

## **THE *SHARI'AH* LEGAL PROFESSION IN THE PHILIPPINES: THE STATUS QUO AND CUES OF ITS FUTURE**

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### **ABSTRACT**

This article provides an overview of the *Shari'ah* legal profession in the Philippines by scrutinising its status quo, identifying the indications of its future, and drawing some insights from its comparison to Malaysia's *Syarie* legal profession. The recognition of the *Shari'ah* legal profession in the secular state of the Philippines is traceable to the Code of Muslim Personal Laws of the Philippines (Muslim Code), which mandated the creation of *Shari'ah* courts and the institutionalisation of the *Shari'ah* bar examinations whose passers are conferred the title of 'Counselor-at-Law'. In view of the recent enactment of the Bangsamoro Organic Law (Republic Act No. 11054), this article will also highlight the implications of the justice system under this organic law on existing Philippine's *Shari'ah* Courts and on the *Shari'ah* legal profession as a whole.

**Keywords:** *Shari'ah* legal profession, *Shari'ah* court, counselor-at-law, code of Muslim personal laws of the Philippines, Bangsamoro Organic Law.

## **PROFESION UNDANG-UNDANG SYARIAH DI FILIPINA: STATUS QUO DAN PETANDA MASA HADAPAN**

### **ABSTRAK**

Artikel ini memberikan gambaran keseluruhan profesion undang-undang Syariah di Filipina dengan meneliti status quonya, mengenal pasti petunjuk masa hadapannya, dan memberi beberapa pandangan berdasarkan perbandingan dengan profesion undang-undang Syarie Malaysia. Pengiktirafan profesion undang-undang Syariah di negara sekular Filipina boleh dikesan melalui Kod Undang-undang Peribadi

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Muslim Filipina (Kod Muslim), yang mewajibkan penciptaan mahkamah Syariah dan penginstitusian peperiksaan bar Syariah yang lulusannya dianugerahkan gelaran 'Kaunselor Undang-undang'. Memandangkan penggubalan Undang-undang Organik Bangsamoro baru-baru ini (Akta Republik No. 11054), artikel ini juga akan menekankan implikasi sistem keadilan di bawah undang-undang organik ini ke atas Mahkamah Syariah Filipina yang sedia ada dan ke atas profesion undang-undang Syariah secara keseluruhan.

**Kata kunci:** Profesion undang-undang Syariah, mahkamah Syariah, penasihat undang-undang, kod undang-undang peribadi muslim Filipina, Undang-Undang Organik Bangsamoro.

## INTRODUCTION

Philippine Muslims have long aspired to have their own system of laws applied to them with the full sanction of the government. The enactment of Presidential Decree No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines ('Muslim Code')<sup>1</sup> in 1977 signalled the realisation of this aspiration. Ideally, the enforcement of this legal system 'shall redound to the attainment of a more ordered life amongst [Philippine Muslims].'<sup>2</sup> The Muslim Code was enacted specifically to recognise the legal system of the Philippine Muslims and to make Islamic institutions more effective;<sup>3</sup> to codify Muslim personal laws;<sup>4</sup> and to provide for an effective administration and enforcement of Muslim personal laws among Muslims.<sup>5</sup> Indeed, the enactment of the Muslim Code is founded on profound and meritorious intentions.

However, the implementation of the Muslim Code is what defines whether the intent or purpose of its enactment has been achieved. This is where the *Shari'ah* legal profession in the Philippines takes an active role that is pivotal to the realisation of the general intent of the Muslim Code. This Code paved the way for the creation of the *Shari'ah* Courts in the Philippines, which necessitates the licensing of individuals who will be authorised to practice law before these courts.

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<sup>1</sup> *Muslim Code 1977* (Philippines).

<sup>2</sup> See *ibid* 3<sup>rd</sup> whereas clause.

<sup>3</sup> See *ibid* Article 2(a).

<sup>4</sup> See *ibid* Article 2(b).

<sup>5</sup> See *ibid* Article 2(c).

This study provides an overview of the *Shari'ah* legal profession in the Philippines – four decades into existence – by scrutinising its status quo, identifying the indications of its future, and drawing some insights from its comparison to Malaysia's *Syarie* legal profession, in the hope of emphasising its role in the fulfilment of the laudable purposes of the Muslim Code and the justice system under the *Bangsamoro Organic Law* (BOL).<sup>6</sup> To do this, the *Shari'ah* legal profession's past is revisited, its present analysed, and its future projected.

## EXTENT OF ADMINISTRATION OF ISLAMIC LAW IN THE PHILIPPINES AND MALAYSIA

While the Muslim Code recognises the legal system of the Philippines 'as part of the law of the land',<sup>7</sup> this does not mean that all aspects of Islamic law are enforced in the Philippines. Only those that are 'fundamentally personal in nature'<sup>8</sup> are enforced. This includes personal status, marriage and divorce, matrimonial and family relations, succession and inheritance, and property relations between spouses. Besides, 'Islamic law as recognised in the Philippines is to be given effect only if it is consistent with the Philippine Constitution.'<sup>9</sup>

*Shari'ah* courts in the Philippines have no criminal jurisdiction over religious offenses under Islamic law. At present, *Shari'ah* courts can only exercise criminal jurisdiction over a few specific offenses under the Muslim Code.<sup>10</sup> Interestingly, under Section 4, Article X of the BOL, the Parliament has the power to enact laws governing

<sup>6</sup> Republic Act No. 11054 (2018), otherwise known as the "Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao".

<sup>7</sup> See Article 2(a), Muslim Code.

<sup>8</sup> Report of the Presidential Commission to Review the Code of Filipino Muslim Laws, 1975.

<sup>9</sup> Norhabib Bin Suod S. Barodi, "Oath (*Yamin*) as a Method of Proof and the Right to Due Process in the Philippines: A Response to *Tampar v Usman*," *Journal of Malaysian and Comparative Law* Vol. 47 No. 1, Jun (2020): 83, <https://ejournal.um.edu.my/index.php/JMCL/article/view/30841>.

<sup>10</sup> Illegal solemnization of marriage (Art 181); Marriage before expiration of 'idda (Art 182); Offenses relative to subsequent marriage, divorce, and revocation of divorce (Art 183); Failure to report for registration (Art 184); Neglect of duty by registrars (Art 185).

criminal jurisdiction on minor offenses punishable by *arresto menor* or *ta'zir* which must be equivalent to *arresto menor*, or fines commensurate to the offense.<sup>11</sup>

In Malaysia, while ‘technically, the administration of Islam falls under the jurisdiction of states,’<sup>12</sup> ‘nonetheless, states are not free to implement the *shari’ah* even if they wish to do so.’<sup>13</sup> This is because of Article 75 of the Federal Constitution which provides that if any state law is inconsistent with a federal law, the federal law shall prevail and the state law shall, to the extent of the inconsistency, be void.<sup>14</sup> Further, ‘the jurisdiction of the *shari’ah* courts is extremely limited, for it covers only Muslim personal law, [which] includes family law, charitable property, religious revenue, places of worship and religious offences such as adultery and other forms of sexual misconduct, defamation, non-payment of alms and consumption of liquor.’<sup>15</sup> Though *Shari’ah* courts in Malaysia have jurisdiction over criminal matters, these courts ‘can only try offences which involve no punishment beyond the stated maximum imprisonment or fine under federal law, making it impossible for them to impose *hudud* punishments.’<sup>16</sup> Mohamed Azam Mohamed Adil and Nisar Mohammad Ahmad are categorical on the extent of Islamic law in Malaysia –

Despite Islam being named as the religion of the Federation, Islamic law or *Shari’ah*, has never been considered by the same Constitution as the law or legal system of the

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<sup>11</sup> See Features of The Bangasamoro Organic Law (BOL) on Bangsamoro Justice System, *infra*.

<sup>12</sup> Ahmad Fauzi Abdul Hamid, “The implementation of Islamic law in contemporary Malaysia: prospects and problems,” [https://www.researchgate.net/publication/38443531\\_The\\_implementation\\_of\\_Islamic\\_law\\_in\\_contemporary\\_Malaysia\\_prospects\\_and\\_problems](https://www.researchgate.net/publication/38443531_The_implementation_of_Islamic_law_in_contemporary_Malaysia_prospects_and_problems).

