of marriage, marriage before expiration of the *'idda* and unauthorized subsequent marriage can be tried in the Shari'a Courts.<sup>43</sup>

### ***Sources for interpretation***

Under Article 4, judges interpreting the Code may draw upon the 'primary sources of Muslim law', the Qur'an and the Sunna (practice of the Prophet). A review of case records secured from the 5th Shari'a Circuit Court in Maguindanao province demonstrated regular use of passages from the Qur'an in judgments on restitution of marital rights, petition for confirmation of divorce and spousal support, and petition to contract subsequent marriage. A more comprehensive review across multiple shari'a courts undertaken by a local non-governmental organisation came to the same conclusion, namely that 'most judges in justifying their decisions never fail to invoke the Qur'an and the Hadith of Prophet Muhammad.'<sup>44</sup>

In addition to the two main sources, the *fiqh* (jurisprudence) books of the Sunni school – the Hanafi, Hanbali, Maliki and Shafi'i – may also be used for legal construction. Interviews with shari'a court judges and experts suggested a strong preference for the Shafi'i books as 'more appropriate', given the beliefs of most Muslim Filipinos.<sup>45</sup>

In addition to Islamic legal sources, judges may also draw on jurisprudence from the Supreme Court, the highest court in the land. Given that only around twenty shari'a cases have ever reached this court, there is, however, limited material on which to draw.

In the next section I explore the institutional arrangements established to administer and enforce the Code.

### **Institutions for Administration of the Code**

The CMPL establishes three main institutions – a Shari'a Court System; the Agama Arbitration Council for amicable settlement of cases; and the *mufti*, or Islamic Jurisconsultant position in the Supreme Court.

### ***Shari'a Courts***

PD 1083 establishes a three-tiered system of courts – Shari'a Circuit Courts (SHCC) at the first instance level; Shari'a District Courts (SDCC) to handle more serious cases and appeals from the SHCC; and, at the apex, the Supreme Court of the Republic

<sup>42</sup> Article 27 CMPL.

<sup>43</sup> Articles 181-185 CMPL.

<sup>44</sup> Solamo-Antonio, above n.24 at 27.

<sup>45</sup> Interview with Shari'a Circuit Court Judges, Cotabato City, 16 April 2011 and MILF Supreme Shari'a Court Judges, Sultan Kudarat, 17 April 2011.

of the Philippines for appeals from the SDCC. Hence, the shari'a court system is not independent but part of the judicial branch of the Philippine government. The Shari'a Courts are located only in areas with a high concentration of Muslims.

Article 147 establishes five District Courts, covering Muslim majority areas of Mindanao.<sup>46</sup> The SDCCs rank equally with Regional Trial Courts in the regular court system. District Courts hear cases on custody, guardianship, legitimacy of children, paternity and filiation, as well as inheritance and customary contracts between Muslims. They also handle appeals from the SHCCs.

By law, 51 SHCCs were to be established across the five districts. At this level – the equivalent of a Municipal Trial Court in the regular system – SHCCs hear trials relating to the limited criminal offences stipulated in PD 1083, as well as disputes related to marriage, divorce, breach of contract to marry, dower, maintenance and restitution of marital rights.

Many of the SHCCs have not yet been created and in 2007 only 25 were operational. The Supreme Court could not confirm precisely how many are operational at the time this article was written in late 2011, but a review of case figures from 2006-2010 shows no data at all for 15 circuit courts, suggesting that at most only 36 have now been created. Of those that do exist, many are inactive.

### ***Supreme Court/Jurisconsultant (Mufti)***

As part of the judicial system of the Republic of the Philippines, Shari'a District and Circuit Courts are subject to the supervision of the Supreme Court. Recognising the Supreme Court's limited expertise on the matter, the Code created the position of the Jurisconsultant in Islamic Law.<sup>47</sup> As stipulated in Article 166(1) the function of the Jurisconsultant is to, 'on the written request of any interested party, have the authority to render legal opinions, based on recognized authorities, regarding any question relating to Muslim Law.'

Also sometimes called the *mufti*, the Jurisconsultant is essentially a "friend of the court", an adviser on shari'a who can provide inputs to the Supreme Court and technical advice to lower-level judges. Despite good intentions, the position has often been, and is currently, vacant. One of the main reasons for this is that PD 1083 set the mufti's salary at 48,000 pesos per year (Article 167). While a reasonable wage in 1977, this is now less than half the minimum wage for unskilled workers in Manila.<sup>48</sup>

<sup>46</sup> The five districts are Sulu; Tawi-Tawi; Basilan and the Zamboanga Peninsula; Lanao del Sur and Lanao del Norte plus Marawi and Iligan Cities; and Maguindanao, North Cotabato, Sultan Kudarat and Cotabato City in Central Mindanao. The District Court in Zamboanga City is currently not functional.

<sup>47</sup> Article 164 CMPL.

<sup>48</sup> Figures from the National Wages and Productivity Commission of the Department of Labor and Employment. See [http://www.nwpc.dole.gov.ph/pages/nctr/cmwr\\_table.html](http://www.nwpc.dole.gov.ph/pages/nctr/cmwr_table.html), accessed 1 October 2011.

## Shari'a Judges and Lawyers

Judges in the District Courts are required to have the same qualifications as their brethren in the regular court system, as well as passing the shari'a bar.<sup>49</sup> Circuit Court judges, however, are only required to have a high school education and to have passed the shari'a bar.<sup>50</sup> Shari'a judges are appointed by the President. Salaries and conditions are set at the same level as Municipal and Regional Trial Court Judges in the regular system.

