

THE SHARIA'AH LAW AND MINDANAO AUTONOMY:
A BACKGROUND PAPER*

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Introduction

The life of every true Muslim cannot be complete without the Shari'ah. In fact, without it, there can never be true Muslims. For even though it means strictly the Islamic law, the Shari'ah encompasses the legal and moral systems of Islam and the source of the concept of right and wrong among Muslims.

Because of the importance of the Shari'ah, I believe that the autonomy proposed for Muslim Mindanao will not be effective unless the Shari'ah as a judicial system will be given greater importance in the autonomous set-up. The judicial system of the Shari'ah is a necessary component of Muslim autonomy from which springs the well-being and orderly life of the Muslim Moro masses. The political and the economic component may naturally fall where they belong: to those who are powerful and influential. The Shari'ah, however, can only belong to the Muslim ummah (community).

Although I am strongly supportive of the Shari'ah, I would like to caution our leaders against "Romanizing" or "Anglicizing" the Shari'ah lest it be treated like the Roman and the Anglo-Saxon laws which are mainly secular in nature. The Shari'ah is divinely promulgated, but it is unlike the canon law in the western concept which relates only to religion.

There are two contexts in which the Shari'ah may be better understood in the Philippines: (1) The Shari'ah as dreamt and fought for by Muslims all over the world, and (2) The Shari'ah as allowed, or that would allow the Muslim Moros to implement by virtue of Presidential Decree 1083 issued by deposed President Ferdinand E. Marcos, which is otherwise known as the Code of Muslim Personal Laws. This particular Presidential Decree still requires our focus and attention since it has not been rendered inoperative or has been revoked by the present Filipino Freedom Constitution. Neither will it be inconsistent with the Constitution of the Republic which was ratified on February 2, 1987. It is for this reason that we are gathered for this conference-workshop because Article X of the proposed Constitution provides for a regional autonomy in Southern Philippines.

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The legal bases of the Shari'ah will be constitutionally sanctioned. Sections 15 and 18 of Article X of the Constitution are quoted here:

"Sec. 15. There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.

Sec. 18. The Congress shall enact an organic act for each autonomous region. *The organic act shall likewise provide for special courts with personal, family and property law jurisdiction consistent with the provisions of this Constitution and national laws.*"

Article XV, Section 3 of the Constitution also provides:

"Section 3. The State shall defend:

(1) The rights of spouses to found a family in accordance with their religious convictions and the demands of responsible parenthood."

The Shari'ah in Its Holiness and All-Comprehensiveness

The Shari'ah, as a divine instrument, is derived from three sources. The primary sources are the *Holy Qur'an* and the *Hadith* (Sayings and Tradition of the Prophet Muhammad, peace and God's mercy be upon him). *Ijma* (the consensus of the Muslim community or of the Muslim scholars) and *Qiyas* (analogical reasoning) comprise the secondary group of sources. The tertiary group, consists of the *Istihsan* (Juristic Preference), *Istislah* (Public welfare) and *Urf* (Custom is resorted to only to fill in the details of the application or interpretation of the Shari'ah.)

The encompassing character of the Shari'ah is deduced and expressed in the manner by which it shows its unity, at the same time its diversity. The Shari'ah as a system of law and morality is a whole system. But its unity does not presuppose that it is compact and indivisible. For purposes of defining the boundaries of its coverages, the Shari'ah has five divisions: (A) Acts of Faith (Ittiqadat), (B) Acts of Worship (Idabat), (C) Moralities (Adab), (D) Transactions (Muamalat), and (E) Punishments (Uqubat). Ittiqadat find their bases and expression in the *Arkan Al-Iman* (Six Articles of Faith in Islam), and *Ibadat* in the Five Pillars of Islam. It is in *Muamalat* that law in the western context finds its place and parallel. In *Uqubat*, we can find the punishments for murder, adultery, fornication and theft.

The Shari'ah, in its attempt to leave no amoral or alegal acts, or to find all acts within its ambit, has qualified actions into five, namely: (1) the Obligation (*fardh* or *wajib*), which is either individual or collective; (2) the Recommended (*Sunna* or *Mandub*); (3) the Forbidden (*Haram*); (4) the Reprehensive or Disapproved (*Makhro*); and (5) the Indifferent (*Mubab*). The scale pegged to this classification is whether the act is valid (*sahih*), invalid (*batil*) or defective or disapproved (*fasid*)

Of course, the sources, divisions and qualifications of acts in the Shari'ah are utopian or idealistic. But this utopian character has to be understood in the light of the consideration that legislation, as far as the Shari'ah is concerned, has already been stopped and closed to make up for inadequacies. After the perfection or revelation in the Qur'an, no more amendments to Islamic law can be made. Hence, the Shari'ah has to be all-embracing.

The Shari'ah as Allowed by P.D. 1083 to be Practiced by the Muslims.

The other context, that is, the proper context of the Shari'ah in the Philippines, is that granted by Presidential Decree No. 1083, the Code of Muslim Personal Laws. As intended, P.D. 1083:

- (a) Recognizes the legal system of the Muslims in the Philippines as part of the law of the land and seeks to make Islamic institutions more effective;
- (b) Codifies Muslim Personal Laws; and
- (c) Provides for an effective administration and enforcement of Muslim Personal Laws among Muslims. (Art. 2, P.D. 1083).

P.D. 1083 is far from a complete source of one legal system; never mind the standard of the Shari'ah as an all-comprehensive system, but even according to the standard of the Roman law system. Nor is it an adequate source of a branch of law like Civil Law. Otherwise stated, its main features are only the following:

- (1) The organization of the Shari'ah Courts;
- (2) The promulgation of rules and procedures in the Shari'ah Courts by the Supreme Court; and
- (3) The exemption of Muslims from the provisions of the Civil Code in matters relating to:
 - (a) Marriage
 - (b) Divorce
 - (c) Support
 - (d) Paternity and Filiation
 - (e) Parental Authority
 - (f) Custody and Guardianship
 - (g) Succession

There are also minor provisions on: (h) Customary Contracts; (i) Communal Property; (j) Conversion to Islam; (k) Civil Personality; (l) The Holidays, and (m) Specific Offenses.