<sup>13</sup> Ibid.

<sup>14</sup> See *ibid*.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

federation. In other words, the status of Islam as the religion of the Federation does not extend to its legal dimension.<sup>17</sup>

## LEGISLATIVE HISTORY OF THE PHILIPPINE *SHARI'AH* LEGAL PROFESSION

The enactment of the Muslim Code, as a development of Muslim personal laws in the Philippines, has 'undergone three formative stages.'<sup>18</sup> It began with the creation of a Research Staff for the project of codification of Muslim personal laws.<sup>19</sup> This Research Staff produced a Draft Code for the administration of Personal Laws with the recommendation to create a Presidential Code Commission that 'would review the draft and submit the substantive aspects of Muslim Personal Laws.'<sup>20</sup> Thus, the Presidential Commission to Review the Code of Filipino Muslim Laws was created on December 23, 1974, by virtue of Executive Order No. 442.<sup>21</sup> On August 29, 1975, this Commission submitted its Report to the President of the Philippines with a recommendation, among others, for the 'immediate approval, promulgation and implementation of' the Muslim Code.'<sup>22</sup> On February 4, 1977, the Code of Muslim Personal Laws of the Philippines was enacted into law.

The fulfilment of the purpose of the Muslim Code to provide 'for an effective administration and enforcement of Muslim personal laws among Muslims,'<sup>23</sup> entails the creation of mechanisms for adjudication and settlement of disputes and rendition of legal opinions. Thus, *Shari'ah* District Courts, *Shari'ah* Circuit Courts and the Office of Jurisconsult in Islamic Law were created. This necessitated the promulgation by the Supreme Court of the Rules of Procedure in the

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<sup>17</sup> Mohamed Azam Mohamed Adil and Nisar Mohammad Ahmad, "Islamic Law and Human Rights in Malaysia", <https://www.researchgate.net/publication/305026714>.

<sup>18</sup> Code of Muslim Personal Laws of the Philippines, Philippine Islam Series No. 2, Office on Muslim Affairs, Introduction, p. v.

<sup>19</sup> See *ibid.*

<sup>20</sup> See *ibid.*, v-vi.

<sup>21</sup> See *ibid.*, vi.

<sup>22</sup> See *ibid.*, 57.

<sup>23</sup> Article 2(c), Muslim Code.

*Shari'ah* Courts (*Ijra-at al Mahakim al Shari'a*) on September 20, 1983, in accordance with Articles 148 and 158 of the Muslim Code.

The Muslim Code is 'a positive articulation of Islamic legislation on persons and family laws.'<sup>24</sup> Article 4(1) thereof provides that in the construction and interpretation of the Muslim Code, the court shall take into consideration the primary sources of Muslim law, referring to *Qur'an* and *Sunnah*. Accordingly, judges in the *Shari'ah* courts must be learned in Islamic law and jurisprudence to discharge this duty effectively. Thus, under Article 140 of Muslim Code, the *Shari'ah* District judge should, as a qualification, be learned in Islamic law and jurisprudence. The determination of this qualification prompted the institutionalisation of the Special *Shari'ah* Bar Examinations (SSBE) under Article 152. The provision reads:

Art. 152. *Qualifications*. – No person shall be appointed judge of the *Shari'a* Circuit Court unless he is a natural born citizen of the Philippines, at least twenty-five years of age, and has passed an examination in the *Shari'a* and Islamic jurisprudence (*fiqh*) to be given by the Supreme Court for admission to special membership in the Philippine Bar to practice in the *Shari'a* Courts.

Ultimately, therefore, passing the SSBE has become the doorway to the *Shari'ah* legal profession in the Philippines.

## **MEMBERSHIP IN THE SHARI'AH BAR OF THE PHILIPPINES AND ADMISSION OF A QUALIFIED PERSON AS PEGUAM SYARIE IN MALAYSIA**

In the Philippines, admission to the practice, including membership in the *Shari'ah* bar of the Philippines, is one of the constitutional powers of the Supreme Court. Thus, the *Shari'ah* legal profession in the Philippines is governed by the rules and other Bar matters promulgated by the Supreme Court. Malaysia's *Syarie* legal profession on the other hand is governed by the *Syarie* Legal Profession (Federal Territories) Act 2019 ('2019 Act'). This 2019 Act –

allows for the establishment of a *Syarie* Legal Profession Qualifying Board whose functions as stated in s. 4 are as follows: (a) to determine the qualifications of the persons intending to apply for the admission as a *Pegum Syarie*; and (b) to provide for - (i) the course

<sup>24</sup> CMPL Philippine Islam Series No. 2, vii.

of instruction, training, education, interview and examination by the Board for the persons intending to apply for admission as a *Pegum Syarie*; and (ii) the course of instruction, training and continuous professional development of *Pegum Syarie*.<sup>25</sup>

On March 11, 2014, the Supreme Court *En Banc* formed the 13<sup>th</sup> *Shari'ah* Bar Examinations Investigating Committee which was tasked 'to review the existing rules and guidelines of the Special *Shari'ah* Bar Examinations for *Shari'ah* Courts.<sup>26</sup> Upon the Committee's recommendation, the Supreme Court directed the Office of the Bar Confidant to submit to the investigating committee a proposed guidelines/rules for the *Shari'ah* Bar Examinations, which the Supreme Court *En Banc* later on approved in Bar Matter No. 2716, otherwise known as the Rules for the Special *Shari'ah* Bar Examinations ('Bar Matter No. 2716'). These new Guidelines/Rules were necessary as the old rules, dating back to 1983, 'only provided for those who may be allowed to take the [SSBE], the documents to be submitted in relation thereto, and the subjects covered by the said bar examinations.'<sup>27</sup>

Bar Matter No. 2716 provides for the requirements for admission to the Special *Shari'ah* Bar. Every applicant for admission as a member of the *Shari'ah* Bar:

- 1) Must be a citizen of the Philippines;
- 2) At least twenty-one (21) years of age;
- 3) Of good moral character;
- 4) A resident of the Philippines; and
- 5) Must produce before the Supreme Court satisfactory evidence of good moral character, and that no charges against him, involving

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<sup>25</sup> Professor Dato' Sri Dr Ashgar Ali Ali Mohamed, "Syarie Legal Profession: With Reference to Syarie Legal Profession (Federal Territories) Act 2019," *Current Law Journal* Vol. 4, (2020): 6, <http://irep.iium.edu.my/82207/1/Syarie%20Legal%20Profession%20CLJ.pdf>.

<sup>26</sup> Bar Matter No. 2716 dated July 14, 2015, otherwise known as the Rules for the Special *Shari'ah* Bar Examinations.

<sup>27</sup> See *ibid*.

moral turpitude, have been filed or are pending in any court in the Philippines.<sup>28</sup>

On the other hand, under s. 12(1) of the *Syarie Legal Profession (Federal Territories) Act, 2019* the following are the conditions for the admission of a qualified person<sup>29</sup> as *Pegum Syarie*:

- 1) Any qualified person may apply for an admission as a Pegum Syarie under section 15, if he fulfils the following conditions:
  - a) has attained the age of twenty-one years;
  - b) is a Muslim;
  - c) is either a citizen or permanent resident of Malaysia;
  - d) is of good character;
  - e) has not been convicted in Malaysia or elsewhere of any criminal offence;
  - f) has not been adjudicated as undischarged bankrupt;
  - g) has attended and passed the courses of instruction, training, education, interview or examination prescribed by the Board, where applicable; and
  - h) has served the period of pupillage as required under section 13;
- 2) A State Pegum Syarie may apply for an admission as a Pegum Syarie under section 15 if—
  - a) he fulfils the conditions referred to in paragraph (1)(a) to (g); and
  - b) he has been engaged in active practice as a State Pegum Syarie in any State before he applies for the admission.

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<sup>28</sup> Ibid, Par. IV(A).

