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# SOURCES OF LAW, SOURCES OF AUTHORITY: THE FAILURE OF THE PHILIPPINES' CODE OF MUSLIM PERSONAL LAWS

Gregory M. Chiarella<sup>†</sup>

*Abstract:* The Code of Muslim Personal Laws of the Philippines (“CMPL”) was established in 1977 as part of an effort to quell longstanding violence between Christians and Muslims in the predominantly Christian country. This codification of Islamic laws in the areas of marriage, divorce, and inheritance provided for a system of Shari’a courts that would operate within the larger framework of the legal system of the Philippines. Three and a half decades later, the CMPL has had little effect. The Shari’a courts are understaffed and underutilized, accounting for less than 0.1% of the caseload in the Philippines. The CMPL is plagued by a series of practical and procedural shortcomings. More significantly, it limits the use of customary law and excludes or marginalizes familiar sources of Muslim authority, minimizing its appeal for Muslims who had hoped that the CMPL would provide greater rights and freedoms. In order to revitalize the CMPL and further engage Muslim citizens in the Philippines, this comment argues for a variety of practical and procedural changes to increase knowledge of and access to the CMPL, an increase in the use of customary law, and for the creation of more leadership roles for Muslims.<sup>††</sup>

## I. INTRODUCTION

Conflict between Christians and Muslims has been a fact of life in the Philippines for centuries.<sup>1</sup> Hostility between these two religious groups has destabilized the country at times and has contributed to economic, political, and legal inequalities. As part of an effort to put an end to this religious conflict, the government of the Philippines agreed in 1977 to adopt a Code of Muslim Personal Laws (“CMPL”).<sup>2</sup> The CMPL theoretically allows Muslims to exercise limited control over their judicial fates through a legal system based on Islamic law (“Shari’a”). While the CMPL has achieved

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<sup>††</sup> In accordance with the policies of the *Pacific Rim Law & Policy Journal*, Arabic words that have entered common English usage will not be italicized. Arabic words that are not in common usage will be italicized. Arabic words will not use diacritical marks such as macrons. However, apostrophes and reverse apostrophes will be employed to signal the letters *hamza* and *‘ayn*, respectively.

<sup>1</sup> See THOMAS M. MCKENNA, *MUSLIM RULERS AND REBELS: EVERYDAY POLITICS AND ARMED SEPARATISM IN THE SOUTHERN PHILIPPINES* (1998) for an in-depth discussion of this history. Christians, especially Catholics, are the dominant religious group in the Philippines today, constituting greater than ninety percent of the population. *The World Factbook: Philippines*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/rp.html> (last visited Oct. 25, 2011).

<sup>2</sup> Justin Holbrook, *Legal Hybridity in the Philippines: Lessons in Legal Pluralism from the Mindanao and the Sulu Archipelago*, 18 *TUL. J. INT’L & COMP. L.* 403, 420 (2010).

some success, it remains a rarely used and poorly managed afterthought in the context of the larger judicial system.

The CMPL has the potential to supply Muslims with a sense of empowerment and control over their lives. Instead, it creates an ineffective legal system that reminds Muslims that their concerns are secondary to those of the Christian majority. To revitalize the system established under the CMPL and transform it into a potent source of law that more effectively engages Muslims, the Filipino government must 1) address procedural and practical shortcomings in the application of the CMPL and 2) address issues of content by drawing upon appropriate sources of law and familiar sources of authority. In doing so, the government can reenergize the CMPL and demonstrate to Muslims throughout the country that it is committed to furnishing an effective legal system based on Shari'a.

Part II of this comment examines the history of conflict between Muslims and Christians in the Philippines and explains the origins of the CMPL. Part III identifies and analyzes the primary reasons for the CMPL's ineffectiveness, namely, practical and procedural shortcomings coupled with a failure to identify appropriate sources of law and authority. Part IV suggests practical solutions for improving administration of the CMPL, outlines jurisdictional reforms that will instill greater faith in the Shari'a court system, and argues that the CMPL must be amended to allow for greater use of customary law and provide a role for several significant sources of authority.

## II. THE CMPL WAS INTRODUCED TO RESOLVE LONG-STANDING CONFLICTS BETWEEN CHRISTIANS AND MUSLIMS IN THE PHILIPPINES

Islam and Christianity reached the Philippines as explorers and traders expanded the geographic range of both religions from the fourteenth to the sixteenth century.<sup>3</sup> The two religions came into fierce and prolonged conflict almost immediately.<sup>4</sup> Divided by geography, culture, and eventually levels of commercial and industrial development, religious differences between Muslims and Christians remain a flashpoint for violence and upheaval on a national scale.<sup>5</sup> The CMPL emerged through an effort to reduce religious tensions and restore peace to the Philippines.

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<sup>3</sup> I O. D. CORPUZ, *THE ROOTS OF THE FILIPINO NATION*, 54-55 (2005).

