

Beyond political accommodation – making Shari’ah justice work for women in the Bangsamoro¹

By Imelda Deinla

Abstract

Legal hybrids have the potential to address justice and development issues in conflicted and post-conflict settings. Using the Philippine Shari’ah court system as case study, this article demonstrates that state hybrids suffer from legitimacy and capacity issues that also constrain their ability to deliver effective justice services and respond to conflict challenges. Forging cooperative networks between secular courts and Shari’ah courts and between local justice personnel and central justice authorities can enhance the effectiveness and legitimacy of a formalized legal hybrid. This can assist in addressing the justice deficit that fuels the cycle of conflict and sustain peacebuilding efforts at post-conflict.

Keywords: legal hybridity, legitimacy, Shari’ah courts, justice, conflict

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Introduction

Democracy and multiculturalism has an uneasy relationship and their co-existence becomes even more complex when overlaid with persistent local conflicts. In Southeast Asia, the adoption of the liberal democratic model of state and its institutions by some countries – or the idea of liberal peace, has often clashed with normative values of both majority and minority groups. In highly plural societies, normative conceptions of law and justice have varied among various groups and continue to flourish even with the strong centralizing force of the state. Cultural and religious practices by minority groups are not only expressions of their identity but also of resistance against the monopolizing power of the state (Richmond 2010; 2012; Richmond and Mitchell 2011, Mac Ginty 2011). Studies have revealed that the perception among the local population of an illegitimate central state is rife in fragile states or those states with weak institutions of security and governance (Goldstone 2008, 285; Rotberg 2003). Forging peace and strengthening the viability of the state system in a post conflict environment has to confront an enormous challenge of restoring trust and confidence among local stakeholders in the state, which is historically regarded by local stakeholders for its predatory, oppressive and unaccountable nature (Richmond 2011; MacGinty 2011) .

Accommodation between the modern state and traditional legal systems has become a strategy in negotiating peace with secessionist movements and in fostering harmonious relationships between central power and local authorities (Choudhry 2008; Benton 2002). This results in a constructed - or reconstructed - legal hybridity that aims to build mutual trust with insurgents and to synthesize different systems to promote complementarity of normative ideas and conflict avoidance. Few studies on negotiated legal hybrids between governments and armed groups or state-initiated legal hybridity have shown mixed results, or often the perceived failure of such hybrids (Choudhry 2008; Bertrand 2008; Freedman and Lottholz 2017). Negative,

and even antagonistic, views about formalized hybrids can be expected particularly when political settlement has not delivered peace dividends and competing powers contend for influence and legitimacy.

The main enquiry, therefore, in this article is how do states gain or increase their legitimacy in post-conflict reconstruction through legal accommodation or the construction of a hybrid legal system? If so, how is legal hybridity constructed so that it can generate trust from its constituency and potentially translate into increased state legitimacy and sustained peacebuilding efforts? Does a hybrid legal system provide a sound foundation for a sustainable hybrid political order? This question also seeks to speak broadly to how statehood can be forged through hybridity and hybridization in a way that merges modern state law and institutions with local or traditional practices and authorities. Increasingly, there is a growing recognition that the Western liberal model of statehood has not been successful in creating legitimate state institutions that promote peace and justice in highly diverse localities (see, for example, Boege et al. 2007; Richmond 2011; Wiuff Moe, 2011; Meagher, De Herdt and Titeca 2014). There have been studies that show the promise of local agencies, customs and practices that interact or relate to formal state practices in advancing peacebuilding and statehood (see, for example, MacGinty 2011; Richmond 2010, 2011). Little is known however about the potential of top-down and state-led approaches to hybridization and its impact on local peace and justice. Or is there evidence to show that hybridization can only be successful through bottom-up and local innovation?

In this paper, I analyse the establishment of the Shari'ah court system in the Autonomous Region of Muslim Mindanao (ARMM) in Southern Philippines to show the prospects as well as the constraints of generating legitimacy of a top-down and formalized hybrid institution as part of a political settlement with the Muslim insurgent group. I argue that legitimacy is a function of

trust in and the capacity of personnel and the institution to deliver effective outcomes. Through its transformation as a “women’s court,” the state Shari’ah has provided Filipino Muslim women with an effective option to resolve problems or issues involving members of their family which in turn assist in building trust in and legitimacy of the state institution. Providing effective justice to one of the marginalized sectors in Philippine society likewise assists in empowering women participatin in building the peace in their communities. Generating trust and capacity in the state Shari’ah courts is the responsibility of both local stakeholders and central state authorities. In this study, I show that forging cooperative and supportive networks between the secular and Shari’ah court systems and between local justice personnel and central justice authorities can enhance the effectiveness and legitimacy of a formalized legal hybrid.

Multi-level hybridity and hybrid legal orders

The use of “hybridity” as an analytical concept has broken the monopoly of modern liberal ideas on how governance, peace and justice are constructed, practised or interpreted in non-Western settings (see Boege et al. 2007, 2008, 2009; Kraushaar and Lambach 2009; MacGinty 2010, 2011; Richmond 2010, 2011; Richmond and Mitchell 2011; Pugh 2011; Deinla, forthcoming). Hybridity, as it prioritizes and highlights the inherent capacity of local practices and agency acting alone, in opposition, interaction or integration with formal state practices and structures, offers an alternative perspective – and potential solution – to peacebuilding and building effective institutions in societies suffering from enduring cycles of conflict. It has suffered criticisms however for being too “descriptive”, providing little opportunity for theorizing (Millar 2011, 2012; Richmond 2006). Its prescriptive turn, which has been utilized by international policy makers and practitioners to intervene in conflict resolution, peacebuilding and transitional justice in conflicted states, is also decried for its symbolic regard

for “local agency” or for legitimizing external intervention (Donais 2012, 6; Richmond 2012, 372; Peterson 2012, 17). Likewise, some works are also regarded as overly “prescriptive” in their desire to be relevant to contemporary conflicts (Richmond 2012; Lemay-Hebert and Freedman 2017).