<sup>29</sup> Under s. 11 of *Syarie Legal Profession (Federal Territories) 2019 Act*, “qualified person” means any person who— (a) possesses any qualification prescribed by the Board; or (b) is an advocate and solicitor and has any additional qualification in the syariah field or judicial syarie as prescribed under section 12.



Interestingly, a qualified person, with some exemptions,<sup>30</sup> shall, before he is admitted as a *Pegum Syarie*, serve a period of pupillage for six months.<sup>31</sup> This pupillage is not a requirement for admission to the *Shari'ah* legal profession in the Philippines.

### **Educational qualifications**

Under Bar Matter No. 2716, applicants to take the SSBE are categorised into non-lawyers and lawyers. For non-lawyers, the educational qualifications consist of a college degree and completion of the seminar on Islamic Law and Jurisprudence required and authorised by the Supreme Court. College degree holders in Islamic Law and Jurisprudence of Muslim foreign universities are also qualified.<sup>32</sup>

Interestingly, the college degree required of a non-lawyer is not specified. This means that any college degree recognised in the Philippines – whether related or allied to Islamic law and jurisprudence or not – complies with the educational qualification. Inevitably, the inclusion of non-Arabic college degree holders has earned objections from some quarters especially from among the *Ulama* in the Philippines who sometimes refer to this class of examinees as the ‘English’ or ‘Western’ professionals. The objections are anchored on the requirement of reputable knowledge of Islamic law and jurisprudence, which is admittedly needed for one to effectively apply Islamic law. For them, the 45-day seminar training on Islamic law and

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<sup>30</sup> (1) The *Majlis Pegum Syarie* may, on special grounds, allow a pupil to serve his period of pupillage with a *Pegum Syarie* who is practising in other States or has been practising less than seven years.

(2) The *Majlis Pegum Syarie* may allow any qualified person to serve different parts of his period of pupillage with different masters.

(3) The *Majlis Pegum Syarie* may exempt any qualified person who has served as a syariah officer for a period of at least one year from serving any period of pupillage under section 13.

(4) For the purposes of subsection (3), the syariah officer shall submit to the *Majlis Pegum Syarie* a certificate from the Director General of Department of Syariah Judiciary Malaysia or respective head of service, as the case may be, stating his period of service as a syariah officer. [s. 14, *Syarie Legal Profession (Federal Territories) 2019 Act*].

<sup>31</sup> S. 13, *Syarie Legal Profession (Federal Territories) 2019 Act*.

<sup>32</sup> Bar Matter No. 2716, Par. III(A).

jurisprudence is not enough to equip the applicants with sufficient knowledge of *Shari'ah*.

This inadequacy is presumptively not an issue for those college degree holders in Islamic Law and Jurisprudence of Muslim foreign universities. One handicap though that they have to struggle with is their inadequate command of the English legal language. The language of court proceedings and pleadings in the Philippines is English, not Arabic. This is an advantage that 'English' professionals enjoy over the 'Arabic' professionals.

The 'English' professionals who religiously completed the seminar training on Islamic law and jurisprudence may arguably be good enough. The 'Arabic' professionals of Islamic law and jurisprudence are probably better. But most likely the best among them is those 'Arabic' professionals who are also conversant with the English legal language considering that it is the *lingua franca* of the *Shari'ah* court proceedings and pleadings in the Philippines.

For applicants who are regular lawyers, they must be Members of the Integrated Bar of the Philippines who aspire to be appointed to any of the *Shari'ah* Courts.<sup>33</sup> Interestingly, regular lawyers are allowed to practice in the *Shari'ah* Courts even without taking and passing the SSBE. Should they wish though to be appointed as a *Shari'ah* Judge, ideally they should pass the said examinations.

### **Seminar Training requirement**

All applicants shall satisfy the 45-day seminar training requirement under Par. IV(B)(1) of Bar Matter No. 2716, conducted by the National Commission on Muslim Filipinos (NCMF). The training covers the following subjects, which also comprise the SSBE:

- 1) Jurisprudence (*Fiqh*) and Customary Laws (*Adat*);
- 2) Persons, Family Relations and Property;
- 3) Succession, Wills/Adjudication and Settlement of Estates;  
and

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<sup>33</sup> Ibid, Par. III(B).

#### 4) Procedure in *Shari'ah* Courts.<sup>34</sup>

Incidentally, some are raising the issue of propriety of allowing the NCMF, an office in the Executive Department, to participate in matters of the SSBE by mandating it with the conduct of the *Shari'ah* seminar training for applicants to the said examinations. With due respect, the author argues that the issue is misplaced. This is akin to legal education and practice of law in relation to the rule-making power of the Supreme Court concerning admission to the practice of law. According to the Supreme Court in *Oscar B. Pimentel, et. al. v Legal Education Board ('Pimentel v LEB')*,<sup>35</sup> the Court's rule-making power covers the practice of law and not the study of law.<sup>36</sup> The Court emphasised that as a professional educational programme, legal education properly falls within the supervisory and regulatory competency of the state.<sup>37</sup>

By analogy, the conduct of the *Shari'ah* seminar training – to prepare *Shari'ah* bar examinees – is well within the prerogative of the state to be assigned to the NCMF, which is under the Executive Department. Therefore, there is no encroachment on the Supreme Court's rule-making power concerning admission to the practice of law before *Shari'ah* Courts. Thus logically, administering the conduct of the SSBE is assigned by the Supreme Court to the Office of the Bar Confidant.<sup>38</sup> However, administering the conduct of seminar training as a strategy in the study of the *Shari'ah* is a function that was properly included in the mandate of the NCMF.

### **The Special *Shari'ah* Bar Examinations (SSBE)**

Each SSBE begins with the request – of the Secretary/Chief Executive Officer of the National Commission on Muslim Filipinos (NCMF) – for the Supreme Court to authorise the conduct of the said examination.<sup>39</sup> Once so authorised, the Office of the Bar Confidant shall then administer the conduct of the examination.<sup>40</sup>

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<sup>34</sup> See *ibid*, Par. IV(B)(1).

<sup>35</sup> *Pimentel v LEB*, G.R. 230642, September 10, 2019.

<sup>36</sup> See *ibid*, 45.

<sup>37</sup> See *ibid*, 55. [*Boldfacing supplied*].

<sup>38</sup> See Bar Matter No. 2716, Par. I.

<sup>39</sup> See *ibid*, Par. I.

<sup>40</sup> See *ibid*.

The next important phase is the designation of the Chairman/Chairperson of the SSBE. For this purpose, the Secretary/CEO of the NCMF shall submit to the Supreme Court a list of at least five (5) names of people for possible appointment as overall Chairman/Chairperson, usually a Muslim Justice of Court of Appeals or Judge of a *Shari'ah* Court, in every SSBE, not later than six (6) months before the scheduled examinations.<sup>41</sup>

One of the crucial functions of the Chairman/Chairperson is to designate examiners in the four subjects comprising the SSBE. Undoubtedly, the quality of the SSBE as a test depends largely on the Chairman/Chairperson and the examiners he selects for each of the four subjects.

The language used in the SSBE is either English or Arabic. Arabic can be used by examinees who are more conversant in Arabic than English such as non-lawyers who are graduates of Muslim foreign universities. The use of Arabic though requires the appointment of translators. Noticeably, Bar Matter No. 2716 did not provide for the qualifications of the translator. Thus, it seems that the minimum qualification for a translator is literacy in both English and Arabic. However, mere literacy in both languages may not be sufficient in order to meet the idiosyncrasies of legal language from the perspective of both English and Arabic. Inaccurate translations may lead to wrong contexts or an entirely wrong question. Any disconnect between the actual questions in English and the translated questions in Arabic will definitely result in inaccurate answers on the part of the examinees who are answering in Arabic. For these reasons, this author submits that mere literacy in both English and Arabic should not be the threshold in the qualification of the translator. The translator should have the competence to distinguish between layman English or Arabic on one hand and legal English or Arabic on the other hand.