Passage of the shari'a bar examination is a pre-condition for lawyers appearing before the shari'a courts. Applicants eligible to sit for the shari'a bar must be lawyers admitted to the Integrated Bar of the Philippines who wish to practice in the shari'a courts; non-lawyers who have passed a 45-day course on Islamic Law given by the National Commission on Muslim Filipinos (NCMF); or Muslim scholars with a degree in Islamic Law and Jurisprudence from abroad. A survey undertaken of shari'a lawyers in the country indicated that over 80 percent received their training through the NCMF course.<sup>51</sup>

## Creation of the Courts – A Slow Beginning

PD 1083 represented an important landmark in the recognition of Islam in the Philippines. Despite this, it would be six years after its passage in 1977 before rules of procedure were enacted and the shari'a bar exam was first given, and eight years before a court would try its first case. The official explanation for the gap was that time was needed to develop rules and procedures and to prepare a cadre of qualified individuals to serve as judges and lawyers. This seems reasonable, given that at the time of the passage of the Code there were perhaps only two or three people in the whole country versed in shari'a and qualified to be a judge.<sup>52</sup>

To develop the human resources required to staff the courts, a group of Muslim lawyers was sent to Pakistan to study shari'a, develop a curriculum, and roll out training back in the Philippines for prospective shari'a judges and lawyers. Responsibility for this training is currently in the hands of the Bureau of Shari'a under the National Commission of Muslim Filipinos.<sup>53</sup> Professor Mehol Sadain of the University of the Philippines College of Law was part of the first batch to take the shari'a Bar in 1983. He claims the lengthy gap was, in fact, indicative of limited genuine interest on the part of the state in establishing a fully-functional shari'a court system.<sup>54</sup> The government was,

49 Article 140 CMPL.

50 Article 152 CMPL.

51 Guerrero et al, above n.27 at 26.

52 Carter Bentley, above n.18 at 63. There were Muslims on the Bench, but most knew little about shari'a as it was not widely taught. Of course, the long tradition of shari'a in the country means there were many Muslims who were familiar with Islamic Law, but they were not qualified as judges.

53 The National Commission on Muslim Filipinos was established in 2009. Training for shari'a lawyers was previously the responsibility of its predecessor institution, the Ministry of Muslim Affairs, later called the Office on Muslim Affairs.

54 Professor Sadain was formerly Director of the University of the Philippines Institute for Islamic Studies.

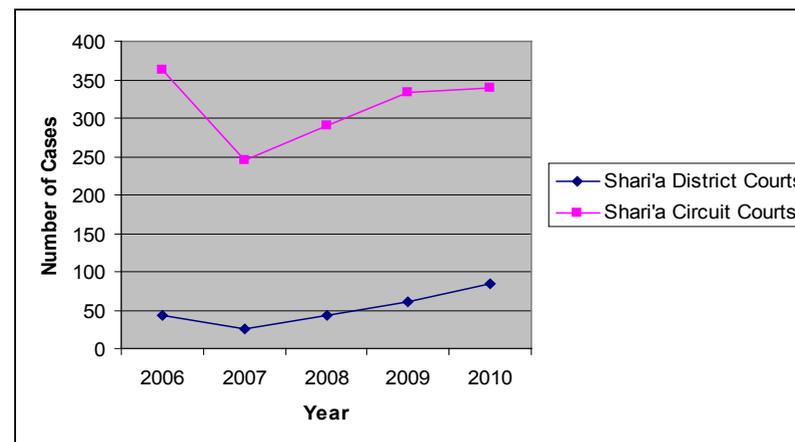
he said, 'merely going through the motions.'<sup>55</sup> A circuit court judge interviewed for this article suggested that the government waited in the hope that Muslim insurgents would surrender, vitiating the need to establish the courts at all.<sup>56</sup>

The impact of this lack of commitment will be evident in the following two sections, which explore the basic operations and current state of the shari'a court system.

## Operations of the Shari'a Court System

By 1985, the shari'a court system was finally up and running. Caseload data for the period 2006–2010 presented below demonstrates minimal uptake of the system by the public.<sup>57</sup>

Figure 1: Caseloads for Shari'a District & Circuit Courts 2006-2010



The courts are most popular in Central Mindanao but almost not functional at all in Sulu, Tawi-Tawi, Basilan and the Zamboanga Peninsula. Over the 2006-2010 period, only 55 of the 257 cases received at the District Court level were from this region. In Sulu, still the seat of Islam in the country, the District Court received only eight cases during this five-year period.

Of the 36 circuit courts for which the Supreme Court has case data, 22 received no new cases in 2010, 12 had received none in the previous three years and 8 had no new cases at all since 2006.

A comprehensive review over a seven-year period by a court monitoring program of all five district courts and six circuit courts reported that the most common cases filed were

55 Interview, Manila, 18 May 2011.

56 Interview, Cotabato City, 16 April 2011.

57 Data provided by the Office of the Court Administrator, Supreme Court of the Republic of the Philippines.

divorce, petition for maintenance, petition to restore marital relations, and subsequent marriage or polygyny.<sup>58</sup> Judges interviewed who sat on circuit courts in Cotabato City, Kidapawan City, and Datu Odin Sinsuat reported that divorce and subsequent marriage were the dominant form of dispute (as is commonly the case in Islamic courts elsewhere in Southeast Asia).

Most cases in the shari'a courts are filed by women. Data covering a seven-year period collected by the Pilipina Legal Resources Center demonstrated that in the Isabela City Circuit Court in Basilan province, for example, 80 percent of litigants were female. This increased to 90 percent in Marawi City. Where men file cases, they tend to be regarding restitution of marital rights, recovery of dower and settlement of property upon divorce.<sup>59</sup>

In view of the personal nature of most of the cases, the shari'a courts place a strong emphasis on amicable settlement. Three main methods are employed. Firstly, either the SDCC or SHCC can form what is called an Agama Arbitration Council to mediate cases related to certain types of divorce, subsequent marriage or offences against customary law.<sup>60</sup> The Council comprises the Clerk of the Court and a representative of each of the parties. The Council is used regularly. In Bongao Circuit Court in Tawi-Tawi, for example, the Pilipina Legal Resources Center data indicated that 25 out of 28 cases monitored were settled through the Council. Countless more are resolved through the second method, pre-trial mediation.<sup>61</sup> Finally, even cases that are officially decided in court are often resolved amicably in session and then provided with official status through a court decision.

### Current State of the Shari'a Court System

The Cotabato City Shari'a Circuit Court is located in the basement of borrowed office space in the Autonomous Region in Muslim Mindanao (ARMM) regional government compound. Presiding Judge Montano K. Kalimpo's office is a simple room, with a desk, a name plate and a few books (the Qur'an and some procedural texts) on a shelf. There is a fan and an air-conditioner, both of which he paid for himself. The 1st Shari'a District Court uses the same facilities, but the Acting Judge only comes once a month as he, like all Shari'a District Court Judges, serves concurrently as a Regional Trial Court judge. Two of Judge Kalimpo's colleagues from neighbouring circuit courts joined our meeting. Among the three judges, the most recent training any of them had received from the Philippine Judicial Academy was in 2004. They have no funds for legal awareness and outreach, let alone legal aid.