The descriptive and prescriptive approaches, however, are not mutually exclusive and have been enhanced by the addition of various disciplines incorporating hybridity in their analytical lenses (see, for example, “hybrid identities” Anthias 2001; “hybrid economies” Altman 2009; “hybrid political orders” Boege et al. 2007). A deeper exploration of the complementary relationship between these two, the prescriptive and descriptive, approaches would enhance both the analytical and policy salience of hybridity. One useful conceptual tool that fuses these perspectives is that hybridity is inherently in flux; it alerts us to the temporal nature of laws and institutions, the variable nature of agency, and highly contested nature of norms and authorities (Boege et al. 2009, 20). MacGinty and Sangera’s (2012) “degrees of hybridity” also provides a functional tool on how hybridity is produced by different actors, networks and structures and the variable capacities of local actors. Combining the historical approach, that has received scant attention on hybridization, would provide a better contextual understanding of hybridity taking place in various areas and levels of peacebuilding and broader spheres of state formation in different contexts. Thus it was observed that it has become less common to acknowledge the “legal and normative hybridity of the past” and that hybridity, rather than a “unified, national state law”, is the rule (Donlan 2011a, 2-3).

It is equally desirable to examine how hybridity has, through structures, institutions and practices, been received, used, and found its meanings among those where hybrids have been created for. As is argued in this paper, a trusted formal legal hybrid can assist in building the

legitimacy of state institutions and promoting community peace (see also Johnson and Hutchinson 2011, 2012). Trust is considered a key indicator of legitimacy and is a measure of how much confidence society has in institutions (Johnson and Hutchinson 2011, 2012). Over time, increased legitimacy can translate into better functioning of state institutions and political stability (ex Englebert 2002; Moss et al 2006). Measuring trust in legal hybrids is a challenging task in a highly contested political order where different groups claim superiority or popularity of their normative values. “Perception” by itself is highly subjective and provides no indication of what it is grounded on. In this research, we measure perception of those who have had experience in dealing with having their disputes and problems resolved or addressed to by various “justice” providers. The term justice here refers to the everyday provision of services and remedies for disputes or issues that, if not attended to, could result in further “injustice” or the escalation of conflict and violence (Cappelletti and Garth 1978; Parker 1999; See also Mac Ginty 2014; Richmond and Mitchell 2012).

This article, which is an offshoot of a broader study on hybrid legal order in Mindanao, Philippines and how this responds to various conflicts and justice concerns in the community, measured trust through the choice of mechanism that individuals would prefer to use when experiencing conflict within members of the family or other members of the community, or when dealing with parties outside of their communities. Through a qualitative survey, community members were asked about their experiences in using a particular justice mechanism, their satisfaction or dissatisfaction of the way their conflict or issue had been resolved, and the qualities they are looking in the provider and in the resolution that the provider would deliver. Through in-depth interviews of justice providers, we also peruse how they perceive each other and seek cooperation from one another. This latter aspect is equally important as local “elites”

and authorities, which largely comprise the ranks of justice providers and articulate views about social relationships, play an important role in shaping “good perception” of and legitimacy of state institutions.

Legal hybridity and justice hybrids in Mindanao, Philippines

Legal hybridity or the establishment of plural and hybrid legal orders is a feature of the Philippine legal system, and as all other existing legal systems are, evolved from or product of interacting legal traditions and of long history of political contestation and negotiation (Benda-Beckmann 2015, 247). In this article, I define a legal system broadly as “having rule-making capacities and the means to induce or coerce compliance” (Moore 1978, 56; see also Forsyth 2009). Legal scholars have tackled legal hybridity through different perspectives – from a comparative approach of various sources of laws and legal traditions (see, for example, Holbrook 2010; Palmer, Mattar and Koppel 2016), how plural laws and norms are deeply embedded in the state system (see, for example, Tamanaha 2008; Donlan 2011b) to critiques of a central unitary system of law and towards a more prescriptive role for an emancipatory role of the individual (Richmond 2010; 2011). Drawing from earlier works on categories of laws or legal ordering (see, for example, Mastura 1994; Holbrook 2010), this paper proposes new categories of legal hybridity that demonstrates the historical stages and patterns of legal hybridization in the context of Mindanao, Philippines. This classification also reflects the broader context of legal hybridity in which law and custom are only part of the wider structure of social ordering and regulation and the existence of various normative ideas are held by competing authorities in a conflicted setting (Braithwaite; Forsyth 2009).

Figure 1:

Syncretic Hybridity	Official state hybridity
Un-official state hybridity	Non-state hybridity

The four categories of hybridity stated in the above diagram are not mutually exclusive and represent a continuum of past and present. All four categories are in a state of flux, highly contested, and at times can be conceptualised with overlapping spaces and boundaries.