### **Counselor-at-Law: Definition and its implications**

After the candidate hurdles the SSBE, takes the Oath and signs the Roll, his admission to the *Shari'ah* Bar of the Philippines is complete and he is now authorised to use the title of Counselor-at-Law. As such, he can practice before the *Shari'ah* Courts or be appointed as a judge or a

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<sup>41</sup> Ibid, Par. VI.

clerk, subject to the other qualifications prescribed for these positions in the judiciary.

However, in the Philippines, a Counselor-at-Law cannot be equated with 'Attorney' or a regular member of the Philippine Bar. In *Alawi v Alauya*,<sup>42</sup> the Supreme Court of the Philippines declared that:

[P]ersons who pass the Shari'a Bar are not full-fledged members of the Philippine Bar, hence may only practice law before Shari'a courts. While one who has been admitted to the Shari'a Bar, and one who has been admitted to the Philippine Bar, may both be considered "counsellors," in the sense that they give counsel or advice in a professional capacity, only the latter is an "attorney."

Consequently, '[c]onsidering ... that a person who has passed the *Shari'ah* Bar Examination is only a special member of the Philippine Bar and not a full-fledged member thereof even if he holds a Bachelor of Laws Degree, he is not qualified to practice law before the regular courts.'<sup>43</sup> Further, 'since a person who has passed the *Shari'ah* Bar Examination does not automatically become a regular member of the Philippine Bar, he lacks the necessary qualification to be appointed a notary public.'<sup>44</sup>

Moreover, it is submitted that Counselors-at-Law are not covered by Rule 139-B on Disbarment and Discipline of Attorneys of the Rules of Court of the Philippines, which provides in Section 1 that:

Proceedings for disbarment, suspension or discipline of attorneys may be taken by the Supreme Court, *motu proprio*, or by the Integrated Bar of the Philippines (IBP) upon the verified person of any person.<sup>45</sup>

Nevertheless, the Supreme Court's disciplinary authority over Counselors-at-Law is inherent to the Court's constitutional power to

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<sup>42</sup> *Sophia Alawi v Ashary M. Alauya, Clerk of Court VI, Shari'ah District Court, Marawi City*, A.M. SDC-97-2-P. February 24, 1997.

<sup>43</sup> In the Matter of Petition to authorize Sharia'h District Court Judges to Appoint Shari'a Lawyers as Notaries Public, Atty. Royo M. Gampong, petitioner) Bar Matter No. 702, May 12, 1994.

<sup>44</sup> Ibid.

<sup>45</sup> Section 1, Rule 139-B, Rules of Court of the Philippines. [*Boldfacing and underscoring supplied*].

‘promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged.’<sup>46</sup>

For the same reasons, this article also submits that Counselors-at-Law are not covered by Bar Matter No. 850,<sup>47</sup> which institutionalised the Mandatory Continuing Legal Education (MCLE) for members of the IBP. They are likewise not required to pay the IBP annual dues.

### **SHARI’AH COURTS IN THE PHILIPPINES**

The three levels of *Shari’ah* Courts in the Philippines before which Counselors-at-Law can practice are the *Shari’ah* District Courts (SDC) and *Shari’ah* Circuit Courts (SCC) established under the Muslim Code<sup>48</sup> and the *Shari’ah* High Court (SHC) which, though already created under the BOL, is yet to be organized.<sup>49</sup> These courts and the personnel thereof are subject to the administrative supervision of the Supreme Court.<sup>50</sup>

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<sup>46</sup> Section 5(5), Article VIII, 1987 Constitution of the Philippines.

<sup>47</sup> Bar Matter No. 850, RE: Mandatory Continuing Legal Education Resolution Adopting the Revised Rules on The Continuing Legal Education for Members of The Integrated Bar of The Philippines.

<sup>48</sup> Art. 137. *Creation.* – There are hereby created, as part of the judicial system, courts of limited jurisdiction, to be known respectively as *Shari’a* District Courts and *Shari’a* Circuit Courts, which shall exercise powers and functions in accordance with this Title. *Shari’a* courts and the personnel thereof shall be subject to the administrative supervision of the Supreme Court. [Article 137, Muslim Code].

<sup>49</sup> SEC. 7. *Shari’ah High Court.* – There is hereby created within the Bangsamoro territorial jurisdiction, as part of the Philippine judicial system, a *Shari’ah* High Court. [Article X, Section 7, *Bangsamoro Organic Law*]. The repealed Republic Act No. 9054 (old Organic Act of ARMM) established the *Shari’ah* Appellate Court but this court was never organized and did not become operational.

<sup>50</sup> See Art 137, Muslim Code; Article X, Section 2, *Bangsamoro Organic Law*.

## Nature of *Shari'ah* Courts

The Philippine *Shari'ah* courts have been previously described as follows:

Unlike the *Shari'ah* courts in other jurisdictions like Malaysia, the Philippine *Shari'ah* Courts owe their creation not to a specific provision of the Philippine Constitution. Further, their jurisdiction is not defined in the Constitution itself. It is the Congress of the Philippines which has the power to define, prescribe, and apportion the jurisdiction of various courts in the Philippines. Against this backdrop, Philippine *Shari'ah* Courts are truly inferior courts the exercise of whose jurisdiction or judgment is correctible by the Supreme Court under the Philippine Constitution.<sup>51</sup>

There has also been a question as to whether *Shari'ah* Courts are regular courts or not. On this point the Supreme Court has made conflicting pronouncements. In *Republic of the Philippines v Hon. Maximiano C. Asuncion, et. al.* (*'Republic v Asuncion'*)<sup>52</sup> decided in March 11, 1994, the Court pointed out that *Shari'ah* Courts are regular courts. The relevant pronouncement follows.

*Regular courts* are those within the judicial department of the government, namely, the Supreme Court and such lower courts as may be established by law... [S]uch lower courts "include the Court of Appeals, Sandiganbayan, Court of Tax Appeals, Regional Trial Courts, *Shari'ah* District Courts, Metropolitan Trial Courts, Municipal Trial Court, Municipal Circuit Trial Courts, and *Shari'ah* Circuit Courts."<sup>53</sup>

However, in Bar Matter No. 702<sup>54</sup> decided just two months later or on May 12, 1994, the Court held that:

Strictly speaking, *Shari'ah* District Courts do not form part of the integrated judicial system of the Philippines. Section 2 of the Judiciary Reorganization Acts of 1980 (B.P. Blg. 129) enumerates the courts covered by the Act, comprising the integrated judicial system. *Shari'ah* Courts are not included in the enumeration notwithstanding that, when said B.P. Blg. 129 took effect on August

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<sup>51</sup> Barodi, 85.

<sup>52</sup> *Republic v Asuncion*, G.R. No. L-108208 March 11, 1994.

<sup>53</sup> Ibid. [*Boldfacing supplied*].

<sup>54</sup> Bar Matter No. 702, In the Matter of the Petition to Authorize Shari'a District Judges to Appoint Shari'a Lawyers as Notaries Public, en banc, 12 May 1994. [*Boldfacing supplied*].

14, 1981, P.D. No. 1083 (otherwise known as "Code of Muslim Personal Laws of the Philippines") was already in force. The *Shari'ah* Courts are mentioned in Section 45 of the Act only for the purpose of including them "in the funding appropriations."

The fact that judges thereof are required by law to possess the same qualifications as those of Regional Trial Courts does not signify that the *Shari'ah* Court is a regular court like the Regional Trial Court. The latter is a court of general jurisdiction, *i.e.*, competent to decide all cases, civil and criminal, within its jurisdiction. A *Shari'ah* District Court, created pursuant to Article 137 of Presidential Decree No. 1083, is a court of limited jurisdiction, exercising original only over cases specifically enumerated in Article 143 thereof. In other words, a *Shari'ah* District Court is not a regular court exercising general jurisdiction within the meaning of Section 232 of the Notarial Law.

The fact, too, that *Shari'ah* Courts are called "courts" does not imply that they are on equal footing or are identical with regular courts, for the word "court" may be applied to tribunals which are not actually judicial in character, but are quasi-judicial agencies, like the Securities and Exchange Commission, Land Registration Authority, Social Security Commission, Civil Aeronautics Boards, Bureau of Patents, Trademark and Technology, Energy Regulatory Board, etc.