Despite limited resources, the judges remain proud of their status and appreciative that

58 Solamo-Antonio, above n.24 at 28. More recent figures were not available from the Supreme Court, but judges and experts interviewed confirmed that the distribution of cases remains unchanged.

59 Ibid, at 17 & 19.

60 Articles 160-163 CMPL.

61 Solamo-Antonio, above n.24 at 20. This is evident from the high number of cases dismissed before trial. In the Isabela City Circuit Court in Basilan province, for instance, 68 percent of cases were dismissed, mostly as a result of amicable settlement.

they are able to implement shari'a law. As the Honourable Judge Datukawa P. Camsa of Datu Odin Sinsuat said, 'What is important is the recognition, the acceptance.'<sup>62</sup>

This acceptance seems to have translated into public support for the shari'a courts, at least among so-called Muslim "influentials". In a survey undertaken by the respected survey firm, the Social Weather Stations, shari'a judges were either moderately or very much respected by 95 percent of respondents, just ahead of shari'a lawyers at 92 percent. 85 percent of respondents who had been litigants in a case considered the outcome fair. An earlier survey covering ordinary Muslims who had used the courts found 65 percent considered the outcome fair.<sup>63</sup>

In addition to achieving a degree of public respect, advances have also been made in academic institutions. While the country's initial set of pioneers had to travel to Pakistan, at least three universities in the Philippines now offer shari'a courses.<sup>64</sup> The Supreme Court also trains judges on shari'a, including on comparative aspects of Philippine civil law and the CMPL. Mandatory Continuing Legal Education (MCLE), a requirement for all lawyers in the Philippines, includes Islamic law in some universities.<sup>65</sup> It is estimated that as many as two to three thousand lawyers a year take the Islamic law module as part of their MCLE training.<sup>66</sup>

Despite these positive developments, the condition of the Cotabato circuit court encapsulates what a recent study described as 'operational woes' – judicial vacancies, lack of staff, inadequate training, low awareness by the general public and geographic, linguistic and financial inaccessibility.<sup>67</sup>

Besides these practical limitations, more systemic concerns regarding gender equity, the courts' legitimacy as genuine instruments of Islamic Law and deficiencies in the Supreme Court as the peak body in the system are all major impediments to progress. I now address each of these deficiencies in turn.

### *Administrative and Human Resources Deficiencies*

As noted above, at least 15 of the 51 circuit courts required to be established by law remain unopened. There are currently no full-time Shari'a District Court judges and only 31 circuit court judges, leaving vacancies of 5 and 19 judges respectively.<sup>68</sup> Given the low caseloads, particularly outside Central Mindanao, the Supreme Court sees no

62 Interview, Cotabato City, 16 April 2011.

63 Guerrero et al, above n.27 at 68, 72 and 73.

64 These are the University of the Philippines, the Mindanao State University (MSU) network across Mindanao and the Western Mindanao State University (WIMSU).

65 As a condition of membership of the Integrated Bar of the Philippines, lawyers are required to undertake 36 hours of approved legal education activities every three years: Supreme Court Circular 'Bar Matter No. 850.'

66 Interview, Professor Mehol Sadain, Manila, 18 May 2011.

67 Guerrero et al, above n.27 at 5.

68 Supreme Court of the Republic of the Philippines (2010), *Annual Report 2009*, Supreme Court Public Information Office, Manila at 57.

need to fill judicial vacancies or open the full set of circuit courts mandated by the Code. This creates a chicken-and-egg situation whereby low caseloads are used to justify minimal investment, but poor accessibility guarantees ongoing low rates of usage.

Inadequate equipment, facilities and training are also a major problem. Rent for the court in Sulu is paid for by the judge herself. The Circuit Court in Marawi City has no toilet or water.<sup>69</sup> These woeful circumstances are unlikely to change, given the Philippine judiciary spends 99.5 percent of its budget on salaries and operational costs, leaving only 0.5 percent for capital outlay.<sup>70</sup>

Human resource shortfalls also complicate the execution of verdicts, particularly for spousal support. Court Sheriffs are responsible for execution but they are based at the District level and lack operational funds to travel to the Municipalities where most cases are tried.<sup>71</sup>

In addition, the system is technically weak. The shari'a bar is open to graduates of law or Islamic jurisprudence or simply those who have undertaken the official 45-day training delivered by the National Commission on Muslim Filipinos. Standards were set low to build up the number of qualified lawyers and judges but this entails a major trade-off on quality.<sup>72</sup>

Technical supervision from the Supreme Court is also almost non-existent. The position of the Jurisconsultant or mufti is unwanted and vacant, as mentioned. While the Supreme Court Judicial Academy trains shari'a court judges, there are no Muslims sitting on the Supreme Court and no judges with expertise in shari'a. Indeed, judges interviewed for this article suggested that the Supreme Court was 'ignorant' of shari'a. While jurisprudence is regularly despatched from the Supreme Court to the lower courts, it is sent in compact disc form to courts with neither the computers nor the information technology skills to use it.

### Accessibility

The shari'a courts are geographically and financially inaccessible. With so many courts yet to be created, potential litigants may have to travel long distances in a region characterised by significant peace and order problems. Furthermore, the courts are only located in Muslim areas of the south. This denies access to the system for significant

69 World Bank (2005), *Joint Needs Assessment for Reconstruction and Development of Conflict-Affected Areas in Mindanao. Volume 5: Local Governance and Institutions Report*, World Bank, Manila at 30. My visit in November 2011 to the Marawi City District and Circuit Courts and the Iligan City Circuit Court confirmed very basic conditions.

70 Supreme Court of the Republic of the Philippines, above n.69 at 57.

71 For more on problems with execution, see Solamo-Antonio, above n.24 at 50.

72 As one analyst has stated, 'the ability [of judges] to discharge the duties of the court and the efficiency of his judgment on a case brought to his court must be in doubt.' Ali, A.P. (2007), 'The Legal Impediments to the Application of Islamic Family Law in the Philippines', 27(1) *Journal of Muslim Minority Affairs* at 105.