Marriage

The substantive provisions of P.D. 1083 on marriage are in essence the *raison d'être* of the Muslim Code because of their substantial differences with the provisions of the Civil Code. The following are the outstanding features of the Muslim Code on Marriage in relation to the Civil Code:

- (1) *On Legal Capacity to Contract Marriage.* In the Code of Muslim Personal Laws, legal capacity to contract marriage starts at the age of fifteen (15) for the male and from the age of puberty for the female. A woman, for this purpose, is

presumed to have attained it at twelve, she may be eligible for marriage if her proper guardian in marriage (Wali) apprises the Court of such fact. In no case, however, shall a female be allowed to contract marriage if she is below twelve years even if she has attained the age of puberty. The proper course for such female would be betrothal (Muslim Code: Art. 16)

In the Civil Code, the legal capacity to contract marriage starts at sixteen (16) for the male and fourteen (14) for the female. (Civil Code: Art. 154; Muslim Code: Art. 16).

(2) *On Dowry (Mahar) as a Requisite.* A stipulation on Mahar duly witnessed by two competent persons is a requisite for marriage under P.D. 1083. It may be a fixed (Mahar Mussamah) or proper dowry (Mahar Mithl). There is no such requisite in the Civil Code, only a marriage license is required. (Civil Code: Art. 53; Muslim Code: Art. 14).

(3) *Divorce (Talaq) as a Right.* Husbands in Islamic law, generally, are given the prerogative to seek divorce. But wives have also ways and means to divorce their husbands. This is a provision of the Muslim Code that is absolutely absent in the Civil Code which recognizes only legal separation and not divorce. (Civil Code: Arts. 97-108, Muslim Code: Arts. 45-56).

(4) *Subsequent Marriages.* Marriage under the Islamic law is neither polygamous nor strictly monogamous. Although the rule in Islam is still one woman for one man, subsequent marriages of up to four (4) women at a time are allowed if a Muslim male can treat them justly and equally in terms of companionship and provisions. The Civil Code does not allow this because any marriage subsequently contracted by any person during the life-time of the first spouse of that person with any person other than the first spouse is illegal and void unless (a) the first marriage was annulled or dissolved, or (b) the first spouse had been absent for seven consecutive years without the other spouse knowing that the absentee is still alive, or if the absent spouse is generally considered, or presumed dead (Civil Code: Art. 83; Muslim Code: Art. 27).

(5) *No Prohibition on Adoption, Only Fosterage.* The Muslim Code prohibits marriages between any Muslim male and a woman who breastfed him for at least five times within two years after his birth. The prohibition by reason of consanguinity likewise applies to persons related by fosterage within the same degrees with exceptions recognized by Muslim law. In the Civil Code, it is the marriage between the adopted and the adoptor that is prohibited, not between the foster children and the foster parents. (Civil Code: Art. 82 (2), (3); Muslim Code: Art. 26).

(6) *Irregular, Not Voidable Marriages.* The Muslim Code talks of void (batil) and irregular marriages (fasid) and not of voidable marriages. Void marriages are those contracted in spite of the impediments for marriage being present. Voidable marriages are those which are valid but may be annulled for some deficiencies, while irregular ones are defective and void until corrected, unlike the voidable ones which are valid until annulled.

The following are irregular marriages according to P.D. 1083:

- (a) Those contracted with a female observing *idda'*;
- (b) The re-marriage of a husband with his former wife whom he has already divorced three times (*talaq bain kubra*);
- (c) Those wherein the consent of either party is vitiated by violence, intimidation, fraud, deceit or misrepresentation;
- (d) Those contracted by a party in a condition of death-illness (*marad al-maut*) without the same being consummated;
- (e) Those contracted by a person in a state of *ihram* (the state of ritual consecration of a person while on a pilgrimage to Mecca); and
- (f) Mixed marriages not allowed under Islamic law, like the marriage between a non-Muslim male with a Muslim female.

These marriages being only irregular and not void on account of relation by consanguinity, affinity or fosterage of the contracting parties, may be corrected or made regular by a new marriage contract in the following cases:

- (a) Those irregular because the wife did not observe the *idda*, after properly observing it;
- (b) Those remarriages of a husband with his former wife whom he had already divorced three times, after the wife had been married to another man and later had divorced her, and had observed the proper *idda*;
- (c) Those where the consent of either party is vitiated by violence, intimidation, fraud, deceit or misrepresentation, after the causes vitiating consent have ceased;
- (d) Those contracted by a person in *marad al-maut*, when that party recovers;
- (e) Those contracted by a person in *ihram*, when the party is no longer in *ihram*; and
- (f) Those mixed marriages not allowed under Islamic law, after the non-Muslim converts to a faith that could make the marriage valid (*Sahih*).

In this connection, the effects of the new marriage to the irregular one retroact to the date of the celebration of the irregular marriage. (Civil Code: Arts. 85-87; Muslim Code: Arts. 32-33).

(7) *When Mahar is Not Satisfied.* The husband fixes the residence of the family but the Court may exempt the wife from living with her husband if her dower (*Mahar*) is not satisfied in accordance with the stipulations. (Muslim Code: Art. 34).

(8) *Acquiring Properties by Gratuitous Title.* As a precautionary measure against the possible alienation of the affections of the wife, the wife cannot, without the husband's consent, acquire any property by gratuitous title, except from her relatives who are within the prohibited degrees in marriage. (Muslim Code: Art. 36).

(9) *Property Relations in the Absence of Stipulations.* The property relations between the spouses, in the absence of any stipulation to the contrary in the marriage settlements or any other contract, shall be governed by the regime of complete separation of property. (Muslim Code: Art. 38).