Syncretic hybridity represents indigenous norms and practices that intermingled with introduced ancient religion and culture prior to Western colonization. The pre-colonial sources of law in ARMM have undergone dynamic change through successive waves of colonization, conflict and modernization. This has resulted in the intermingling of indigenous law and norms with Islam and with Philippine secular laws producing a multiplicity of justice authorities that both compete against and complement one another. The ARMM, whose population is 90% Muslim,ⁱ consists of at least thirteen ethno-linguistic groups whose individual members self-identify with and claim distinctive cultural practices.ⁱⁱ A syncretic or folk Islam/*adat* developed which was the result of a type of Islamic law introduced from India and Southeast Asia blended with existing pre-Islamic beliefs and customs (Deinla and Taylor 2015, 15). While most *adat* is orally handed down, there are two existing written laws such as the Magauindanao *Luwaran* and the Sulu Code that deal with persons and family matters and criminal offenses (Deinla and Taylor 2015, 20). The Sulu Code underwent several revisions up to the American period for the

purpose of abolishing slavery and slave trade and adopted more symbolic forms of punishment (Jundam 2006, 34-36). It was revived – and revised in 2002 – by the Provincial Board in consultation with community leaders and elders to deal with increasing incidents of *mang-guyod* (or forcible abduction of a woman for marriage).ⁱⁱⁱ The revision had taken place amidst the incapacity of state laws and mechanisms in addressing the “un-regulated” abduction of women and the seeming disintegration of customary law in the face of heightened armed conflict and violence in Sulu province.

Legal hybrids that are officially sanctioned by and through legally-recognized processes of the state can be classified as official state hybridity. These are existing customary practices that have been officially sanctioned by the state or re-stated through legislation. This formalized legal hybridity, which will be illustrated in detail in the following section, is produced through accommodation between state and local authorities and elites, with or without the participation of the broader stakeholders in the process. There are also ‘un-official’ state hybrids or those that developed from state institutions, may or may not be legally recognized by the state or is legally proscribed but such prohibition is not enforced. These hybrids operate tacitly through state mechanisms and are usually innovations from their existing functions. Prolonged conflicts in ARMM and weakness of state justice institutions to provide speedy and effective justice have triggered newer forms of state-based hybridization.

One notable example is the transformation of local executive bodies, such as the Peace and Development Council, into dispute resolution mechanisms using a combination of traditional methods of mediation or adjudication and formal-legal procedures.^{iv} One mechanism involves five members of a committee headed by the municipal mayor; each member comes from varied backgrounds but are all respected for their knowledge of *adat* or custom and has their own area

of ‘expertise’ in dealing with particular disputes such as murder, *maratabat* (offending the honour or pride of the family/ clan), *rído* (clan feuding), and family matters. The committee arranges or invites the parties to meet and present their position and several “hearings” are scheduled to present evidence. It can also order arrest or apprehension of those who do not voluntarily present themselves after the invitation and conduct its own fact-finding or investigation. Mediation is the first option but the committee can also make a decision in writing stating penalties or fines if the parties cannot agree and can authorize the police or security forces to enforce the decision.^v

Official legal state mechanisms can also spawn “unofficial” or semi-official hybrids, as when they perform roles outside of their official functions or prescribe additional rules that are not in their original mandate. An illustration of this is when the public defender’s office, known as the Public Attorney’s Office (PAO), conducts a ‘pre-litigation conference’ whose purpose is to mediate between parties involving criminal offenses. The Office of the Prosecutor, also known as Fiscal’s Office, which prosecutes criminal cases on behalf of the state, likewise conducts un-official mediation which can result in an amicable settlement between the parties that can lead to the dismissal of the case or the accused pleading to a lesser form of criminal offense. Outcomes of this mediation conducted by PAO and Fiscal lawyers are usually successful and use a combination of state laws and traditional laws to arrive at an acceptable enforceable settlement for the parties.^{vi} This category of legal hybridity demonstrates the capacity of local state personnel to innovate on their roles, the way they deploy various sources of laws for particular problems and also re-shape or reinterpret laws.

Non-state hybridity refers to those laws that have been initiated primarily in the non-state sector which constitutes an alternative system of law. An example of this form of hybridity is

when insurgent groups adopt their own Islamic law and Shari'ah justice which they hold as "authentic". Different groups – or the individuals within the group – however, have or believe in their own "true" versions; such versions depend where they had trained in their Islamic studies whether that be in Pakistan, Yemen, Egypt, or Saudi Arabia, for example. In practice, most dispute resolutions are held through mediation than rather than adjudication and informed by traditional norms and practices. While most of those interviewed believe in Quranic texts sanctioning early marriage, they are also pragmatic about its practical consequences and would not readily encourage such practice.^{vii}

Formalizing legal hybridity: the Shari'ah court system in the Philippines

The Muslim population in Mindanao has practised Shari'ah as an institution of justice for centuries before the colonial period and in post-colonial times (Majil 1973; Gowing 1978). Legal accommodation for traditional norms and practices, particularly those on persons and family matters, was extended under American colonial administration. The formal establishment of the Shari'ah court system in the Philippines, however, has been a product of and a means towards political accommodation in restive Muslim Mindanao. The proposal towards the adoption of the Code of Muslim Personal Laws (CMPL) was part of the broader peace negotiation that the Philippine government, under the then martial law regime of Ferdinand Marcos, undertook with the insurgent group, the Moro National Liberation Front (MNLF). There were suggestions that the proposal was part of diplomatic overture of the government with the Organization of Islamic Conference (OIC) which was supportive of Muslim issues and grievances (Ali 2000, 117). The establishment of a state Shari'ah court system in the Philippines came a year after the signing of the Tripoli Agreement in December 1976 when Presidential Decree No. 1083 was issued on 4 December 1977 adopting the Code.^{viii} It was not until 1984 that

the Shari'ah court system became functional following the adoption of the Special Rules of Procedure of the Shari'a Court by the Philippine Supreme Court and recruitment of the first batch of Shari'ah court judges.^{ix}