Muslim populations elsewhere in the country, particularly in Metro Manila.<sup>73</sup>

Government legal aid to support claimants is non-existent. A limited number of non-governmental organisations provide legal aid for major cases, but these are few in number.<sup>74</sup>

Language is another impediment to accessibility. The official languages of the court are English and Arabic. Some judges speak one and not the other. Many litigants speak neither. The cost of hiring an interpreter exacerbates financial barriers to access.

Levels of awareness of the existence and function of the system are likewise low. In a recent survey commissioned by the World Bank, for instance, 20 percent of respondents from Maguindanao province stated they would take murder, rape and sexual assault cases to the shari'a courts, but these are, of course, outside the court's jurisdiction.<sup>75</sup>

### Gender

Only 2 of the 31 judges operating in the shari'a court system are female, even though the vast majority of claimants are women. Research indicates that the rate of dismissal of cases filed by women is much higher than those by men<sup>76</sup> and the fact that 'no cases for divorce have been filed on grounds of domestic violence, wife beating or marital rape' suggests that not all women are comfortable using the court to resolve these issues.<sup>77</sup>

### Legitimacy gap

Many *ulama* (Muslim religious scholars) apparently reject the CMPL as being non-Islamic. Of course in its purest sense, the authority of Islamic law is divinely derived and cannot draw on the state for legitimacy. It is inevitable then that all state-made "Islamic" law will be rejected by some<sup>78</sup> but failure of the Code to reflect local *adat* also creates a large law-practice gap that reduces its legitimacy. Finally, given the region's long history of neglect and discrimination at the hands of successive rulers in the north, Muslims in general distrust institutions of the state.<sup>79</sup>

73 In the previous Congress, Senate Bill 1346 of 2010 to create Shari'a Courts in Metro Manila and other areas outside Mindanao was filed by Senator Loren Legarda, but did not receive the necessary support.

74 One such legal aid group is SALIGAN. See <http://www.saligan.org/>

75 World Bank/World Food Program (2012, forthcoming) *Violent Conflict and Displacement in Central Mindanao: Challenges to Recovery and Development*, World Bank/WFP: Manila, above n.13. For more on lack of awareness, see World Bank, above n. 69 at 36 and Solamo-Antonio, above n.23 at 4

76 Solamo-Antonio, above n.24 at 28.

77 Ibid at 67.

78 Professor Mehol Sadain and Raissa Jajurie said, for example, that some Middle-Eastern educated Muslim scholars do not recognise Constitutional supremacy and, by extension, reject the Code.

79 See World Bank, above n.69 at 36-37.

## Explaining the Shortcomings

In this next section, I explore in more detail the factors underpinning the failure of the shari'a courts to fully achieve the stated objective of PD 1083 to provide for effective administration and enforcement of Muslim personal laws. Three main causes emerge: central government neglect, weak governance in Mindanao and an apparent absence of support within the Muslim community for shari'a law.

### *Central government neglect/lack of political support*

Appeasement might buy political space but it does not appear to be a sound basis for the kind of long-term effort required for sustainable institution-building. Central government neglect of the shari'a court system is mirrored by equally half-hearted efforts to implement other political concessions made to Muslims. On Islamic financing, for instance, the Philippine Amanah Bank has been technically insolvent for much of its existence since it was established in 1973. Although it has been recently recapitalized, the present day Al-Amanah Islamic Investment Bank has a total portfolio of only \$2 million, all of which comprises conventional, not Islamic financing. Philippine government financial agencies have no interest in policy change to open up Al-Amanah's monopoly and make Islamic financing more accessible to Muslim Filipinos.<sup>80</sup>

The absence of Congressional support for reform has also left the shari'a court system trapped to some extent in 1977. PD 1083 is now 34 years old and was passed under a martial law era Constitution. Some implications of this have been discussed above, such as the ongoing vacancy of the Jurisconsultant position and the inability to establish new courts. But what Marcos rammed through under martial law would be impossible today. All experts interviewed for this paper summarily dismissed the prospect that the Code could be amended – there is simply no appetite for this issue in Congress.

### *A Context of Weak Governance and Institutional Malaise*

The operational, human resource and logistical constraints faced by the shari'a courts are not unique in the region. They reflect a broad pattern of weak governance in Muslim Mindanao.<sup>81</sup> For example, out of 2490 villages in the Autonomous Region in Muslim Mindanao, 549 do not have a primary school. Local Mayors and officials are infamous for absenteeism, preferring to spend time in Manila or major provincial cities.<sup>82</sup>

Given the relatively high levels of public respect they enjoy, the shari'a courts are actually probably in better shape than many other institutions in the ARMM region.

80 Discussions with the Central Bank of the Philippines and the Department of Finance held by World Bank officials in June 2011. Emails on file with the author.

81 It is worth pointing out that there are also major vacancies in lower courts in other parts of the country. See Ramos, M. (2011) at <http://newsinfo.inquirer.net/63635/lower-courts-lack-judges-due-to-low-unattractive-pay>, accessed 1 October 2011.

82 See <http://www.dilg.gov.ph/news.php?id=63&newsCategory=Central>, accessed 1 October 2011.

## *Shari'a a low priority?*

Not all blame for the failings of the system can be attributed to the central government or Congress. Among the multiple challenges of socio-economic want, inequality and violent conflict, shari'a does not appear to rank as a high priority among Filipino Muslims – including officials of the Autonomous Region in Muslim Mindanao.

In 2001, Congress passed Republic Act 9054 (RA 9054), known as the Expanded Autonomous Region in Muslim Mindanao (ARMM) Organic Act. The Act expanded the territory and provided additional autonomy to the ARMM region.<sup>83</sup> Reflecting its tortured path through Congress, the law was passed five years after the 1996 Final Peace Agreement with the Moro National Liberation Front (MNLF). Another political concession to armed insurgents, it made several important contributions to the implementation of shari'a.