- (10) *The Wife May Not Sue or Be Sued Independently.* In all suits by or against the wife, the husband must be included except:
- When the litigation is between the husband and the wife;
 - When the suit concerns her paraphernal property;
 - When the litigation is incidental to her profession, occupation, or business;
 - When the litigation concerns a property within the marriage, the administration of which has been transferred to her. (Muslim Code: Art. 44).

In the Civil Code, considering that there is no divorce, but only legal separation, the wife may also be sued independently of the husband: (a) When they are judicially separated, (b) when they have in fact been separated for at least one year, (c) when the regime of property relations agreed upon in the marriage settlements is the complete separation of property, and (d) when the action against the wife is upon the civil liability arising from her criminal offense. (Civil Code: Art. 113).

Divorce

The provisions on Divorce on the Code of Muslim Personal Laws are all new provisions as far as Philippine Civil Law is concerned. In Islamic Law, or the Shari'ah, divorce is in fact not the law but the exception. The Hadith of the Prophet even has this to say: "Of all things that God has allowed, the most hateful in the sight of God is Divorce." It is resorted to only after all reconciliation efforts have been exhausted, or when it is indubitable that the parties in the marriage are incompatible, when their marriage is breaking up or in fact has already broken up.

(1) *It is Divorce, Not Merely Legal Separation.* In incidents, effects and consequences, what is provided by Islamic law and the Muslim Code when divorce has to be resorted to is not merely the legal separation of the husband and wife as understood in Civil law. It is the complete and formal dissolution of the marriage bond. (Civil Code: Arts. 97-108; Muslim Code: Art. 45).

(2) *Judicial Approval Not Necessary.* The modes of divorce contemplated in the Muslim Code do not anymore need judicial approval for its validity or enforcement except in *Faskh* in which only the Court can decree on the divorce upon petition of the wife or her proper *Wali*.

The following are the grounds for petition by the wife or her *wali* for a divorce by *Faskh*:

- Neglect or failure of the husband to provide support for the family for six consecutive months;
- Conviction of the husband by final judgment sentencing him to an imprisonment of at least one year;
- Failure of the husband to perform his marital obligations for six months, without reasonable cause;
- Impotency of the husband;
- Insanity or affliction of the husband with an incurable disease which would make the continuance of the marriage relationship injurious to the family;
- Unusual cruelty of the husband, and
- Other causes recognized by Islamic law.

In relation to (f) above, the following are considered unusual cruelty to the wife on the part of the husband;

(a) If the husband habitually assaults her or makes her life miserable by cruel conduct even if these do not result in physical injury;

(b) If the husband associates with persons of ill-repute or leads an infamous life or attempts to force the wife to live an immoral life;

(c) If he compels her to dispose of her exclusive property or prevents her from exercising her legal rights over it;

(d) If he obstructs her in the observance of her religious practices; or

(e) If the husband does not treat her justly and equitably as enjoined by Islamic law. (Muslim Code: Art. 52-53).

(3) *Divorce, generally, a Husband's Prerogative.* In general, it is the husband who may divorce his wife by *Talaq* (Repudiation), *ila* (Vow of Continence), *zihar* (Injurious Assimilation of the Wife), *lian* (Acts of Imprecation). In some instances, the wife may initiate the divorce by *Khul* (Redemption), *Tafwid* (the Delegated Right to Repudiate) or even by *Faskh* (Judicial Decree). (Muslim Code: Art. 45).

(4) *Husband's Right to Revoke the Divorce.* If the divorce of the husband from his wife was effected through *Talaq* (Repudiation), the husband has the right to take her back (*ruju*) within the prescribed *idda'* by resumption of co-habitation without a need of a new contract, provided that the divorce was only the first or second time. After the *idda'*, however, or if the divorce was for the third time, the repudiation is irrevocable (*Talaq bain sugra*, *Talaq Bain Kubra*). (Muslim Code: Art. 92 (2)).

(5) *Waiting Period (Idda')*. *Idda'* is the period of waiting by a woman whose marriage has been dissolved by death or by divorce, the completion of which shall enable her to contract a new marriage. The period of waiting (*idda'*) shall be:

(a) For dissolution of marriage, by death, four months and ten days counted from the death of the husband;

(b) For termination of marriage by divorce, three monthly courses;

(c) For pregnant women, a reasonable period after delivery; and

(d) Should the husband die while the wife is observing *idda'* for divorce, another *idda'* for death shall be observed which is four months and ten days. (Muslim Code: Arts. 56-57).

Support

The wife shall be entitled to support during the marriage. In fact, even when the resources of the husband have been so reduced that he cannot give support without neglecting his own needs, the husband is still obliged to support his wife. (Muslim Code: Art. 70).

(1) *Divorced Wife Not Entitled to Support.* While the husband and the wife are obliged to live together and render mutual help and support, once divorced, the wife is not anymore entitled to support except while observing the *idda'* or when she is pregnant during the time of her divorce, or when she is breastfeeding the child of the former husband in which case the husband is obliged to support not only

his child but even the former wife up to the time of the child's weaning. (Muslim Code: Art. 34).

(2) *Denial of Support.* When the resources of the husband have been so reduced that he cannot give support without neglecting his own needs and those of his family, his obligation to support shall cease except between spouses in which the husband, though needy, is obliged to support the wife. (Muslim Code: Art. 70 (b)).

Paternity and Filiation

There are generally no illegitimate children in Islamic law owing to the severe punishment against adulterers and fornicators which is stoning, or lashing. Children of subsequent marriages are perfectly legitimate, unlike in Civil Law.

Only children clearly born out of wedlock, and *awlad al-zina* or children who were the cause of their mothers being divorced by *lian* (Acts of Imprecation) by their husbands are illegitimate children. Children born within six months from the dissolution of the prior marriage are presumed to have been conceived during the former marriage, or if born thereafter, during the latter marriage, if the wife already contracted another marriage. (Muslim Code: Art. 60).

Parental Authority

The father and the mother jointly exercise parental authority over their legitimate and acknowledged children. In case of disagreement, however, the father's decision shall prevail. In the case of *awlad al-zina*, their mothers exercise parental authority over them.