Moreover, decisions of the *Shari'ah* District Courts are not elevated to this Court by appeal under Rule 41, or by petition for review under Rule 45, of the Rules of Court. Their decisions are final "whether on appeal from the *Shari'ah* Circuit Court or not" and hence, may reach this Court only by way of a special civil action under Rule 65 of the Rules of Court, similar to those of the National Labor Relations Commission, or the Central Board of Assessment Appeals.<sup>55</sup>

Yet in the 'The Judiciary Annual Report (2015-2016)' which is an official document of the Supreme Court, the fact that *Shari'ah* Courts are considered as regular courts was reiterated in the following statements:

The *Shari'ah* courts are courts with a limited and special jurisdiction to hear and decide cases and administer justice for the country's Muslim population in accordance with the Muslim Code of Personal Laws. Even with limited and special jurisdiction, they are

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<sup>55</sup> Ibid. [*Boldfacing supplied*].



considered regular courts, as pointed out in *Republic v. Hon. Asuncion* (GR 108208, March 11, 1994).<sup>56</sup>

Conflicting as they are, nonetheless the pronouncements of the Court in *Republic v Asuncion* and Bar Matter No. 702 can actually be reconciled. *Shari'ah* Courts, in the context of Bar Matter No. 702, are not regular courts in the sense that unlike the regular Regional Trial Courts which are courts of general jurisdiction, *Shari'ah* Courts are courts of limited and special jurisdiction. However, in the context of *Republic v Asuncion*, *Shari'ah* Courts are regular courts because they are courts 'within the judicial department'.

Parenthetically, the reference of the Court in Bar Matter No. 702 to the term 'court' as applicable as well to tribunals 'which are not actually judicial in character', while correct in context vis-à-vis quasi-judicial agencies, is yet an inaccurate insinuation vis-à-vis *Shari'ah* Courts. This is because *Shari'ah* Courts are not quasi-judicial tribunals. *Shari'ah* Courts are courts which are exercising judicial power. The Muslim Code is unmistakable on this point in that '[t]he judicial function in the *Shari'a* District Courts shall be vested in *Shari'a* District judges'.<sup>57</sup> Only a regular court can exercise judicial power as the Philippine Constitution is also unmistakable on this point under Section 1, Article VIII, which says, '[t]he judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.'<sup>58</sup> Examples of these 'lower courts' established by law are the *Shari'ah* Courts.

Further, the reasoning of the Court in Bar Matter No. 702 – decisions of the SDCs are not elevated to this Court by appeal under Rule 41, or by petition for review under Rule 45, of the Rules of Court – is no longer accurate in view of the recent development in jurisprudence. In *Mendez v Shari'a District Court*,<sup>59</sup> the Court held that decisions of the SDCs can be elevated to the Supreme Court via petition

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<sup>56</sup> The Judiciary Annual Report (2015-2016), 49. [*Boldfacing supplied*].

<sup>57</sup> Article 139, Muslim Code. [*Boldfacing supplied*].

<sup>58</sup> *Boldfacing supplied*.

<sup>59</sup> *Sheryl M. Mendez v. Shari'a District Court, 5<sup>th</sup> Shari'a District, Cotabato City, Rasad G. Balindong (Acting Presiding Judge); 1<sup>st</sup> Shari'a Circuit Court, 5<sup>th</sup> Shari'a District, Cotabato City, Montano K. Kalimpo (Presiding Judge); and Dr. John O. Maliga, G.R. No. 201614, January 12, 2016.*

for review on *certiorari* under Rule 45<sup>60</sup> of the Rules of Court for cases where only errors or questions of law are raised or involved.<sup>61</sup>

### **Jurisdiction of *Shari'ah* Courts under the Muslim Code as amended<sup>62</sup>**

The *Shari'ah* Courts are conferred on jurisdiction classified into (a) exclusive original jurisdiction, b) concurrent original jurisdiction, and (c) appellate jurisdiction (for SDCs).

‘Original jurisdiction means jurisdiction to take cognizance of a cause at its inception, try it and pass judgment upon the law and facts, while exclusive jurisdiction precludes the idea of co-existence and refers to jurisdiction possessed to the exclusion of others.’<sup>63</sup> Stated differently, original jurisdiction is ‘the power of the court to take judicial cognizance of a case instituted for judicial action for the first time under conditions provided by law’<sup>64</sup> and exclusive jurisdiction is ‘the power to adjudicate a controversy to the exclusion of all other courts at that stage.’<sup>65</sup>

Concurrent jurisdiction, ‘also called ‘coordinate’ jurisdiction, is the power of different courts to take cognizance of the same subject matter.’<sup>66</sup> ‘Where there is concurrent jurisdiction, the court first taking cognizance of the case assumes jurisdiction to the exclusion of the

<sup>60</sup> Appeal by *Certiorari* to the Supreme Court by way of a verified petition raising only questions of law which must be distinctly set forth.

<sup>61</sup> See *Mendez v Shari'a District Court*.

<sup>62</sup> “Upon the ratification of this Organic Law, the pertinent provisions of the following laws which are inconsistent with this Organic Law are hereby amended accordingly: ... (d) Articles 140, 143, 152, 153, 154, 164, 165, 166, 167 and 168 of Presidential Decree No. 1083, or the “Code of Muslim Personal Laws of the Philippines” [s. 4(d), A18 *BOL* 2018 (Philippines)].

<sup>63</sup> Willard B. Riano, *Civil Procedure (A Restatement for the Bar)* (Quezon City: Rex Bookstore, 2007), 36, citing *Cubero v Laguna West Multi-Purpose Cooperatives, Inc.*, G.R. No. 166833, December 5, 2006.

<sup>64</sup> Mangontawar M. Gubat, *Reviewer in Procedure and Evidence Governing Philippine Shari'a Courts* (Marawi City: Mangontawar M. Gubat, 2012), 16, citing *Garcia vs. De Jesus*, 206 SCRA 779, 786.

<sup>65</sup> *Ibid*, 16.

<sup>66</sup> Willard B. Riano, *Civil Procedure (A Restatement for the Bar)*, 36.

other courts.’<sup>67</sup> It has also been defined as ‘the power conferred upon different courts, whether of the same or different ranks, to take judicial cognizance at the same stage of the same case in the same or different judicial territories.’<sup>68</sup> The jurisdiction of the SDC<sup>69</sup> is laid down as follows:

The *Shari'ah* District Courts in the Bangsamoro Autonomous Region shall exercise exclusive original jurisdiction over the following cases where either or both of the parties are Muslims: *Provided*, That the non- Muslim party voluntarily submits to its jurisdiction:

- a) All cases involving custody, guardianship, legitimacy, and paternity and filiation arising under Presidential Decree No. 1083;
- b) All cases involving disposition, distribution, and settlement of the estate of deceased Muslims who were residents of the Bangsamoro Autonomous Region, the 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) Petitions for the declaration of absence and death for the cancellation or correction of entries in the Muslim Registries mentioned in Title VI of Book Two of Presidential Decree No. 1083;
- d) All actions arising from customary and *Shari'ah* compliant contracts in which the parties are Muslims, if they have not specified which law shall govern their relations;
- e) All petitions for *mandamus*, prohibition, injunction, *certiorari*, *habeas corpus*, and all other auxiliary writs and processes;
- f) Petitions for the constitution of a family home, change of name, and commitment of an insane person to an asylum;
- g) All other personal and real actions not falling under the jurisdiction of the *Shari'ah* Circuit Courts wherein the parties

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<sup>67</sup> Ibid.

<sup>68</sup> Mangontawar M. Gubat, *Procedure and Evidence Governing Philippine Shari'a Courts*, 16.

<sup>69</sup> Section 6, Article X, BOL.

involved are Muslims, except those for forcible entry and unlawful detainer, which shall fall under the exclusive original jurisdiction of the Municipal Trial Court;

- h) All special civil actions for interpleader or declaratory relief wherein the parties are Muslims residing in the Bangsamoro Autonomous Region or the property involved belongs exclusively to Muslims and is located in the Bangsamoro Autonomous Region;
- i) All civil actions under *Shari'ah* law enacted by the Parliament involving real property in the Bangsamoro Autonomous Region where the assessed value of the property exceeds Four hundred thousand pesos (P400,000.00); and
- j) All civil actions, if they have not specified in an agreement which law shall govern their relations where the demand or claim exceeds Two hundred thousand pesos (P200,000.00).