The CMPL is the first concrete legal expression of Philippine constitutional commitment to consider the Muslim cultural communities' "customs, traditions, beliefs and interests" in formulating and implementing state policies (see also Mastura 1994).^x The mandate to the Research Staff that made the first draft of the Code was to survey, collect and gather all Muslim laws from all sources particularly those that affect Philippine secular laws and to reconcile these two sources of laws.^{xi} The final draft of the Code that was promulgated however significantly differed from the draft after undergoing revision from the commission of experts and in consultation with selected lawyers and *ulamas* (learned men of Islam) from Mindanao.^{xii} It must be noted that no woman was part of these deliberations and consultations. That no legal precept must be incorporated in the Code that contravenes the Philippine Constitution was a core guiding principle in codification.^{xiii} While the Code itself acknowledges the "legal system of the Muslims in the Philippines as part of the law of the land", only those that are fundamentally personal in nature were codified.^{xiv} The Code ordained the orthodox Sunni school of law from which Islamic interpretation or jurisprudence could be constructed from, an implicit assumption by the framers that Filipino Muslims practice this form of Islamic thought.^{xv} As an ethnically diverse region, *adat* or customary law, is widely practiced and varies from one Muslim ethnic group to another. *Adat* is likewise recognized but is subordinated to the Code and Muslim law and must be proven as a fact when not embodied in the CMPL.^{xvi} It has been suggested that the limitation in the application of customary law as a familiar source of Muslim authority reduces the appeal of the CMPL to Muslims who have expected greater autonomy and rights (Chiarella 2012).

Legitimacy of state Shari'ah

Proposals towards strengthening the state Shari'ah have consistently been on the agenda in the peace settlement or in the discussion of access to justice reforms in Mindanao. Actual reform initiatives to enhance the Shari'ah has not however proceeded independently of peace negotiations – and thus intended reforms have not come about and which in turn has contributed to the further marginalization of Shari'ah courts and judges from the broader justice system in the Philippines. Both the draft Organic Act of the ARRM (Republic Act No. 9064) and the shelved *Bangsamoro* Basic Law contained provisions increasing the jurisdictions of the Shari'ah and enhancing its institutional capacity.^{xvii} This marginalization has been caused by lack of serious attention to the Shari'ah's potential in addressing the justice deficit in Mindanao and in contributing to peacebuilding. At the heart of this neglect lies the problem of legitimacy that has shaped attitudes towards the court.

The legitimacy of the state Shari'ah in the Philippines has been in question since its inception. The discussion above shows that the CMPL was not, in the first place, a product of broad public deliberation and consultation, and more inclusive group of Muslim elites. This explains the ambivalent, critical or disdainful attitudes that groups and individuals have on the court and its personnel. While a survey in 2007 among Muslim “influential” showed a favourable regard for the court and personnel (Guerrero et al. 2007), our qualitative interviews with various justice stakeholders show a range of negative or critical views about the substantive content of the Code as well as on the capacity of judges. On the extreme end, are insurgent groups and community dispute resolution providers who regard the state Shari'ah as “fake shari'ah”. One reason for this label is their perception of certain provisions in the Code as “un-

Islamic” such as the provisions on *talaq*,^{xviii} polygamy,^{xix} evidence and procedure.^{xx} Other Code provisions that are regarded as not Islamic are those on succession and inheritance, parental authority, property relations and penalty.^{xxi} These same group however also expressed their willingness to serve as state Shari’ah judges and to follow the CMPL, if given the opportunity to be appointed.^{xxii} Civil society groups also decry discriminatory provisions in the Code such as the sanctioning of marriage of minors, particularly of girls below fifteen years if they have attained puberty.^{xxiii}

Part of the legitimacy question is engendered by the Shari’ah court’s institutional design and consequent attitudes of other justice providers. The qualifications to become judges and practitioners before the Shari’ah courts is considered below par to what is required for the secular courts. A 45-day training and passing the Shari’ah Bar examination are the minimum requirements required to practice in the Shari’ah court which is considered inferior to the rigour and competitiveness of that required in civil court professionals.^{xxiv} In fact, Shari’ah practitioners are not considered “lawyers” but “counsellors”.^{xxv} The community justice providers also deride the qualifications of state Shari’ah as many of them have years of Islamic studies in Islamic universities abroad or are regarded as learned or pious (either as *ulamas* or *imams*) in the community. Some secular judges expressed resentment over the equality in remuneration with Shari’ah judges who they perceive as “less qualified” and are handling much lighter case load than secular courts.^{xxvi}

The Supreme Court, the court at the apex of the Philippine judicial system, has shown less enthusiasm for the Shari’ah courts. Judges interviewed lament that there is hardly any training provided for the continuing education of Shari’ah judges and personnel on dispensing Islamic justice, absence of physical offices or inadequate provision for office maintenance,

equipment and supplies, and scarcity of court personnel assisting judges such as the Sheriffs and Shari'ah PAO counsellors.^{xxvii} Security for the judges and court personnel is also an aspect that Shari'ah judges found wanting support from the Supreme Court.^{xxviii} Some of the Shari'ah judges also expressed feelings of insecurity with the secular court system and the exclusion of Shari'ah courts in the public information video of the Supreme Court further confirmed their sense of being “second-class” court personnel.^{xxix}