Widowed mothers who contract subsequent marriages lose parental authority over their children by their deceased husbands unless their second husbands are related to them (the children) within the prohibited degrees in consanguinity. (Muslim Code: Art. 77 (2)).

Custody and Guardianship

(1) The care and custody of children below seven years of age whose parents are divorced shall belong to the mother, or in her absence, to the maternal grandmother, the paternal grandfather, sister and aunts. In their default, it shall devolve upon the father and the nearest paternal relatives. (Muslim Code: Art. 78 (1)).

(2) Minors above seven years of age but below the age of puberty may choose the parent with whom they want to stay. (Muslim Code: Art. 78 (1)).

(3) The unmarried daughter who has attained the age of puberty shall stay with the father; and the son, under the same circumstances, shall stay with the mother. (Muslim Code: Art. (78) (2)).

(4) The guardians of a minor as far as his person and property are concerned are in this order of preference:

- (a) Father
- (b) Father's executor or nominee;
- (c) Paternal grandfather;
- (d) Paternal grandfather's nominee; or
- (e) The Court (Muslim Code: Art. 80)

(5) The guardians in marriage of a contracting party are in this order:

- (a) Father
- (b) Paternal grandfather
- (c) Brother and other paternal relatives
- (d) Paternal grandfather's executor or nominee; or
- (e) The Court (Muslim Code: Art. 79).

Succession

The settlement of the estate of a decedent shall be effected as soon as the death of the decedent is ascertained, provided the successor is alive at the time of the death of the decedent, and that he is not disqualified to inherit according to Islamic law.

The legal heirs of a decedent are generally classified into three, namely: (A) The Qur'anic Heirs or Sharers (Ashab-Al-Farud), (B) Residuaries (Ashab Al-Mirath), and (C) Distant Kindred (Dhaw Al-Arham).

(7) *Qur'anic Heirs.* The heirs whose respective sharers are fixed by the *Qur'an* in Sura IV are the following:

(a) The husband, the wife, A husband surviving together with a legitimate child or a child of the decedent's son is entitled to 1/4 of the hereditary estate; should there be no such descendant, he shall inherit 1/2 of the estate. The wife, surviving with a legitimate child or a child of the decedent's son shall be entitled to 1/8 of the hereditary estate; in the absence of such descendant, she shall inherit 1/4 of the estate (Muslim Code: Arts. 110-112).

(b) The father, mother, grandfather, grandmother. The father succeeding with the legitimate son of the decedent or a son of the decedent's son is entitled to 1/6 of the estate. The father who succeeds with the legitimate daughter of the decedent or a daughter of the decedent's son inherits 1/6 of the estate without prejudice to his share as residuary. The mother succeeding with a child or child of the decedent's son, or with two or more brothers or sisters of the decedent, is entitled to 1/6 of the estate. Should she survive without any such descendant or with only one brother or sister, she inherits 1/3 of the estate. The paternal grandfather succeeding together with the child of the decedent, or in default thereof, with his descendants in the direct male line, however distant, shall be entitled to 1/6 of the hereditary estate. Should he survive with any sharer other than the brothers or sisters of the decedent he shall be entitled to 1/6 of the estate without prejudice to his right as residuary. The paternal grandmother succeeding in default of his mother, father, or intermediate grandfather of the decedent inherits 1/6 of the hereditary estate. (Muslim Code: Art. 110-116).

(c) The daughter and the son's daughter in the direct line. If the decedent leaves no son but one daughter, the latter inherits $1/2$ of the hereditary estate. Two or more daughters share equally $2/3$ thereof. Should one or more daughters survive with one or more sons of the decedent, the daughters are entitled to one half of the shares of the sons. Should a lone daughter of the decedent survive with his son's daughter, the $2/3$ share shall be divided between them, $1/2$ thereof to be awarded to the former and $1/6$ to the latter. The son's daughter, in the absence of any child of the decedent, shall be entitled to $1/2$ of the estate. Two or more daughters of the decedent's son share $2/3$ of the estate per capita (Arts. 110-118).

(d) The Full Sister, the Consanguine Sister, the Uterine Sister, the Uterine Brothers. The full sister is entitled to the extent of $1/2$ of the hereditary estate should the decedent leave neither descendant, father, nor full brother. Two or more full sisters also inherit $2/3$ of the estate per capita. The consanguine sister, should the decedent leave neither descendant, full brother, nor full sister, is entitled to $1/2$ of the estate. Two or more consanguine sisters also inherit $2/3$ of the estate per capita. The share of the uterine brother or sister is $1/6$ of the hereditary estate should there be no surviving descendant, father, paternal grandfather, or full brother and sister of the descendant, father, paternal grandfather, or full brother and sister of the decedent. Two or more uterine brothers or sisters inherit $1/3$ of the estate per capita. (Muslim Code: Art. 110-119-121).

(2) *Residuaries*. Any residue left after the distribution of the shares to the Qur'anic heirs shall be apportioned among the residuaries. Some residuaries succeed in their own right (*asabah bin-nafs*), some in another's right (*asabah bil-ghair*), and others together with another (*asabah maal-ghair*).

(A) The following persons are residuaries in their own right:

(a) Male descendants of the decedent in the direct line, however distant in degree;

(b) Male ascendants of the decedent in the direct line, however distant in degree;

(c) Full-blood or consanguine brothers of the decedent and their male descendants, however distant in degree; and

(d) Full-blood or consanguine paternal uncles of the decedent and their male descendants, however distant in degree.

(B) The residuaries in another's right are the following:

(a) Daughters surviving with the son of the decedent;

(b) Son's daughters surviving with their own brothers;

(c) Full sisters surviving with their full brothers; and

(d) Consanguine sisters surviving with their consanguine brothers.

(C) Full-blood or consanguine sisters surviving with daughters of the decedent or with the son's daughters, however distant in degree from the decedent, are residuaries together with another. (Muslim Code: Arts. 124-127).