The *Shari'ah* District Court in the Bangsamoro Autonomous Region shall exercise appellate jurisdiction over all cases decided upon by the *Shari'ah* Circuit Courts in the Bangsamoro Autonomous Region within its territorial jurisdiction, as provided under Article 144 of Presidential Decree No. 1083, as amended.

Interestingly, while the amendatory clause of the BOL (s 4(d), A18) expressly amends Article 143 of the Muslim Code (original jurisdiction of SDC), Article 155 of the Muslim Code (jurisdiction of SCC) was not included in the enumeration of provisions amended. As it stands under the Muslim Code, the SCCs shall have exclusive original jurisdiction over:

- 1) All cases involving offenses defined and punished under this Code.
- 2) All civil actions and proceedings between parties who are Muslims or have been married in accordance with Article 13 involving disputes relating to:
  - a) Marriage;
  - b) Divorce recognized under this Code;
  - c) Betrothal or breach of contract to marry;
  - d) Customary dower (*mahr*);

- e) Disposition and distribution of property upon divorce;
  - f) Maintenance and support, and consolatory gifts, (*mut'a*); and
  - g) Restitution of marital rights.
- 3) All cases involving disputes relative to communal properties.<sup>70</sup>

Nonetheless, the BOL provides for the jurisdiction of SCCs<sup>71</sup> in the Bangsamoro Autonomous Region as follows:

The *Shari'ah* Circuit Courts in the Bangsamoro Autonomous Region shall exercise exclusive original jurisdiction over the following cases where either or both of the parties are Muslims: *Provided*, That the non-Muslim party voluntarily submits to its jurisdiction:

- a) All cases involving offenses defined and punished under Presidential Decree No. 1083, where the act or omission has been committed in the Bangsamoro Autonomous Region;
- b) All civil actions and proceedings between parties residing in the Bangsamoro Autonomous Region who are Muslims or have been married in accordance with Article 13 of Presidential Decree No. 1083, involving disputes relating to:
  - i. Marriage;
  - ii. Divorce;
  - iii. Betrothal or breach of contract to marry;
  - iv. Customary dower or *mahr*;
  - v. Disposition and distribution of property upon divorce;
  - vi. Maintenance and support, and consolatory gifts;
  - vii. Restitution of marital rights;
- c) All cases involving disputes relative to communal properties;
- d) All cases involving *ta'zir* offenses defined and punishable under *Shari'ah* law enacted by the Parliament where

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<sup>70</sup> Ibid, Article 155.

<sup>71</sup> Section 5, Article X, BOL.

punishable by *arresto menor* or the corresponding fine, or both;

- e) All civil actions under *Shari'ah* law enacted by the Parliament involving real property in the Bangsamoro Autonomous Region where the assessed value of the property does not exceed Four hundred thousand pesos (P400,000.00); and
- f) All civil actions, if they have not specified in an agreement which law shall govern their relations, where the demand or claim does not exceed Two hundred thousand pesos (P200,000.00).

It is readily noticeable that the BOL has expanded the jurisdiction of the *Shari'ah* Courts in the BARMM.

## FEATURES OF PRACTICE BEFORE *SHARI'AH* COURTS

### *A Shari'ah Court functions as a court*

'A court is an organ of government belonging to the judicial department, the function of which is the application of the laws to controversies brought before it as well as the public administration of justice.'<sup>72</sup> 'Courts exist to promote justice'<sup>73</sup> and 'are established to adjudicate peacefully the controversies between individual parties for the ascertainment, enforcement and redress of private rights, or for the punishment of wrongs done to the public.'<sup>74</sup> How the civil courts operate and function based on the foregoing descriptions is generally similar with the *Shari'ah* Courts in the Philippines. Both courts share commonalities in the intricacies of court proceedings and the administration and promotion of justice in general. The civil courts exist as instruments for this ultimate purpose and so are *Shari'ah* courts. For this reason, the following observation on *Shari'ah* Courts in Malaysia is also true of the *Shari'ah* Courts in the Philippines, viz:

Philosophically, the *Shariah* Court is a place to abolish persecution and cruelty and ultimately to uphold justice. The function of the

<sup>72</sup> Willard B. Riano, *Civil Procedure (A Restatement for the Bar)*, 356.

<sup>73</sup> Ernesto L. Pineda, *Legal and Judicial Ethics* (Quezon City: Central Professional Books, 1999), 367, citing *Cuaresma v Enriquez*, 248 SCRA 454.

<sup>74</sup> *Ibid*, 367, citing *Black's Law Dictionary*, 6<sup>th</sup> Edition, p. 353.

*Shariah* Court will always be as an institution for the upholding of truth and justice in a professional, effective, efficient and modern manner. The *Shariah Court* is a place to dispense justice according to *hukum syara'*. However, *hukum syara'* in the context of Malaysia means Islamic law which has been defined according to the specific jurisdiction by virtue of the Federal Constitution of Malaysia. The *Shariah* Court, just like any other court in Malaysia, is a place to administer justice and to have a proper trial in a court. A trial is a process that would take longer time and needs to follow certain court procedures.<sup>75</sup>

While *Shari'ah* Courts are governed by the Special Rules of Procedure in the *Shari'ah* Courts,<sup>76</sup> the Rules of Court of the Philippines applies in a suppletory manner. Thus, courtroom formalities and basic common rules governing civil courts are likewise observed in *Shari'ah* Courts.

### **Advantages and Handicaps of 'English' and 'Arabic' professionals**

The ability to litigate in accordance with procedure is an indispensable competency in the practice of law. Without familiarity with procedure, non-JDs and the 'Arabic' professionals find it difficult to flourish in practice before *Shari'ah* Courts. This handicap discourages them to engage in such practice. On the other hand, knowledge of *fiqh* is also an indispensable competency that a *Shari'ah* practitioner must possess in the practice of law before *Shari'ah* Courts. 'Arabic' professionals are more capable of relating scholarly works and standard treatises on Islamic law and jurisprudence (*fiqh*) from the original sources in Arabic. Therefore, this is an advantage that they enjoy over the so called 'English' professionals who are not so conversant with *fiqh*. Thus, their ability to litigate before *Shari'ah* Courts in terms of the substantive aspects of Islamic law and jurisprudence would be more effective and authoritative.

These relative advantages and handicaps of either 'English' or 'Arabic' *Shari'ah* practitioners are matters that should prompt the

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<sup>75</sup> Ramizah Wan Muhammad, "The Theory and Practice of Sulh (Mediation) in the Malaysian Shariah Court," *International Islamic University Malaysia Law Journal* Vol. 16 No. 1, (2008): 39, <https://doi.org/10.31436/iiumlj.v16i1.42>.

<sup>76</sup> *Special Rules of Procedure governing the Shari'ah Courts (Ijra-at al Mahakim al Shari'a)* En Banc Resolution, September 20, 1983.

Supreme Court to rethink the relative weight assigned to each subject in the SSBE and the National Commission on Muslim Filipinos, to adjust accordingly the time allotted to each subject during the *Shari'ah* seminar training. At present, the relative weights of the four subjects in the SSBE are distributed as follows:

Shari'ah Bar subject	Relative weight
1. Persons, Family Relations and Property	35%
2. Succession, Wills/Adjudication and Settlement of Estates	35%
3. Jurisprudence ( <i>Fiqh</i> ) and Customary Laws ( <i>Adat</i> )	15%
4. Procedure in <i>Shari'ah</i> Courts	15%

*Fiqh* and Procedure (15% each in relative weight) are the same subjects where the 'English' or the 'Arabic' professionals, respectively, are arguably weak. There are two tendencies in the approach of examinees vis-à-vis these two subjects. The first tendency is that, since the two subjects have lesser relative weights in the overall score to pass<sup>77</sup> the examinations, both categories of examinees will give inadequate attention to these important subjects. This may compromise the relevant competencies in Jurisprudence (*fiqh*) and Customary Laws (*Adat*) or Procedure in *Shari'ah* Courts, which *Shari'ah* bar exam passers need in their practice of law.