Most prominently, under Article III(5), the jurisdiction of the system was expanded beyond personal laws to encompass commercial transactions and criminal cases. An Appellate Court vested with 'final and executory' authority was established to hear appeals from the district courts.<sup>84</sup> To ease problems of accessibility, a Public Assistance Office was to be established in each of the Shari'a District Courts to provide free legal aid to indigent clients.<sup>85</sup> RA 9054 also promoted representation for Muslims in the peak national institutions of justice, mandating at least one representative on the Bench of the Supreme Court and two judges on the Court of Appeals, 'whenever feasible.'<sup>86</sup> By 2011, however, neither the Shari'a Appellate Court nor the legal aid offices had been established. The ARMM Regional Legislative Assembly has passed no enabling legislation to establish the broader jurisdiction for shari'a stipulated in RA 9054.<sup>87</sup> There are no Muslims on the Supreme Court.<sup>88</sup>

Whereas the inadequate implementation of the Code of Muslim Personal Laws could initially be explained solely by a lack of central government commitment to what was merely a political concession, it is now clear that poor governance at the sub-national level plays an equal part. The failure of the Regional Legislative Assembly to act on the openings in the Expanded ARMM Organic Act epitomises its technical deficiencies on matters of shari'a law and general weakness as a functioning legislature. At the same time, however, this inaction also reflects mixed views within the Muslim community on the importance of shari'a or at least of its regulation by the State. One shari'a judge interviewed for this article expressed strong support for the expansion of shari'a into criminal cases, as envisaged by RA 9054, believing it would equip the courts to resolve

83 The ARMM region was established in 1989 as an indirect outcome of peace talks with the Moro National Liberation Front (MNLF).

84 Article VIII(7) RA 9054.

85 Article VIII(6) RA 9054.

86 Article VIII(2) RA 9054. Article V of the Act also promotes Muslim representation in cabinet and in relevant central government agencies and state-owned enterprises, known in the Philippines as Government Owned and Controlled Corporations (GOCCs).

87 Experts interviewed for this paper noted the Regional Legislative Assembly's ignorance of the basics of shari'a and its general inactivity on all matters.

88 There are, however, two Muslim judges in the Court of Appeals.

the inter-communal violence that wracks some parts of Mindanao. However, he felt that legislative action had not been forthcoming, as the 'majority of Muslim leaders do not support shari'a law.'<sup>89</sup>

Shari'a is evidently not a high order priority for the Moro Islamic Liberation Front either. The MILF's Draft Comprehensive Compact – its proposed peace agreement with the Government of the Philippines – makes only passing reference to shari'a and only for personal laws.<sup>90</sup> A prominent activist connected with the MILF with whom I spoke stated that they wished the shari'a legislation had never been introduced in the first place – it discriminated against women and was best left outside the purview of the state. MILF Peace Panel member, Professor Abhoud Lingga, told me that given the understandable priority accorded by the MILF to the fundamental concerns of power sharing arrangements and territorial claims, other issues, such as shari'a law, were naturally pushed into the background.<sup>91</sup>

In this context of central government neglect, moribund local governance and varying degrees of commitment to the application of Islamic law within the Muslim community, the intentions of the CMPL remain partially achieved at best. Shari'a in the Philippines still functions most actively at the informal, community level, beyond the institutions of state.

In the final section of this paper, I briefly explore the ongoing implementation of shari'a through traditional or non-state justice systems and through courts established by the Moro Islamic Liberation Front.

### Shari'a in Community Justice Systems

Community justice systems that function outside the courts are the main forum for dispute resolution in the Philippines, as in the rest of the world.<sup>92</sup> There are two main forms of community justice in the country – a state-sponsored compulsory mediation body known as the Barangay Justice System; and informal institutions comprising local leaders who resolve community disputes in line with local customs and traditions.<sup>93</sup>

The Barangay Justice System (BJS) establishes a mediation council in every village in the country comprising the village head and council members who mediate minor civil

89 Interview, Cotabato City, 16 April 2011.

90 Article X, Section 8, Moro Islamic Liberation Front (2010) 'Final Working Draft on Comprehensive Compact'.

91 Discussion with Professor Lingga, Manila, 14 October 2011.

92 See Clark, S. and Stephens, M. (2011), 'Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia' in J. Ubink (ed), *Customary Justice: Perspectives on Legal Empowerment*, International Development Law Organization/Van Vollenhoven Institute, Rome and World Bank (2008), *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, World Bank, Jakarta.

93 The Barangay Justice System is regulated in the 1991 Local Government Code. Traditional justice systems are recognized in the 1987 Constitution at Article XIV, Section 17: 'the State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions.'

and criminal cases before they can be taken to court.<sup>94</sup> As a "delegalized environment" geared towards accommodating different customs across the country, shari'a principles and norms are practiced in some locations through the BJS.<sup>95</sup>

In Muslim areas, traditional community dispute resolution institutions are more influential than the Barangay Justice System. Across ethnically diverse Muslim Mindanao, these institutions are neither structurally nor normatively uniform. However, they all apply a mix of local *adat* and shari'a, sometimes combining Muslim, indigenous and Christian traditions (known in the Philippines as the "tri-people approach") to mediate or arbitrate disputes.<sup>96</sup>

In the Municipality of Datu Odin Sinaut in Maguindanao province, complaints submitted to the Barangay Justice System (BJS) are referred to a council of Islamic elders for resolution in line with shari'a and customary practices. If resolution cannot be reached, the complaint reverts to the BJS for settlement by mediation. In Buldon, in the same province, the traditional justice mechanism comprises Muslim clerics, representatives from each of the Moro National and Moro Islamic Liberation Fronts and local indigenous leaders. The council handles all types of disputes – civil and criminal – drawing on the Qur'an, local customs and even national laws.

The traditional justice institutions functioning in Muslim Mindanao demonstrate the usual strengths and weaknesses of these mechanisms worldwide. Highly accessible and widely accepted socially, they are also subject to abuse of discretion, discrimination against women and lack of accountability.<sup>97</sup>

### Justice in the Shadows – the Shari'a Court System of the Moro Islamic Liberation Front

Almost nothing has been written on the operations of the shari'a court system operated by the Moro Islamic Liberation Front. This next section draws on a rare interview with three judges from the MILF's Supreme Shari'a Court and documentation on the court's structure provided by them.<sup>98</sup>

94 For more on the Barangay Justice System, see Stephens, M. (2003), 'Local-level Dispute Resolution in Post-reformasi Indonesia: Lessons from the Philippines', 5(3) *Australian Journal of Asian Law* 213.

95 The US government, working through the Gerry Roxas Foundation, has supported training programs for the Barangay Justice System in the Autonomous Region in Muslim Mindanao, drawing on Islamic principles and practices. See [http://www.gerryroxasfoundation.org/prog\\_justice%20background.php](http://www.gerryroxasfoundation.org/prog_justice%20background.php). See also Sosmena Jr., G.C. (1996), 'Barangay Justice: a Delegalisation Mechanism', 20 *Hiroshima Law Journal* 384-404.