(3) *Distant kindred (Dhaw Al-Arham)*. The following are distant kindreds:

(a) The daughter's children and the children of the son's daughter and their descendants;

- (b) The excluded grandfather and the excluded grandmother;
- (c) The sister's children, the brother's daughters, the sons of the uterine brother, and their descendants; and
- (d) The paternal aunts, the uterine uncles and the maternal aunts and uncles.

In default of all shares and residuaries, the distant kindreds inherit the entire hereditary estate (Muslim Code: Arts. 131-132).

(4) *Exclusion Among Heirs.* The exclusion of heirs from the inheritance are governed by these rules:

- (a) In the same line, the relative nearest in degree excludes the more remote;
- (b) Whoever is related to the decedent through any person shall not inherit while the latter is living, except in a case of a mother concurring with her children.
- (c) Full-blood relatives exclude the consanguine and the uterine;
- (d) Heirs who do not succeed by reason of disqualification on any ground shall not exclude others. (Muslim Code: Art. 123).

(5) *Reduction of Shares or Reversion of Residue.* If the totality of the shares assigned to each of the sharers exceeds the whole inheritance the shares shall be reduced proportionately, or if after the distribution of the shares a residue is left and there is no surviving residuary heir, the same shall revert in its entirety to the lone sharer or to all the sharers in proportion to their respective shares. The husband or the wife, however, shall not be entitled to any part of the reverted portion as long as there are other sharers or distant kindred. (Muslim Code: Arts. 129-130).

(6) A divorced wife shall have no share in the inheritance except if she is still observing the *idda'* at the time of the death of the decedent. (Muslim Code: Art. 96).

(7) *Walad Al-Lian*, or the child who was the cause of his or her mother's having been divorced by *lian* shall have mutual rights of succession only with the mother and her relatives. (Muslim Code: Art. 95).

(8) The husband, who, while in *marad al-maut*, divorced his wife shall not inherit from her if he recovers, but the wife has the right to succeed him if he dies even after the expiration of her *idda'* (Muslim Code: Art. 96 (2)).

(9) The share of an heir who is missing or absent at the time of the death of the decedent shall be reserved: (a) until he reappears and claims it, (b) until he is proven dead, or (c) until the lapse of ten years after which he shall be presumed dead by decree of the court. (Muslim Code: Art. 98).

(10) Those who have intentionally caused directly or indirectly the death of the decedent, and those who convert to a faith other than Islam are disqualified to succeed a Muslim decedent. (Muslim Code: Art. 93).

(11) In a testamentary succession, the testator cannot dispose of more than 1/3 of his estate. Any bequest in excess thereof shall not be valid unless ratified by the heirs. (Muslim Code: Art. 106).

(12) Should the testator die without having made a bequest in favor of any of his sons who predeceased him, or who simultaneously dies with him, such child

is entitled to 1/3 of the share that would have pertained to the father if he were alive. (Muslim Code: Art. 107).

(13) The parent or spouse who is disqualified to inherit by Islamic law may be entitled to 1/3 of what he or she would have received without such disqualification. (Muslim Code: Art. 107).

Customary Contracts

Customary contracts of transactions whereby one person delivers to another any real estate, plantation, orchard, or any fruit bearing property by *sanda*, *sanla*, *arinadao*, or similar contracts are construed as mortgage (*rihan*) in accordance with Muslim law (Muslim Code: Art. 175).

Communal Properties

(1) Communal properties shall be administered or disposed of in accordance with Muslim law or *ada!*

(2) The trustee of any property shall be a person who is in lawful possession thereof, either personally or through an agent.

(3) When there is a dispute as to its custody, possession or administration, the Shari'ah Circuit Court may appoint a trustee to such communal property. (Muslim Code: Art. 173-174).

Conversion to Islam

(1) The registration of a person's conversion to Islam constitutes a *prima facie* proof that he professes Islam. Whoever disputes the profession or renunciation of Islam by any person shall have the burden of proof. (Muslim Code: Art. 176).

(2) No conversion of a minor below 18 years of age shall be registered by the District or Circuit Registrar without the written consent or permission of the parents or guardian except when such minor has been emancipated from parental authority. (Muslim Code: Art. 177).

(3) The conversion of non-Muslim spouses to Islam shall have the effect of ratifying their previous marriage as if the same had been performed in accordance with Muslim law provided that there is no legal impediment to the marriage under Muslim law. (Muslim Code: Art. 178).

(4) The change of religion by a Muslim shall not have the effect of extinguishing any obligation or liability incurred prior to said change.

Civil Personality

The conceived child shall be considered born for all purposes favorable to it, provided it is born alive, however briefly, at the time it is completely delivered from the mother's womb. In contrast, the Civil Code has this provision: "For civil purposes, the fetus is considered born if it is alive at the time it is completely delivered

from the mother's womb. However, if the fetus had an intra-uterine life of less than seven months, it is not deemed born if it dies within 24 hours after its complete delivery from the maternal womb." (Civil Code: Art. 41; Muslim Code: Art. 10).

The Holidays Recognized

(1) The Holidays recognized are: (a) *Amun Jadid* (New Year), (b) *Maulid Al-Nabi* (The Birthday of the Prophet), (c) *Lailat Al-Isra Al-Mira* (the Nocturnal Journey and Ascension of the Prophet), (d) *Eid Al-Fitr* (First Day of Ramadan), and (e) *Eid Al-Adha* (The 10th day of the 12th lunar month of *Dhul-Hijjah*. (Muslim Code: Art. 169).

(2) These holidays are officially observed in the following provinces and cities: (a) Basilan, (b) Lanao del Norte, (c) Lanao del Sur, (d) Maguindanao, (e) North Cotabato, (f) Sultan Kudarat, (g) Sulu, (h) Tawi-Tawi, (i) Zamboanga del Norte, and (j) Zamboanga del Sur, and in the cities of Cotabato, Iligan, Marawi, Pagadian and Zamboanga, and in such other Muslim provinces and cities as may hereafter be created. (Muslim Code: Art. 170).