The second tendency is that since Jurisprudence (*fiqh*) and Customary Laws (*Adat*) and Procedure in *Shari'ah* Courts are, respectively, the weakness of the 'English' and 'Arabic' professionals, then both categories of examinees will give excessive attention to the same subjects at the expense of the other two major subjects – Persons, Family Relations and Property and Succession, Wills/Adjudication and

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<sup>77</sup> The passing score in the Special *Shari'ah* Bar Examinations is at least an over-all average of 75% with no subject getting a score of below 50, for it will result in automatic disqualification even if the resulting over-all average reaches the passing mark of 75%.



Settlement of Estate – which are the core or essence of the Muslim Code.

### **Few cases for litigation in the *Shari'ah* Courts**

*Shari'ah* Courts are courts of limited and special jurisdiction. They exercise jurisdiction only over a number of cases as opposed to regular courts with general jurisdiction over civil, criminal, commercial, electoral, environmental and other categories of cases. *Shari'ah* Courts exercise jurisdiction over cases that are related to Muslim personal laws only. Besides, there are cases which although are within the *Shari'ah* Courts' original jurisdiction, are also concurrent with civil courts. In other words, parties sometimes opt to litigate their cases in the civil courts instead of the *Shari'ah* Courts.

Moreover, almost all the *Shari'ah* Courts in the Philippines are stationed in the core territory of the autonomous region in Muslim Mindanao which consists of five provinces only. This means that the geographical ground from which cases may emanate is also limited. Further, the customary laws of Philippine Muslims also contribute to the relatively few dockets of the *Shari'ah* Courts. This is because of the existing mechanisms for amicable settlement in the customs of the local population including arbitration and mediation. In fact, the *Shari'ah* Courts are authorised to constitute, in appropriate cases, what the Muslim Code calls as *Agama* Arbitration Council.<sup>78</sup> This council serves as a mechanism for possible settlement of appropriate cases without going to a full-blown trial. All this contribute to the relatively few dockets of the *Shari'ah* Courts.

However, it is by no means insinuated here that the relatively few dockets of the *Shari'ah* Courts should be viewed as discouraging. This phenomenon has to be taken at its face value. Courts are passive tribunals. When their jurisdiction is not invoked by the filing of the necessary pleadings, courts cannot *motu proprio* take cognisance of a case no matter how manifest the facts are outside the court. If parties

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<sup>78</sup> Art. 160. *Constitution*. – The *Sharī'a* District Court or the *Sharī'a* Circuit Court may, in appropriate cases, constitute an *Agama* Arbitration Council in the manner specified in this Title. [Article 160, Muslim Code].

settle amicably without court litigation, courts have no prerogative to interfere on their own initiative.

## **FEATURES OF THE BANGSAMORO ORGANIC LAW (BOL) ON BANGSAMORO JUSTICE SYSTEM**

The establishment of the Bangsamoro Autonomous Region in Muslim Mindanao ('BARMM') carried with it substantial features that characterise the Bangsamoro justice system, which this author believes should ideally be a pillar of the autonomous status of the Bangsamoro region. Some of these substantial features are as follows:

- 1) One of the matters over which the Bangsamoro government shall exercise its authority is the administration of justice.<sup>79</sup>
- 2) The Congress of the Philippines may create *Shari'ah* courts outside the BARMM.<sup>80</sup> The Parliament has been given the power to enact laws pertaining to *Shari'ah*.<sup>81</sup>
- 3) The jurisdiction of the *Shari'ah* Courts in the BARMM has also been expanded.<sup>82</sup>
- 4) The creation of the *Shari'ah* High Court is also mandated.<sup>83</sup>
- 5) Modifications were introduced in the qualifications of *Shari'ah* judges.<sup>84</sup>
- 6) Gesture of integration of the *Shari'ah* Bar.<sup>85</sup>
- 7) The Parliament may create new offices pertaining to the Bangsamoro justice system.<sup>86</sup>

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<sup>79</sup> See BOL, Article V, Section 2(a).

<sup>80</sup> See *ibid*, Article X, Section 2.

<sup>81</sup> See *ibid*, Article X, Section 4.

<sup>82</sup> See *ibid*, Article X, Sections 5-6.

<sup>83</sup> See *ibid*, Article X, Section 7.

<sup>84</sup> See *ibid*, Article X, Section 8.

<sup>85</sup> See *ibid*, Article X, Section 15.

<sup>86</sup> See *ibid*, Article X, Section 16.

### **Creation of *Shari'ah* courts outside the BARMM**

The creation of *Shari'ah* Courts in areas outside the autonomous region is just a matter of time. The growing number of Muslims residing in major metropolitan areas in the Philippines is real and it is happening. The number of non-Muslims converting to Islam is increasing at a fast pace. The crucial role of *Shari'ah* Courts in the generation of true understanding of *Shari'ah* from the outlook of non-Muslim observers is manifest. The existence of *Shari'ah* courts in non-Muslim areas, it is hoped, would be a healthy sign of peaceful co-existence between the non-Muslims and the Muslims. These circumstances are precisely the factors that may encourage the Congress of the Philippines to create *Shari'ah* Courts outside the Bangsamoro autonomous region.

### **Enactment of laws pertaining to *Shari'ah***

The power of the Bangsamoro Parliament to enact laws on personal, family, and property law jurisdiction is a welcome development that signifies that the 'Muslim Code is not beyond improvement.'<sup>87</sup> Nevertheless, the author believes that it is the following provision that has tremendous implication on the *Shari'ah* legal profession in the Philippines:

The Parliament has the power to enact laws governing commercial and other civil actions not provided for under Presidential Decree No. 1083, as amended, or the "Code of Muslim Personal Laws of the Philippines," and criminal jurisdiction on minor offenses punishable by *arresto menor* or *ta'zir* which must be equivalent to *arresto menor*, or fines commensurate to the offense.<sup>88</sup>

This provision is one big leap from the regime of the Muslim Code. The power to enact 'laws governing commercial and other civil actions' is practically giving a key to enter the vast expanse of commercial law and civil law albeit from a *Shari'ah* perspective. Personal and family law, which is the primary theme of the Muslim Code, is just one of the components of civil law. The other major components of civil law are the laws of obligations and contracts, succession and property. Further, in its own right, commercial or

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<sup>87</sup> CMPL Philippine Islam Series No. 2, 56.

<sup>88</sup> Article X, Section 4, Bangsamoro Organic Law.

mercantile law is also broad. With the trending acceptability of Islamic finance and *Shari'ah*-compliant doing of business, it is just a matter of time before the Parliament will find itself preoccupied with enacting laws for BARMM to respond to and benefit from commerce in the autonomous region.

This provision also empowers the Parliament to enact laws on criminal jurisdiction on *ta'zir* which has to be limited to minor offenses. No matter how insignificant it might be compared to criminal law in general, this should be viewed as a big step forward for the autonomous government. It signals the recognition of Islamic penal law concepts in the Philippines. Such recognition is the first step towards more elaboration in the future.

### **The creation of the *Shari'ah* High Court**

The SHC is a major feature of the Bangsamoro justice system. While it is yet to be organised, it is arguably a modest improvement of its precursor, the *Shari'ah* Appellate Court, which never became operational under the defunct autonomous government. Whereas the SHC shall be composed of five justices including the Presiding Justice,<sup>89</sup> the *Shari'ah* Appellate Court was to be composed only of three justices including the Presiding Justice. Whereas the SHC now has exclusive original jurisdiction over all actions for the annulment of judgments of SDCs,<sup>90</sup> the *Shari'ah* Appellate Court did not have that jurisdiction. The appellate jurisdiction of the SHC and the nature of its decisions are governed by the following provisions:

The *Shari'ah* High Court shall exercise exclusive appellate jurisdiction over cases under the jurisdiction of the *Shari'ah* District Courts within or outside the Bangsamoro Autonomous Region.