96 This mix of influences was evident from the arrival of Islam in the country. See Abubakar, above n.3 at 59: 'When Islam came to the Philippines, it absorbed many cultural elements that in time came to be recognized and accepted as Islamic.'

97 This description is mostly drawn from World Bank, above n.70 at 34 and the interview with Raissa Jajurie.

98 Interview held on 17 April 2011 at the compound of MILF Vice-Chair Ghadzali Jaafar in Sultan Kudarat, Maguindanao Province. It is reported that the MNLF also maintains a system of Shari'a Courts but in the absence of any data on this system, it is not covered in this paper.

The MILF was formed in 1977 and, according to the judges, immediately established a mechanism to handle transgressions by MILF members. Over time, the scope of the MILF court system has expanded to cover a wide range of disputes involving community members in MILF-controlled areas. Some assessments have estimated that as many as 70 percent of disputes in these areas are handled by the MILF courts.<sup>99</sup>

While my discussion with the judges suggests this is an overstatement, a formal court structure was in place by 1997. The system has four tiers, with a Supreme Court, Court of Appeals and trial courts at the Provincial and City/Municipal levels.<sup>100</sup> The jurisdiction is very broad, with the courts split into divisions covering criminal, administrative and civil (property and personal/family law) issues. Generally only criminal cases are submitted for appeal to the higher courts.

Documentation provided by the MILF describes a full list of court personnel – judges, clerks, administrators, stenographers, interpreters, sheriffs and even janitors. The judges conceded, however, that most of the courts function on a skeleton staff.

While any individual is free to assist with the mediation of civil disputes, imposition of criminal sanctions is legally the exclusive purview of the state. Thus, the MILF court operates in secret, with no permanent physical location, moving from place to place – it is what one of the judges jokingly referred to as ‘literally a kangaroo court.’

Like the government system, the MILF judges draw on the Qur’an, Sunna and Sunni *fiqh* (jurisprudence) books (with a preference for the Shafi’i madhhab), but only as a guide. In reality, resolution is mostly based on local cultural norms rather than Islamic law. Attainment of justice, rather than application of written law, is the main function of the court.

There is a written code of procedure, but it is mostly ignored in favour of mediation aimed at rapid settlement. Indicating a general preference for informality, one of the judges remarked, ‘We are a revolutionary organization.’ The approach of the court is inquisitorial rather than adversarial and the Supreme Court always sits *en banc*, reflecting ‘a collective and consultative approach.’<sup>101</sup> Litigants in the MILF courts do not have lawyers, but rather representatives or *wakil* to support them. *Wakil* are appointed by the court and are often Muslim clerics.

Filing fees range from 300 pesos (USD 6.86) at the Municipal level up to 1500 pesos

<sup>99</sup> World Bank, above n.70 at 31. Santos also stated in 2001 that the MILF’s court system was ‘more developed, operational and patronized than is imagined.’ Santos, S.M. (2001), *The Moro Islamic Challenge: Constitutional Rethinking for the Mindanao Peace Process*, University of the Philippines Press, Quezon City at 27.

<sup>100</sup> The Municipal Court handles cases with a limit on fines and damages of 200,000 Pesos (USD 4,600) – the City Court’s limit is up to 400,000 Pesos (USD 9,200) and the Provincial Court’s is 400,000 Pesos and above.

<sup>101</sup> Interview, 17 April 2011. According to the documentation provided, the MILF Supreme Shari’a Court is supposed to have one Chief Justice and eight Associate Judges but at present only four associate judges are active.

(USD 34.30) to submit a case to the Supreme Court. Sanctions and civil remedies are monetized, although this was not previously the case. In 2003 the MILF executed a defendant following a murder case in Lanao. Before then, the MILF also used to maintain detention facilities to imprison “convicted” criminals. Responding to calls from the government and a desire to position the organization as more moderate, the judges claimed that harsh shari’a sanctions and detention are no longer imposed.

With only around 10 to 20 cases per year reaching the Supreme Court, and work as a judge being voluntary, the system suffers from resource constraints, just as does the government structure. The judges mentioned a number of problems – lack of resources, the need for ongoing training and capacity-building for judges and staff, and difficulties executing court decisions that affect MILF armed personnel.

If a peace agreement with the government can be reached, the judges expressed the hope that the official shari’a system could be better aligned with the MILF’s approach – specifically to remove certain aspects of the PD 1083 that were not ‘fully Islamic’ and to expand the jurisdiction to cover criminal cases.

## Conclusion

This paper has provided an overview of the origin and contemporary application of Islamic law in the Philippines. A tradition of around 700 years’ standing, shari’a remains an important influence at the community level in Muslim areas of the country.

Contemporary evolution of shari’a in the Philippines has inevitably been linked to political negotiations between armed Muslim insurgents and national governments intent on addressing violent conflict in Mindanao. The most significant concession made to this end was the passage of the Code of Muslim Personal Laws in 1977. For a Catholic majority country, the existence of an Islamic Law system was welcomed as a progressive step towards recognition of Muslim culture as a part of the Philippine nation and as a realization of the Constitutional right of Muslims to exercise their own customs, beliefs and practices. Pushed through under martial law, it even led a shari’a court judge interviewed for this paper to remark, half-jokingly, that ‘Marcos was the best President.’ But political concessions and the imperatives of appeasement have not proven a robust basis for sustainable institutional development. Like much government reform in Muslim Mindanao, intentions have not been matched by implementation. So, while the shari’a courts are functioning and reasonably well-regarded, a lack of political support meant they were slow to commence and are now mostly stagnant.

Central government neglect and weak governance in Muslim Mindanao are at the core of the problems. Furthermore, it seems evident that shari’a is not currently a high order priority among Muslim leaders, against more pressing issues of power-sharing and territorial claims.

The major prospect for evolution once again lies on the negotiating table. The Moro Islamic Liberation Front is in peace talks with the Government of the Philippines for a Bangsamoro sub-state that would enhance the current limited autonomy practiced by the government of the Autonomous Region in Muslim Mindanao. A peace deal and the possible prospect of genuine autonomy could open up the potential for reform to

strengthen the implementation of shari'a. But without the fresh political momentum that a peace agreement would bring, the government system is likely to continue to function at its current low standard. Traditional community justice systems and the parallel court of the MILF will continue to be the level at which shari'a evolves and is most relevant to ordinary Muslims.