Penalties For Specific Offenses

(1) Any person who shall, without authority, solemnize any marriage purportedly under the Code of Muslim Personal Laws, shall be punished by imprisonment of not less than 2 months but not more than 2 years, or a fine of not less than P200 but not more than P2,000.00 or both at the discretion of the Court. (Muslim Code: Art. 181).

(2) Any widow or divorced woman who, having been married under Muslim law or the Code of Muslim Personal Laws, contracts another marriage before the expiration of the prescribed *idda'*, shall suffer the penalty of a fine not exceeding P500.00. (Muslim Code: Art. 182).

(3) Any person who fails to notify the Shari'ah Courts concerned of his subsequent marriage, divorce or the revocation of divorce, shall face a penalty of *arresto mayor* or a fine not less than P200 but not more than P2,000.00 or both at the discretion of the court. (Muslim Code: Art. 183).

(4) Any person who knowingly fails to perform his duty to register any fact concerning the civil status of persons shall be punished by a fine of not less than P100 but not more than P1,000. (Muslim Code: Art. 184); and

(5) Any district or circuit registrar who fails to perform his duties in accordance with the Code of Muslim Personal Laws shall be penalized in accordance with Section 18 of Act 3753. (Muslim Code: Art. 185).

The Shari'ah Courts

P.D. 1083 mandates the creation of fifty-six (56) Shari'ah Courts in Muslim areas, or in the words of the Constitution, "Muslim Mindanao" (5 Shari'ah

District Courts and 51 Shari'ah Circuit Courts). At present, three (3) of the five Shari'ah District Courts have been created and assigned with Shari'ah District Judges. They are the Shari'ah District Court in Zamboanga City (for the First, Second and Third Shari'ah Judicial Districts), the Shari'ah District Court in Marawi City (for the Fourth District of Shari'ah), and the Shari'ah District Court in Cotabato City for the Fifth District. Seven (7) Shari'ah Circuit courts have already been created, one each in the provinces of Tawi-Tawi, Sulu, Basilan, Zamboanga del Sur, Lanao del Norte, Maguindanao, and North Cotabato. One of these courts, however, the one in Kabacan, North Cotabato, is still without a judge.

The Shari'ah District Courts have both exclusive original jurisdiction and original jurisdiction concurrently with existing civil courts. They have exclusive original jurisdiction over:

(a) All cases involving custody, guardianship, legitimacy, paternity and filiation arising under P.D. 1083;

(b) All cases involving disposition, distribution and settlement of the estate of deceased Muslims, probate of wills, issuance of letters of administration or appointment of administrators or executors regardless of the nature or the aggregate value of the property;

(c) Petition for the declaration of absence and death and for the cancellation or correction of entries in the Muslim Registrar's book mentioned in Title VI, Book Two of P.D. 1083;

(d) All actions arising from customary contracts in which the parties are Muslims, if they have not specified which law shall govern their relations; and

(e) All petitions for *Mandamus*, prohibition, injunction, *certiorari*, *habeas corpus*, and all other auxiliary writs and processes in aid of its appellate jurisdiction.

Concurrently with existing civil courts, the Shari'ah District Courts have original jurisdiction over:

(a) Petitions by Muslims for the constitution of a family, home, change of name, and commitment of an insane person to an asylum;

(b) All other personal real actions wherein the parties involved are Muslims except those for forcible entry and unlawful detainer, which falls under the exclusive original jurisdiction of the Municipal Circuit Courts; and

(c) All special actions for inter pleader or declaratory relief wherein the parties are Muslims, or the property involved belongs exclusively to Muslims.

In addition to their original jurisdiction, the Shari'ah District Courts also have appellate jurisdiction over all cases tried in the Shari'ah Circuit Courts within their territorial jurisdiction. (Arts. 143-144, P.D. 1083).

The provisions of all laws relative to the Courts of First Instance (now Regional Trial Courts) are applicable to the Shari'ah District Courts such as those relating to the appointment, tenure and compensation of judges, except as to the qualification of the judges because judges in the Shari'ah District Courts have to be, in addition to the qualifications fixed in the Judiciary Law, learned in Islamic law and jurisprudence.

The Shari'ah Circuit Courts have exclusive original jurisdiction over:

- (1) All cases involving offenses defined and punished under P.D. 1083;
- (2) All Civil actions and proceedings between parties who are Muslims, or who have been married in accordance with the Code of Muslim Personal Laws involving disputes relating to:

- (a) Marriage;
- (b) Divorce;
- (c) Betrothal or breach of contract to marry;
- (d) Customary dower (Mahar)
- (e) Dispositions and distribution of property upon divorce;
- (f) Maintenance and Support, and consolatory gifts (mut'a); and
- (g) Restitution of Marital rights

Procedure in the Shari-ah Courts

The Supreme Court, in September 1983, promulgated the Special Rules of Procedure in the Shari'ah Courts (Ijraat Al-Mahakim Al-Shari'ah) in pursuance of Articles 148 and 158 of P.D. 1083 which provide:

The Shari'ah Circuit Courts also have exclusive original jurisdiction over all disputes involving communal properties.

The provisions of all laws relative to Municipal Circuit Courts also apply to the Shari'ah Circuit Courts especially regarding the number, qualifications, appointment, compensation, functions, and duties of Shari'ah Circuit Judges and the Court personnel.

Procedure in the Shari-ah Courts

The Supreme Court, in September 1983, promulgated the Special Rules of Procedure in the Shari'ah Courts (Ijraat Al-Mahakim Al-Shari'ah) in pursuance of Articles 148 and 158 of P.D. 1083 which provide:

“Art. 148 (and 158) – Special Procedure. The Shari'ah District (Circuit) Courts shall be governed by such Special Rules of Procedure as the Supreme Court may promulgate.”