Politics also plays a role in supporting or undermining the legitimacy of Shari'ah courts. Some judges pointed to the lack of support by local government officials to the court, especially when compared to those given to civil courts. The building and building upkeep for the courts are the responsibility of local governments but some courts have reported not having their own offices and that they have to conduct their official duties at home. On one hand however, some judges admitted that conducting their tasks in their homes make them more accessible to and trusted by the community, as this was the traditional setting of the Shari'ah.^{xxx} Some of the respondents in the interviews admitted that the Shari'ah courts and judges have less political value than secular judges as they do not have jurisdiction to hear high political-value cases such as election disputes, land or property related and criminal cases.^{xxxi} Some respondents also noted that Shari'ah courts in Christian-dominated local governments receive more support than those courts located in Muslim-dominated communities.^{xxxii} The low trust level by local elites in state Shari'ah courts can also be partly explained by the active role local politicians play in dispute resolution in their communities as a demonstration of and a way to secure power and privileges (Deinla, forthcoming 2018; Kreuzer 2009, 11). In fact, there are multiple avenues of dispute resolution, whether they are state, non-state or hybrid forums. As a result, forum shopping is commonplace among disputants where dispute resolution proceedings can even take place

simultaneously with each other. For instance, a murder case can concurrently run in the secular criminal court, a rebel-Shari'ah court, and with village elders all at the same time.^{xxxiii}

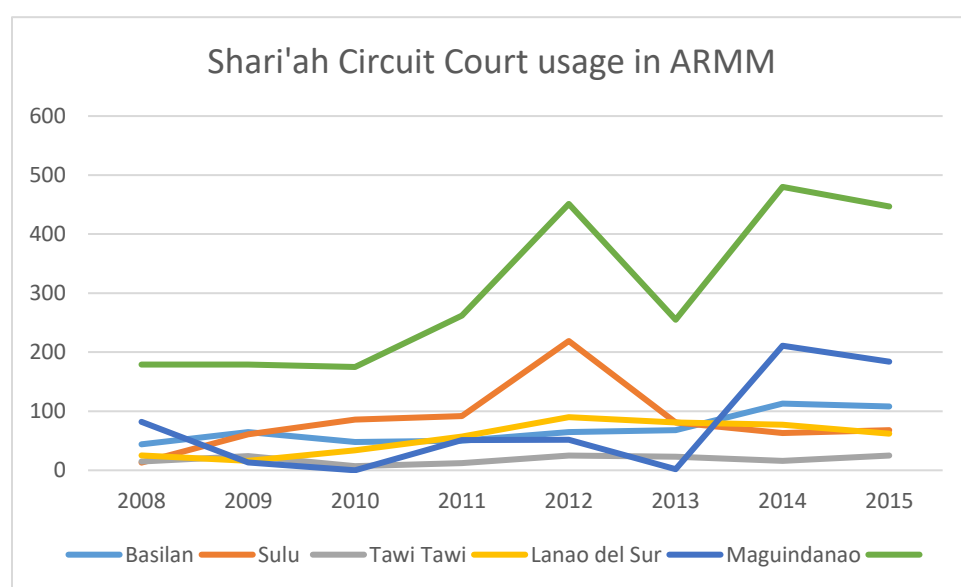
Muslim women as drivers of legitimacy of the state Shari'ah court

The legitimacy of the state Shari'ah court is driven not by the elites but by the women who use the court's processes and remedies. The Shari'ah court has become a "women's court" where almost eighty percent (80%) of cases are initiated by women.^{xxxiv} Most of the cases that are processed in the courts concern divorce, support of children, and "restitution of marriage" which is a proceeding where a woman who was divorced by the husband through *talaq* seeks to restore her marriage.^{xxxv} Divorce by *talaq* is initiated by a man by repudiating his marriage to his wife for three times or when the husband fails to resume cohabitation after the second repudiation.^{xxxvi} While *talaq* confers on Muslim men the privilege of unilateral divorce, the CMPL allows the woman to unilaterally divorce her husband if he had delegated the right of *talaq* to his wife (divorce by *tafwid*).^{xxxvii} The CMPL additionally gives Muslim women the right to divorce their husbands (divorce by *faskh*) through judicial decree by showing grounds for dissolution such as inability to support the family and "unusual cruelty".^{xxxviii}

Shari'ah judges reported that women who were deserted by their husbands or those who were physically and emotionally abused were able to access the courts and obtain divorce. The wife of an Abu Sayyaf bandit was able to obtain divorce despite the threat of violence against the judge while a woman Shari'ah judge was able to convince a powerful politician to settle the divorce proceedings in an orderly manner.^{xxxix} Polygamy, the practice of some Muslim men to have multiple wives, has also been regulated in the CMPL and the Shari'ah judge can enquire if the man meets the conditions for contracting subsequent marriages. The CMPL prescribes that despite Islamic rules permitting multiple wives, "no Muslim male can have more than one wife

unless he can deal with them with equal companionship and just treatment as enjoined by Islamic law and only in exceptional cases”.^{xl} Some of the judges interviewed expressed that polygamy is not widely practiced in Muslim communities in Mindanao and the problem arises mostly in cases where Christian men “convert” to Islam only for the purpose of remarriage and to evade secular law’s criminal liability against multiple marriages.^{xli}