Indeed, should the government and the MILF prove unable to secure a peace agreement, a return to the violence that broke out when the talks last collapsed in 2008 is possible.<sup>102</sup> In addition to perpetuating the dire human development conditions in the south, the conflict and associated instability exacts a heavy toll on the international image of the Philippines as a whole, deterring much-needed foreign investment. And yet, the hundreds of years of armed struggle for recognition by the Bangsamoro indisputably prove that a military solution is not possible – nor will pouring development aid into Mindanao address Moro concerns. A negotiated peace that acknowledges historical injustices, recognizes the role of Muslims in Philippine society and provides for genuine autonomy may not solve the problems in the south, but it is certainly impossible to see any significant social progress without it.

Australia's interests in Mindanao are mostly tied up with regional security and a rapidly expanding development assistance program. Ongoing instability in the area creates the conditions for regional terrorism to flourish in the Philippines, as it did during the 1990s and the first decade of this century.<sup>103</sup> Given this imperative and our understanding of the origin of the conflict, Australia needs to look beyond traditional approaches of cooperation on security and economic development to support initiatives – including a functioning system of shari'a law – that acknowledge the role of Islam in the history of the Philippines and promote genuine recognition of Muslim culture and identity.

102 Following the breakdown of the peace talks in August 2008, fighting between MILF forces and the government in Central Mindanao led to the displacement of hundreds of thousands of people: see International Crisis Group (2008), *The Philippines: The Collapse of Peace in Mindanao*, Asia Briefing No. 83, 23 October 2008.

103 In the 1990s, this was most prominently personified by the presence in the country of Ramzi Yousef, one of the key protagonists in the first World Trade Center bombing. More recently concerns have related to the presence of Jemaah Islamiyah in Mindanao. For more on the latter, see International Crisis Group (2004), *Southern Philippines Backgrounder: Terrorism and the Peace Process*, ICG Asia Report No. 80, 13 July 2004.

## References

### *Books and Articles*

- Abinales, P.N. and Amoroso, D.J. (2005), *State and Society in the Philippines*, Anvil, Manila.
- Abubakar, C.A. (2005), 'The Advent and Growth of Islam in the Philippines', in K.S. Nathan and M.H. Kamai (eds), *Islam in Southeast Asia: Political, Social and Strategic Challenges for the 21st Century*, Institute of Southeast Asian Studies, Singapore.
- Ali, A.P. (2007), 'The Legal Impediments to the Application of Islamic Family Law in the Philippines', 27(1) *Journal of Muslim Minority Affairs*.
- Asian Institute of Journalism and Communication (n.d) 'Courts for Muslims: A Primer on the Philippine Shari'a Courts', The Asia Foundation, Manila.
- Asian Institute of Journalism and Communication (n.d.) 'A Primer on the Muslim Personal Laws of the Philippines', The Asia Foundation, Manila.
- Carter Bentley, G. (1981), 'Islamic Law in Christian Southeast Asia: The Politics of Establishing Shari-a Courts in the Philippines', 29 *Journal of Philippine Studies* 45.
- Clark, S. and Stephens, M. (2011), 'Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia', in J. Ubink (ed), *Customary Justice: Perspectives on Legal Empowerment*, International Development Law Organization/Van Vollenhoven Institute, Rome.
- Glenn, H. Patrick (2000), *Legal Traditions of the World*, Oxford University Press, Oxford.
- Guerrero, L.L., Barra, H., Mangahas, M. and Licudine, V.L. (2007), *The Code of Muslim Personal Laws in Practice: What Influential Muslims and Shari'a Lawyers Think*, Social Weather Stations, Manila.
- Houben, V.J.H. (2003), 'Southeast Asia and Islam', 588 *American Academy of Political and Social Science* 149-170.
- Human Development Network (2005), *Philippine Human Development Report: Peace, Human Security and Human Development in the Philippines*, Human Development Network, Manila.
- International Crisis Group (2004), *Southern Philippines Backgrounder: Terrorism and the Peace Process*, ICG Asia Report No. 80, 13 July 2004.
- International Crisis Group (2008), *The Philippines: The Collapse of Peace in Mindanao*, Asia Briefing No. 83, 23 October 2008.
- International Crisis Group (2011), *The Philippines: Back to the Table, Warily, in Mindanao*, Asia Briefing No. 119, 24 March 2011.
- International Crisis Group (2011a), *The Philippines: A New Strategy for Peace in Mindanao?*, Asia Briefing No. 125, 3 August 2011.
- Jundam, Hj. Mashur Bing-Ghalib (2005), *Adat and Share'ah Laws in the Life of the*

Tausug, Vibal Publishing House, Manila.

- Lingga, Aboud Syed M, (2008), 'Understanding the Bangsamoro Right to Self-Determination', B.M. Tuazon (ed), *The Moro Reader: History and Contemporary Struggles of the Bangsamoro People*, Center for People Empowerment in Governance, Manila.
- Lingga, Aboud Syed M. (2010), 'Assertions of Sovereignty and Self-Determination: The Philippine-Bangsamoro Conflict', 1(2010-01) *Mindanao Horizons*.
- Mastura, M.O. (1994), 'Legal Pluralism in the Philippines', 28(3) *Law and Society Review*.
- Moro Islamic Liberation Front (2010), 'Final Working Draft on Comprehensive Compact.'
- Moro Islamic Liberation Front Peace Panel/The Asia Foundation (2010), *GRP-MILF Peace Process: Compilation of Signed Agreements and other related Documents (1997-2010)*, MILF Peace Panel/The Asia Foundation.
- National Reconciliation Commission of Thailand (2006), 'Overcoming Violence Through the Power of Reconciliation', National Reconciliation Commission, Bangkok.
- Rodil, R.B. (2010), 'Achieving Peace and Justice in Mindanao through the Tri-People Approach', 1(2010-01) *Mindanao Horizons*.
- Santos, S.M. (2001), *The Moro Islamic Challenge: Constitutional Rethinking for the Mindanao Peace Process*, University of the Philippines Press, Quezon City.
- Solamo-Antonio, I. (2003), *The Shari'a Courts in the Philippines: Women, Men & Muslim Personal Laws*, Pilipina Legal Resources Center, Inc., Davao.
- Sosmena Jr., G.C. (1996), 'Barangay Justice: a Delegalisation Mechanism', 20 *Hiroshima Law Journal* 384-404.
- Stephens, M. (2003), 'Local-level Dispute Resolution in Post-reformasi Indonesia: Lessons from the Philippines', 5(3) *Australian Journal of Asian Law* 213.
- Supreme Court of the Republic of the Philippines (2009), *Annual Report 2008*, Supreme Court Public Information Office, Manila.
- Supreme Court of the Republic of the Philippines (2010), *Annual Report 2009*, Supreme Court Public Information Office, Manila.
- Women Living Under Muslim Laws (2003), *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*, Women Living Under Muslim Laws, London.
- World Bank (2005), *Joint Needs Assessment for Reconstruction and Development of Conflict-Affected Areas in Mindanao. Volume 5: Local Governance and Institutions Report*, World Bank, Manila.
- World Bank (2008), *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, World Bank, Jakarta.
- World Bank/World Food Program (2012, forthcoming) *Violent Conflict and Displacement in Central Mindanao: Challenges to Recovery and Development*,