The outstanding features of the Special Rules of Procedure in relation to regular procedure on the Rules of Court in the Philippines are the following:

- (1) The period to answer a plaintiff's complaint (da'wah) is ten (10) days from receipt of the summons;
- (2) Answer may be filed either personally or by counsel, or with the assistance of the Clerk of Court (Section 4);
- (3) The filing of the following pleadings, petitions or motions are disallowed:
 - (a) Motion to dismiss or to quash;

- (b) Motion for bill of particulars;
- (c) Motion for extension of time to file pleadings or any other paper;
- (d) Motion to declare defendant in default;
- (e) Reply, third party complaints, or intervention;
- (f) Petition for certiorari, mandamus or prohibition against any interlocutory order issued by the Court;
- (g) Petition for relief from judgment;
- (h) Motion for new trial, or reopening of trial; and
- (i) Any dilatory motion for postponement. (Section 13).

(4) Motions to declare defendants (mudda'alai) in default are unnecessary because should the defendant fail to answer the complaint within ten (10) days from service, the court will proceed to receive the evidence ex-parte upon which judgment will be rendered (Section 5);

(5) If the defendant (mudda'alai) admits the claim of the plaintiffs (muddai) judgment will be rendered in his favor without further receiving evidence. (Section 7 (2)).

(6) While the plaintiff (muddai) has the burden of proof, the defendant (mudda'alai) may take an oath (yamin) to support his defense (Section 7).

(7) In cases of claims and counter-claims, the Court may require both parties to take a mutual oath (tahalif) on any particular fact or facts upon which the Court may render judgment (Section 14);

(8) When proving any fact, the Court is to adhere to the sources of Muslim law relating to the number, status, or quality of witnesses (adala), or to evidence in general. The Rules of Court apply only suppletorily (Section 16); and

(9) When special offenses under P.D. 1083 are filed, the court will hear them according to applicable laws and the Rules of Court. The principles of Muslim Law will apply only suppletorily.

Problems of the Shari'ah in the Philippines

In my capacity as a student of the Shari'ah, and a practitioner of Muslim Personal Laws in the Shari'ah Courts, I construe the problems of the Shari'ah in the Philippines as resulting from: (1) The divinity and unity of the Shari'ah; (2) The substantive and substantial inadequacies of P.D. 1083; (3) The government reluctance to extend the Shari'ah in the Philippines; (4) The skeptical attitude of the Moros towards the Courts; (5) Insufficient rules of procedure; (6) Conflict of rules on evidence, and (7) Problems of Appeal.

1. *The Divinity of the Shari'ah.* The divine and united character of the Shari'ah is one of the causes of its main problems in the Philippines. The Shari'ah as the law of God is a Holy law. Its main promulgator is God Himself through the *Qur'an* as filled in its details by the *Hadith* and the other secondary and tertiary sources. As such, many ulama (scholars), at least the more conservative or fundamentalist of them, believe that the Shari'ah is supposed to be "uncompromisable", that is, it should be applied either in its holiness or entirety, or not applied at all. As it is, in the Philip-

pines only the family law portion of the Shari'ah is adopted without the authority and power to punish crimes such as murder, theft, adultery, and fornication according to the Law of God.

2. *The Substantive Inadequacies of P.D. 1083.* As already stated, the Code of Muslim Personal Laws is far from a complete system of law, nor is it an adequate source of a branch of law. In fact, it is not even the whole of *muammalat*. In western law parlance, it is not even civil law. It is strictly only Personal or Family Laws. Specifically, it covers only Muslim laws on *Marriage, Divorce, Paternity and Filiation, Support, Parental Authority, Custody and Guardianship, and Inheritance*, with minor provisions on *Customary Contracts, Communal Property, Civil Personality, Conversions to Islam, The Holidays and Some Specific Offenses* which are not purely criminal.

Conflicts among Muslims are not always limited to purely one of the above issues. In the Philippines, the most common legal cases among Muslim Moros are those that relate to land sale and land ownership. Considering the trust (*amanah*) nature of transactions in Islam, reinforced by the rural and personalized relations of Moros, most of their transactions are not reduced to writing. Furthermore, the *torrens* system of land titling and ownership in the Philippines notwithstanding, the Muslim Moros have up to now relied on their traditional and Islamic concepts of land ownership. To them, as it is in Islam, no better proof of ownership should challenge their continuous, adverse, open, notorious and exclusive possession, occupation and cultivation of the land which they had for so long a time, in fact, beyond reach of memory and before their predecessors-in-interest.

(3) *Government Reluctance to Extend the Shari'ah in the Philippines.* The government's obvious reluctance to give the Muslim Moros what is due them in the Shari'ah may primarily be due to constitutional and legal restraints, the Philippines being a secular state. Secondarily, it may also be due in part to Christian fears and complaints. The majority of the Filipinos are Christians. Even the "Bangsa Moro Homeland", so-called as far as it is Muslim, is on the whole, predominantly Christian. The Christians cannot help but be apprehensive that the Shari'ah may be imposed upon those who live in the provinces which are predominantly Muslim or have a sizeable number of Muslims. Specifically, they are afraid that the Shari'ah laws on the punishments for murder, adultery, fornication and theft might also be applied to them. With due respect, I say that they are threatened by their ignorance of the Shari'ah and of a very simple Philippine law, the Code of Muslim Personal Laws.

(4) *The Skeptical Attitude of the Muslim Moros Toward the Courts.* Moros are quite distrustful of the Courts in the Philippines. They feel that these are not their courts and rightly so, considering that the courts use a language that they do not understand and adopt laws that are not theirs, as Muslims. The procedure in Philippine courts is also such that it is not speedy and inexpensive. They cannot obtain justice without a lawyer, or hire a lawyer without money. In other words, they do not get justice in the western system if they have no money to have their day in court.

When P.D. 1083 came about providing for the creation of the Shari'ah courts, Muslims did not there and then welcome the creation of the courts, even though the

courts are supposed to be Islamic. The Moros thought that it was just another Philippine court. Furthermore, the courts, although quite wrongly, were linked to the tyranny and the so-called "genocidal campaign" of deposed President Ferdinand Marcos against the Moro People. The Code of Muslim Personal Laws was even taken to have been the codification of Muslim Personal Laws personally by Marcos. These, however, are to be understood in the light of the Moro People's over-blown skepticism of the entire judicial system of the country which to them is tedious, expensive and unjust, what with the un-Islamic personal laws, rules of evidence, and land ownership that are imposed upon them.