Table 1. Total court load of Shari’ah Circuit Courts in the ARMM

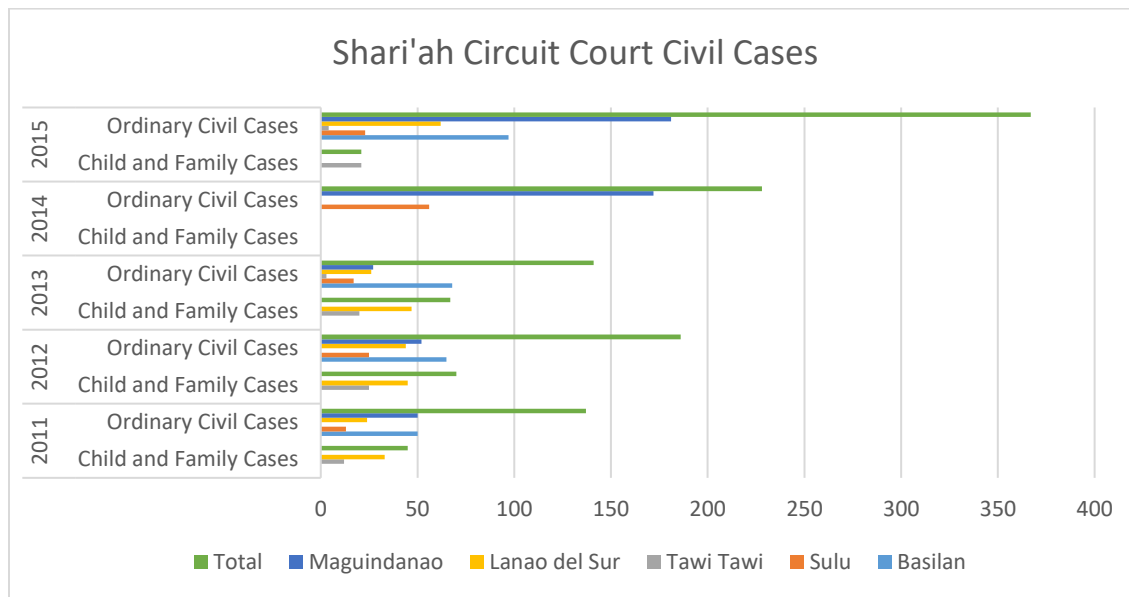


Source: Compiled from the data issued by Office of the Court Administrator – Philippine Supreme Court

The Shari’ah courts are also being used for a range of other functions that assist in resolving conflicts within the family and facilitate their access to government services. Constituted as a registry, the Shari’ah clerk of court acts as a circuit registrar to register, keep records and issue certificates of birth, marriage, divorce and other incidents of civil status. The Agama Arbitration Council, an *ad hoc* mechanism that can be organized by the clerk of court performs mediation and arbitration function to resolve disputes between family members with the aid of elders, traditional leaders and respected members of the community. Judges, in their

un-official capacity, reports to be doing more consultation and mediation tasks than in hearing cases as there are actually few cases being brought for adjudication. As shown in Figure 2 below, the mediation and administrative functions of the courts drive court usage, more than its adjudicatory functions (as shown in the low numbers in Child and Family cases).

Table 2. Total number of Shari'ah Circuit Court civil case load



Source: Compiled from the data issued by Office of the Court Administrator – Philippine Supreme Court

The current state of Shari'ah court's legitimacy however remains low compared with other community justice providers. In a survey conducted among justice users in the ARMM, it can be confirmed that Muslim Filipinos' preferred mode of dispute resolution is through mediation and settlement of their issues by their own family or clan and traditional elders and leaders. A total of 145 respondents reported to have been involved in resolving conflicts in the community and 66.9% indicated their roles as mediator/conciliator, raising of blood money, member of the KB, settlement of rido, and as member of the indigenous justice system. Respondents in the survey have consistently indicated their family/ clan as their dispute resolver

of choice, followed by the KB, village elders/ traditional leaders, PAO, the police and the fiscal.^{xlii} Those who indicated to have no current dispute chose the following entities as the ones they would most likely approach to resolve their disputes – family/ clan, KB, village elders/ traditional leaders, state Shari’ah courts, state secular courts, PAO and the police.^{xliii} Of those who separated or divorced (or 9% of total respondents of 544), only 15.5% registered their divorce with the government registry. Divorces are still mostly done through the imams and their families. Of those who separated, divorce was ‘approved’ by imam (31%), others (spelled as family members, 26.7%), state Shari’ah judge (17.8%), wali (11.1%) and civil court judge (2.2%). There are also about 86 respondents (or 19% out of 451 who answered the question) whose children’s births had not been registered.

There are indicators however that show potential in raising the legitimacy of state Shari’ah and thus in allowing Muslim Filipinos greater access to justice and other government services. While the state Shari’ah is not indicated as the first recourse to solving their problems, it ranks fifth in having finally resolved respondents’ disputes and also comes in fourth in consideration for those who may be experiencing disputes in the future. For those who have been to the courts, 58.7% reported that it was useful to them, while only 2.9% said NO and 15.9% stated ‘Don’t Know’. There is, however, a very low percentage of people who have been to the Shari’ah court, 14.4% (out of 542 who responded to the question), 64% who said NO, 16.4% who said they don’t know the court, and 5.2% with no response.