The decisions of the *Shari'ah* High Court shall be final and executory except on questions of law which may be raised before the Supreme Court following the procedure for appeal from the Court of Appeals to the Supreme Court.<sup>91</sup>

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<sup>89</sup> Article X, Section 9, Bangsamoro Organic Law.

<sup>90</sup> Ibid, Article X, Section 7.

<sup>91</sup> Ibid.

### Qualifications of *Shari'ah* judges under the BOL

The provisions on the Bangsamoro justice system in connection with the qualifications of *Shari'ah* judges have one common contentious aspect, *i.e.*, the qualification that the person to be appointed as *Shari'ah* judge must be a regular member of the Philippine Bar.<sup>92</sup> The qualification under the Muslim Code that the judge must pass the SSBE has been omitted. This means that only a regular member of the Philippine Bar can be appointed as *Shari'ah* Judge.

Another qualification of a *Shari'ah* judge which is prescribed in the BOL but not in the Muslim Code is the qualification of being 'a Muslim'.<sup>93</sup> This provision in the BOL puts closure to the remote possibility of a non-Muslim being appointed as *Shari'ah* judge under the Muslim Code which, to note, did not prescribe this qualification.

In addition, under the BOL the person to be appointed as *Shari'ah* judge must have 'completed at least two (2) years of *Shari'ah* or Islamic Jurisprudence'.<sup>94</sup> This ensures that the *Shari'ah* judge to be appointed has an academic background in *Shari'ah* or Islamic jurisprudence other than the 45-day seminar training conducted by the NCMF.

### Gesture of integration of the *Shari'ah* Bar

Section 15, Article X of the BOL signals the integration, sooner or later, of the *Shari'ah* Bar.

SEC. 15. *Bangsamoro Shari'ah Integrated Bar.* – The Supreme Court may adopt the rules for the integration of the *Shari'ah* Bar under such conditions as it shall see fit in order to raise the standards of the profession and improve the administration of justice in the Bangsamoro Autonomous Region.

This provision supplies the organic basis for the integration of the Philippine *Shari'ah* Bar. It indicates the authority that can facilitate the integration, what the conditions are, and how the integration can be done. Pursuant to the provision, the Supreme Court of the Philippines has authority over the following: (1) the integration of the Philippine

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<sup>92</sup> Ibid, Article X, Section 8.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

*Shari'ah* Bar, (2) the adoption of rules for such integration, and (3) the conditions of the integration. This provision also indicates the two (2) purposes of the integration, *i.e.*, (a) in order to raise the standards of the profession and (b) in order to improve the administration of justice in the Bangsamoro Autonomous Region.

### **Creation of new offices pertaining to the Bangsamoro justice system.**

Under Sec. 16, Art. X, the Parliament may create several offices that pertain to the justice system in the Bangsamoro Autonomous Region. These offices include a *Shari'ah* public assistance office, a *Shari'ah* special prosecution service, a *Shari'ah* academy, and the Office of the Jurisconsult of Islamic Law. As the BOL was ratified only in 2019 and the BARMM is still in its transition period, only the Office of the Jurisconsult of Islamic Law was created from among these offices as of this writing.

### **BANGSAMORO JUSTICE SYSTEM'S IMPLICATIONS ON THE *SHARI'AH* LEGAL PROFESSION IN THE PHILIPPINES**

There are several implications of the Bangsamoro justice system on the *Shari'ah* legal profession in the Philippines. First, the possible creation of *Shari'ah* Courts outside BARMM and the expansion of their jurisdiction will expand the areas where Counselors-at-Law can practice law thereby broadening their client base and increasing the demand for their services. However, this development also brings with it the corresponding responsibility of Counselors-at-Law to enhance their litigation skills on cases or actions which they have not usually handled in the *Shari'ah* courts.

Second, as the Parliament is given the power to enact laws pertaining to *Shari'ah*, particularly on commercial and other civil actions and *ta'zir* penal legislation, Counselors-at-Law would have to include in their role the shaping of these laws. Certainly, every law to be passed by the Parliament in this context would affect the *Shari'ah* practitioners. As this corpus of laws grows amidst emerging trends like Islamic finance, so is the extent of the practice of law of the

Counselors-at-Law. This would mean that *Shari'ah* practitioners have to develop competencies, which are necessary in these emerging trends.

Third, the requirement that only a regular lawyer can be appointed as *Shari'ah* judge will stimulate the emergence of practitioners or legal professionals who have competencies in both the *Shari'ah* and Philippine law. These are the kind of skilled legal service providers that will dominate in areas of practice where Islamic law blends with other legal traditions and vice versa, *e.g.*, Islamic banking and finance and *halal* industry. Thus, what is viewed as emasculating the *Shari'ah* legal profession could eventually be the very impetus for its upgrading. If Counselors-at-Law pursue the path to become full-fledged members of the Philippine Bar, they are actually skilled enough to succeed. Many of their colleagues have pursued this path and succeeded.

Fourth, the idea of integration of the Philippine *Shari'ah* Bar gains momentum. Under Section 15, Article 10 of the Bangsamoro Organic Law, '[t]he Supreme Court may adopt the rules for the integration of the *Shari'ah* Bar under such conditions as it shall see fit in order to raise the standards of the profession and improve the administration of justice in the Bangsamoro Autonomous Region.' The next step then is to convince the Supreme Court of the Philippines that the time is ripe for the integration of the Philippine *Shari'ah* Bar for two main reasons: 1) it is practical, as the existing number of *Shari'ah* lawyers is enough for integration, and 2) it is necessary to raise the standards of the *Shari'ah* legal profession. The IBP is a success story on this proposition.

The integration of the Philippine *Shari'ah* Bar will potentially accomplish good results. It will prevent divisiveness in existing *Shari'ah* lawyers' organisations due to geographical or ethnic differences. This will promote unity and eliminate the tendency of factionalism or tribalism. Also, the Supreme Court can institutionalise a mandatory continuing legal education (MCLE) for *Shari'ah* lawyers, similar to the MCLE for regular lawyers. To recall, the MCLE is a mechanism required of members of the IBP 'to ensure that throughout their career, they keep abreast with law and jurisprudence, maintain the ethics of the profession and enhance the standards of the practice of

law.<sup>95</sup> Ultimately, the integration of the Philippine *Shari'ah* Bar will result in the improvement of the administration of justice in the BARMM. With an integrated *Shari'ah* Bar, the courts, the community, and the BARMM as a whole can look upon a solid, well-organised, and effective partner in the attainment of justice in the region.

## CONCLUSION

The Philippine *Shari'ah* legal profession is co-extensive with the limited scope of the Muslim Code and the jurisdiction of the *Shari'ah* courts. Nonetheless, the Counselors-at-Law are essential in the fulfillment of the intent and purposes for which the Muslim Code was enacted, *i.e.*, the intent to realise the aspiration of Philippine Muslims to have their own system of laws applied to them and the purposes of recognising the legal system of the Philippine Muslims and making Islamic institutions more effective; codifying Muslim personal laws; and providing for an effective administration and enforcement of Muslim personal laws among Muslims.

*Shari'ah* practice in the Philippines is limited but this should not be a reason for Counselors-at-Law to slacken in their practice before *Shari'ah* courts. The active role of taking part in the administration and promotion of justice through the *Shari'ah* courts must intensify in view of the new development brought about by the BOL. Counselors-at-Law must continue being relevant to the over-all success of the autonomy granted to the Bangsamoro. Being good enough for passing the SSBE is not the terminal goal. The goal is to aspire for excellence in whatever legal platform or activity where Islamic law and other legal traditions blend.

It is projected that the Philippine *Shari'ah* legal profession will see its frontiers expanded with the new development in the Bangsamoro justice system, particularly the expansion of the jurisdiction of the *Shari'ah* Courts and the power of the Parliament to enact laws pertaining to *Shari'ah* on commercial and other civil actions and *ta'zir* penal legislation.

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<sup>95</sup> Rule 1, Section 1, Bar Matter No. 850.