(5) *Insufficient Rules of Procedures and Evidence in the Shari'ah Courts.* As mandated by P.D. 1083, the Supreme Court promulgated in September 1983 the Special Rules of Procedure in the Shari'ah Courts (Ijraat Al-Mahakim Al-Shari'ah). It intended to compromise or differentiate the Islamic and the Philippine rules of procedure and evidence in the Courts. Trials in the Shari'ah Courts have already commenced but many rules on procedure remain ambiguous, if not conflicting, in the Rules of Court and in the Special Rules of Procedure in the Shari'ah Courts.

Consider that in Rule 16, Section 1 of the Rules of Court, a motion to dismiss within the time for pleading may be made on seven (7) grounds while in Section 13 of the Special Rules of Procedure in the Shari'ah Courts, such motion to dismiss is disallowed, like the motions for extension of time to file an answer, and to declare defendant in default which are, on the other hand, allowed by Rule II, Section 7 and Rule 18, Section 1 of the Rules of Court, respectively. Ordinarily, no problem on the conflict of these rules is encountered as it is understood that the Special Rules are to be applied primarily and the regular Rules of Court suppletorily. But as soon as there are cases wherein a defendant would like to adduce evidence on his behalf while not having filed his answer to the complaint within, or even after the reglamentary period allowed by law, soon the disallowance of the motion for declaration of defendant in default becomes a problem for the judge. For it is not clear in the law if the Court *motu proprio* can declare a defendant, who did not file his answer, in default.

Consider also that the best evidence according to Rule 130 of the Rules of Court is documentary evidence. In Islamic law, however, the personal word of an upright Muslim is deemed worthier than an abstract piece of documentary evidence, a piece of information susceptible to alteration and falsification. *Sahada* or testimonial evidence is the best evidence held by Islam in Sura II, verse 282 of the *Holy Qur'an*.

Section 16 of the Special Rules of Procedure in the Shari'ah Courts provides thus:

"Section 16. Suppletory Rule in Civil Cases. — *The Court shall adhere to the sources of Muslim law relating to the number, status, or quality of witnesses (adala) and evidence required to prove any fact. Except as herein provided, the Rules of Court shall apply in a suppletory manner.*"
(Underlining supplied)

The Court seems bound to follow the Islamic rule on evidence and apply the Rules of Court only suppletorily when the issue is proof. But, as an inheritance or sale involving real estate, one party may have all the documentary evidence of ownership according to Philippine laws but the good Muslims in the community may testify to the fact that the property belongs to other party or parties. Here, the laws on land ownership, if the property in question is a piece of land, will have to be considered, which may be a direct opposition to the Islamic system. But then, can the court pursuant to Section 16 of the Special Rules of Procedure apply the Philippines laws on land ownership only suppletorily to the Islamic modes and evidence of land ownership, vis-a-viz, land titles?

(6) *Problems of Appeal.* The decision of the Shari'ah District Courts are final but appealable to the Supreme Court (Art. 145, Muslim Code). Considering the Islamic law and the present composition of the Supreme Court, what capacity or expertise has our Supreme Court to review and decide cases appealed to it involving questions of Islamic law?

Recommendations

On Problem 1. Nothing much can be done about it except to take the Philippines as a *Dar Al-Aman* (Secular Territory). It is not an Islamic state or *Dar Al-Islam*. As such, only the considered care of Islamic law can, at most, be in place, namely the laws on persons and family relations. Muslims have to make the most of what there is.

On Problem 2. It may be in order to consider Islamic commercial laws and land ownership concepts and laws to be codified and included in the present substantive aspect of the Shari'ah in the Philippines.

On Problem 3. The Philippines is a secular and Christian country. The Shari'ah will be applied only to Muslims. Article 3, paragraph (3) of the Code of Muslim Personal Laws is quite explicit in this regard:

(3) The provisions of this Code shall be *applicable only to Muslims* and nothing herein shall be construed to operate to the prejudice of a non-Muslim" (Underlining supplied)

Title II, Chapter one of the same Code (which is on marriage) also provides:

"Article 13. Application. (1) The provisions of this title shall *apply to marriage and divorce wherein both parties are Muslims, or when only the male party is a Muslim and the marriage is solemnized in accordance with Muslim law on this Code in any part of the Philippines.*"

(2) In case of marriage between a Muslim and a non-Muslim solemnized *not in accordance with Muslim law or this Code, the Civil Code of the Philippines shall apply.*" (Underlining supplied)

It is only in marriage relations between a Muslim and a non-Muslim that a non-Muslim party can be brought to the jurisdiction of Islamic law or the Shari'ah Courts, in fact, even in marriage relations, only when the marriage had been solemnized in accordance with Islamic law. The aspect of the Shari'ah that prescribes the penalties of stoning, lashing and cutting off of hands against criminal transgressors will definitely be in the jurisdiction of our regular regional trial or municipal circuit courts. If a Muslim commits an offense against anybody, be it against a Muslim or a Christian, that Muslim is tried in our regular courts according to Philippine penal laws. With more reason that if it is a Christian who should commit an offense against anybody, even against a Muslim, that Christian will be tried according to Philippine penal laws, and not according to Islamic law.

On Problem 4. On the Skeptical Attitude of Muslim Moros towards the Courts, time and effective information on the Shari'ah Courts will find the Muslims running to the Courts.

On Problem 5. The adoption among Muslims of the Islamic modes of land ownership will engender clearer rules of evidence. The conflict on which is the best evidence documentary or testimonial will no longer arise. Some more supplemental Rules of Procedure in the Shari'ah Courts will perfect the system in the Shari'ah Courts.

On Problem 6. The highest authority of the State should seriously consider the appointment of a Muslim member to the highest tribunal, the Supreme Court, preferably one who is also learned in Islamic law and jurisprudence to represent the Shari'ah.

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