Table 3: Top five most trusted institutions in ARMM

	Trust	Don't Trust
Own family or clan	94.3%	.6%
Imam or mosque	82.7%	.7%
Village elders/ traditional leaders	75.9%	1.7%
Barangay leaders or officials	71.9%	2.9%
School	73.7%	3.7%

Table 4: Top 6 least trusted institutions in ARMM

	Don't Trust	Trust
Catholic Church	11.8%	43%
Military	10.5%	52%
Police	7.5%	66.7%
National officials	5.7%	51.3%
Municipal/ city officials	5.1%	56.4%
Provincial officials	4.8%	53.7%

This reflects either the lack of machinery and personnel by the courts to popularize its existence and services – or part of the broader malaise on mistrust of state institutions (as shown

in Tables 1 and 2 above). The survey confirms earlier findings that family/ clan, Muslim religious leaders, village elders/ traditional leaders and barangay/ village officials are the most trusted institutions in the ARMM (Co et al. 2013, 170). Some civil society organizations undertook community programs to raise awareness of the Shari'ah while the Supreme Court also reported to have rolled out mobile courts at one time in 2010. These efforts need to be sustained, particularly as there is increasing proliferation and competition from other community-based justice providers which have become innovative in their methods of delivering justice services.

The broader conflict and development conditions in ARMM need to be taken account of in terms of future initiatives to assist in making the Shari'ah courts more effective – and legitimate. 54% of the respondents stated they have experienced a dispute, either as one of the disputants (27.2%) or as one involved in resolving it (26.7%). The court's jurisdiction is limited to family matters and their incidents, and as one judge remarked, "We don't expect to take more divorce cases if only to increase our case load; our task is to preserve the family."^{xliv} Most of the community conflicts in the ARMM are related to land and property issues within the family or clan, physical violence such as deaths and assaults, politics, business competition, and marriage problems and these conflicts are often interspersed within the *rido* matrix (clan feuding) (See also Magno 2007).^{xlv} Around 103 respondents declared that a *rido* is necessary before a dispute or problem can be resolved (19% out of 543, while another 19.33% indicated Don't Know).^{xlvi}

The most prevalent issues involving female respondents also shadow the broader conflict environment, although more specific gender-based violence have also been reported such as rape, abduction, forced marriage, trafficking of women and early marriage for girls.^{xlvii} It should also be noted that 12.9% of respondents (70 people) were married below 18 years of age, with

females comprising 77% of them (54 females). There are also 2.2% of respondents who were married at the age below 15, where 91% of them were females (11 females out of 12).

Table 5. Top seven disputes involving female respondents

1. Land and property disputes
2. Separation of property within family
3. Others (also family related problems)
4. Debts, estafa, fraud
5. Gossiping/ defamation/ scandal
6. Public disturbance and malicious mischief
7. <i>Rido</i>

The limited means – and mechanisms, that the Shari’ah courts use to resolve disputes also disadvantage it from other justice providers who offer more flexible and quick methods to settle the conflict. The survey finds that marriage problems are, next to land conflicts, the most common disputes resolved in the community. Respondents identify the family/ clan (277), village elders/ traditional leaders (150), KB (118) and the police (75) as the five most preferred institutions to resolve *rido*. It is however a revelation to know that state Shari’ah is ranked at sixth (42) for respondent’s choice in resolving *rido*, ahead of other community-based providers such as the Municipal Peace and Order Council (33), imam (30) and MILF Shari’ah (24). For Muslim Filipinos, their family’s safety, trust and confidence in the justice provider as well as reconciliation of the parties, time of resolution, and payment of blood money are major considerations when seeking to resolve their disputes.^{xlvi} Some of the state Shari’ah judges, by virtue of their status and knowledge of the community, are also regarded as traditional elders and

leaders and for this reason are trusted to resolve disputes that are outside their formal authority. In fact, Shari'ah judges admitted to be doing more consultation and mediation work than deciding cases, as is demanded by their constituents.^{xlix}

Indeed, strengthening the state Shari'ah demands more than just expanding their authority to decide particular disputes. Only 23.7% of respondents will consider bringing disputes involving crimes and business to the Shari'ah that may be constituted in the Bangsamoro.¹ In the wider context of peace and development in the ARMM, Muslim Filipinos prioritize health, education, peace and security, employment and basic utilities as critical services that they demand from government institutions.^{li}

Conclusion

Beyond the rhetoric of political – and cultural – accommodation, legal hybrids have the potential to address real justice and development issues in conflicted settings. Official state hybrids, or those that have been officially constituted or sanctioned by the state shows that despite their highly contested nature, can assist in addressing justice deficit and development goals in conflict areas. State hybrids are however continuously plagued by legitimacy and capacity issues that also constrain their ability to perform their functions and respond to conflict challenges. Traditional and religious authorities do not recognize the authority of 'secularized' Shari'ah judges and that the Shari'ah itself is 'fake' because the judges' have no sufficient Islamic knowledge. In this article, it is demonstrated that gaining legitimacy in a contested environment demands the support of the elites at the national and local levels and the delivery of effective service to the community. The Philippine state Shari'ah suffers from legitimacy issues that contributes to its marginalization – and isolation – from the broader secular legal system and in turn diminishes its capacity to respond to the justice needs in Mindanao. This has been

brought about by its poor institutional design from its inception but also the continued neglect in uplifting the standards of the physical offices and personnel and failure to reach out to the broader population.