World Bank/WFP: Manila

### **Major Interviews**

Interviewed at the ARMM Regional Government Compound, Cotabato City, 16 April 2011.

- Presiding Judge Hon. Montano K. Kalimpo, 1st Shari'a Circuit Court, Cotabato City
- Hon. Judge Datukaka P. Camsa 2nd Shari'a Circuit Court, Datu Odin Sinsuat.
- Hon. Zailon L. Wahab, 15th Shari'a Circuit Court, Kidapawan City.

Three judges from the Moro Islamic Liberation Front (MILF) Islamic Supreme Court were interviewed at the compound of MILF vice-chair Ghadzali Jaafar, Sultan Kudarat Province, 17 April 2011. Their names are withheld at their request. Present during the interview was Executive Director of the Bangsamoro Development Agency (BDA), Ustadz Muhammad Yacob.

Isabelita Solamo-Antonio, Executive Director, Pilipina Legal Resources Center, Inc, Davao City, 18 April 2011.

Prof. Mehol Sadain, College of Law and Institute of Islamic Studies, University of the Philippines, Manila, 18 May 2011.

Raissa Jajurie, Vice-Chair, Nisa ul-Haqq fi Bangsamoro, Manila, 15 August 2011.

### **Legislation & Regulations**

Land Registration Act (Act No.496) of 1902.

Philippine Commission Act (Act No. 718) of 1903.

The Public Land Act (Act No. 926) of 1903.

The Mining Act of 1905.

The Cadastral Act (Act No. 2259) of 1913.

Republic Act No. 394 of 1949, An Act Authorizing For A Period Of Twenty Years Divorce Among Moslems Residing In Non-Christian Provinces In Accordance With Moslem Customs And Practices.

Constitution of the Republic of the Philippines 1973.

Presidential Decree 264 of 1973, An Act Creating a Philippine Amanah Bank.

Presidential Decree 542 of 1974, Amending Presidential Decree 264 Creating the Philippine Amanah Bank.

Presidential Decree 1083 Of 1977, A Decree to Ordain and Promulgate a Code Recognizing the System of Filipino Muslim Laws, Codifying Muslim Personal Laws, and Providing for its Administration and Other Purposes.

Executive Order 697 of 1981, Creating the Ministry of Muslim Affairs.

Constitution of the Republic of the Philippines 1987.

Executive Order 209 of 1987, The Family Code of the Philippines.

Executive Order 122A of 1987 Creating the Office on Muslim Affairs

Executive Order 295 of 1987 Amending Executive Order 122A Entitled “Creating the Office on Muslim Affairs.”

Republic Act 6734 of 1989, An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao.

Republic Act 6848 of 1990, An Act Providing for the 1989 Charter of the Al-Amanah Islamic Investment Bank of the Philippines.

Republic Act 7160 of 1991, The Local Government Code of the Philippines.

Instruksi Presiden Nomor 1 Tahun 1991 Presiden Republik Indonesia, ”Kompilasi Hukum Islam”. [*Presidential Instruction N. 1 of 1991, “Compilation of Islamic Law”.*]

Republic Act No. 9054 of 2001, An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao.

Supreme Court Circular, Bar Matter No. 850 of 2001 on Mandatory Continuing Legal Education.

Republic Act 9997 of 2009, An Act Creating a National Commission on Muslim Filipinos.

Senate Bill 1346 of 2010 Establishing the Shari’a District Court System in the Autonomous Region in Muslim Mindanao (ARMM) and in the Areas Outside the Said Autonomous Region.

### **Websites**

Central Intelligence Agency, ‘The World Factbook’, <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html>, accessed 1 October 2011.

Department of the Interior and Local Government (2010) ‘ARMM Officials Cautioned on Absenteeism’ at <http://www.dilg.gov.ph/news.php?id=63&newsCategory=Central>, accessed 1 October 2011.

Department of Labor and Employment National Wages and Productivity Commission (2011), [http://www.nwpc.dole.gov.ph/pages/ncr/cmwr\\_table.html](http://www.nwpc.dole.gov.ph/pages/ncr/cmwr_table.html), accessed 1 October 2011.

Jimenez-David, R (2011) ‘Divorce and the Status Quo’. Philippine Daily Inquirer, 5 June 2011 at <http://opinion.inquirer.net/5801/divorce-and-the-status-quo>, accessed 1 October 2011.

Ramos, M (2011) ‘Lower Courts Lack Judges Due to Low, Unattractive Pay’. Philippine Daily Inquirer, 23 September 2011 at <http://newsinfo.inquirer.net/63635/lower-courts-lack-judges-due-to-low-unattractive-pay>, accessed 1 October 2011.

### **Notes**

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ARC Federation Fellowship  
C/- Centre for Islamic Law and Society  
Melbourne Law School  
The University of Melbourne  
Tel: +61 3 8344 6847  
Fax: +61 3 8344 4546

ARC  
Federation  
Fellowship

Islam, Syari’ah  
and  
Governance  
Background  
Paper

**[cils-info@unimelb.edu.au](mailto:cils-info@unimelb.edu.au)**

**<http://www.lindseyfederation.law.unimelb.edu.au>**

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