Endnotes:

- ⁱ The ARMM was established through a plebiscite in Mindanao in 1989 and is composed of the five provinces of Basilan, Sulu, Tawi Tawi, Maguindanao, and Lanao del Sur.
- ⁱⁱ More than 90% of the survey respondents in the research indicated membership in a particular ethno-linguistic group in Mindanao.
- ⁱⁱⁱ Confidential interview with a key resource person involved in the process of revising the Sulu Code 2002, April 2014.
- ^{iv} Interview with Secretary of a Municipal Peace and Order Council in Maguindanao province, November 2015.
- ^v Ibid.
- ^{vi} Interviews with ARMM PAO lawyers, November 2015.
- ^{vii} Ibid.
- ^{viii} The full title of Presidential Decree 1083 is “A Decree to Ordain and Promulgate A Code Recognising the System of Filipino and Muslim Laws, Codifying Muslim Personal Laws, and Providing for its Administration and Other Purposes”.
- ^{ix} The Special Rules of Procedure Governing the Shari’a Courts was promulgated 20 September 1983 pursuant to Articles 148 and 158 of the CMPL.
- ^x Sec. 11, Art. XV, 1973 Constitution of the Republic of the Philippines; Preamble of the CMPL (1977).
- ^{xi} Memorandum Order No. 370 (1 August 1973) Creating the Research Staff for the Codification of Philippine Muslim Laws.
- ^{xii} ‘Report of the Presidential Commission to review the Code of Filipino Muslim Personal Laws’ in *Code of Muslim Personal Laws of the Philippine* (Quezon City: Office on Muslim Affairs, 2005), 47-57 (‘Report of the Presidential Commission’).
- ^{xiii} Ibid.
- ^{xiv} ‘Report of the Presidential Commission’, 54; Art. 2(a), CPML (1977).
- ^{xv} ‘Report of the Presidential Commission’, 53; Arts. 6,7 and 134, CMPL (1977). There was no explanation however in the Code or in the Committee Report how the orthodox Sunni Islam became the ‘official’ Islamic legal thought. A historical assumption was derived from the origins of the *Maguindanao Luwaran* which were selections from the Shafi’i madhab (Michael O Mastura, ‘Introduction’ in *Code of Muslim Personal Laws of the Philippines* (Quezon City: Office on Muslim Affairs, 2005), v-ix).
- ^{xvi} Art. 5, CMPL (1977).
- ^{xvii} Both draft legislations failed to pass or stalled in Philippine Congress.
- ^{xviii} Or divorce through verbal denunciation by the husband; Art. 46, CMPL.
- ^{xix} Arts 27-30, CMPL (1977).
- ^{xx} Art No ; Interview with community-based Shari’ah judges and dispute resolution providers.
- ^{xxi} Ibid, 105, in relation to the response of Shari’ah lawyers or counsellors.
- ^{xxii} Interview with community-based Shari’ah judges.
- ^{xxiii} Art. 16(2), CMPL (1976).

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- ^{xxiv} The Shari'ah Bar consists of only four subjects (Persons, Family Relations and Property; Jurisprudence (*Fiqh*) and Customary Laws (*Adat*); Procedure and Evidence; and Succession, Will/Adjudication and Settlement of Estate) compared to ten subjects in secular courts apart from requirement that candidates passed a four year law degree.
- ^S *Re: Petition to Allow Shari'a Lawyers to Exercise Their Profession at the Regular Courts*, Bar Matter No. 681 dated August 05, 1993.
- ^{xxvi} Interview with secular judges, April 2014.
- ^{xxvii} Interview with Shari'ah judges, April 2014.
- ^{xxviii} *Ibid.*
- ^{xxix} *Ibid.*
- ^{xxx} *Ibid.*
- ^{xxxi} Interview with Judges, April 2014.
- ^{xxxii} Interview with Judges, April 2014.
- ^{xxxiii} Key informant interview, February 2013.
- ^{xxxiv} Interview with Shari'ah judges, April 2014.
- ^{xxxv} *Ibid.*
- ^{xxxvi} Art. 46, CMPL.
- ^{xxxvii} Art 51, CMPL.
- ^{xxxviii} Art. 52 and 53, CMPL.
- ^{xxxix} Interview with Shari'ah judges, April 2014.
- ^{xl} Art. 27, CMPL.
- ^{xli} Interview with Shari'ah judges, April 2014.
- ^{xlii} Respondents who have had experience in having their disputes resolved were asked this question: Will you approach this person again if you experience another dispute in the future? Note: a total of 148 out of 544 (27%) answered that they have experienced issue or dispute in the last three years.
- ^{xliii} Respondents who have no current dispute were asked this question: If you experience a problem or dispute with your spouse or relatives in the future, who among the following would you like to have it resolved?
- ^{xliv} Interview with Shari'ah Judges, April 2014.
- ^{xlvi} Survey results from respondents having experienced dispute and those involved in resolving disputes.
- ^{xlvi} Question: Do you think *rido* is necessary before a dispute or problem can be resolved? 288 said No, 105 Don't Know, and 46 No response.
- ^{xlvi} Interviews with Community-based Justice Providers.
- ^{xlvi} Common response from Interviews with Justice Providers and result from Justice User Survey.
- ^{xlix} Interview with Shari'ah judges, April 2014.
- ¹ Question: Would you take your problems involving crimes and business to the state Shari'ah once Bangsamoro is created? Answer: Yes (23.7%), No (2.8%), Don't Know (13.1%), It Depends (11%), and No Response (49.4%).
- ^{li} Survey respondents were asked to rank the most important services that they would like to see delivered by government institutions. The results were as follows: Health services (1), Education (2), Peace and security (3), Employment (4), and Basic utilities (5).

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