<sup>4</sup> LUIS H. FRANCA, *A HISTORY OF THE PHILIPPINES: FROM INDIOS BRAVOS TO FILIPINOS* 51-62, 90-95 (2010).

<sup>5</sup> See, e.g., Simon Roughneen, *New Violence in the Philippines Sparks Terrorism Fears*, WASH. TIMES, Oct. 30 2008, <http://www.washingtontimes.com/news/2008/oct/30/new-violence-in-philippines-sparks-terrorism-fears/>.

A. *The Relationship Between Muslims and Christians in the Philippines Has Been Defined by Conflict for Centuries*

Conflict between Islam and Christianity in the Philippines began as soon as the Spanish arrived in 1521. The Spanish immediately and aggressively expanded their influence.<sup>6</sup> The large southern island of Mindanao and several smaller surrounding islands became the principal bastion of Islam in the Philippines, while the Spanish established themselves in the north.<sup>7</sup> The religious differences between the North and the South, exacerbated by natural geographic barriers, led to a rigidly segmented society.<sup>8</sup>

The Spanish controlled much of the Philippines for over three centuries, during which Catholicism assumed the mantle of state religion.<sup>9</sup> The Spanish were unable to conquer the Muslim communities of the South,<sup>10</sup> however, as Muslim groups set aside their differences in order to confront a common foe.<sup>11</sup> Ironically, the relatively advanced Muslim political systems of the southern Philippines disadvantaged the region economically. As the North experienced substantial industrial growth under Spanish rule, the South maintained a defensive posture that stymied economic development.<sup>12</sup> Combined with existing religious and cultural differences, the North's economic growth and relative prosperity exacerbated the divisions between the two regions.<sup>13</sup> The Spanish defeat at the hands of the United States in 1898 led to an increase in violence, but changed little in the substantive relationship between Muslims and Christians.<sup>14</sup>

Independence, achieved in the wake of World War II, also failed to unify the nation. Instead, it led to a resurrection of violence based on religion and geography. Shortly after the Philippines gained independence, the government resettled hundreds of thousands of Christians on fertile lands in Mindanao, displacing Muslim farmers who had comprised a majority of the population in the region and establishing Christians—especially

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<sup>6</sup> FRANCIA, *supra* note 4, at 51-62.

<sup>7</sup> *Id.* at 45-46, 62-63.

<sup>8</sup> Holbrook, *supra* note 2, at 411.

<sup>9</sup> CORPUZ, *supra* note 3, at 185-243 (expounding upon the Christianization of the Philippines).

<sup>10</sup> FRANCIA, *supra* note 4, at 93-94.

<sup>11</sup> *See* CORPUZ, *supra* note 3, at 58-59.

<sup>12</sup> AMER M. BARA-ACAL & ABDULMAJID ASTIH, *MUSLIM LAW ON PERSONAL STATUS IN THE PHILIPPINES* 9-10 (1998).

<sup>13</sup> *Id.*

<sup>14</sup> Holbrook, *supra* note 2, at 413-15.

Catholics—as the dominant religious group.<sup>15</sup> Today, Muslims represent less than thirty percent of the population of Mindanao.<sup>16</sup> This demographic shift, combined with more deliberate efforts to assimilate Filipino Muslims, led to political marginalization and the deprivation of rights.<sup>17</sup> The Filipino government adopted an aggressive policy of integration that allowed Muslims to retain certain customary rights<sup>18</sup> while gradually phasing out Muslim practices among the southern provinces.<sup>19</sup>

Tensions began to mount as Filipino Muslims were deprived of the relative autonomy they had enjoyed under both the Spanish and American governments. Violent skirmishes throughout the 1960s culminated in the Jabidah Massacre of 1968 in which Christian officers summarily executed at least fourteen Muslim members of the military for an alleged mutiny.<sup>20</sup> The ensuing outcry among the Muslim population contributed to the rise of the pseudo-terrorist organization the Moro National Liberation Front (“MNLF”).<sup>21</sup> As violence ripped across the southern region, President Marcos declared martial law in 1972.<sup>22</sup> Rather than solving the crisis, the declaration of martial law sparked greater violence between the government and Islamic resistance groups.<sup>23</sup>

Conflict permeated the Philippines, especially in the South, for years following the implementation of martial law.<sup>24</sup> In November of 1976, the Republic of the Philippines and the MNLF reached a tentative peace agreement in the Tripoli Agreement.<sup>25</sup> Under the terms of the agreement, the government agreed to grant greater regional autonomy to the southern Philippines.<sup>26</sup> Significantly, the agreement also provided for the creation of Shari‘a courts.<sup>27</sup> The Tripoli Agreement did not end the conflict or directly

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<sup>15</sup> *Id.* at 417.

<sup>16</sup> Marly A. Bacaron, *Indigenous Conflict Resolution Mechanisms in Mindanao: Is Their Institutionalisation the Answer?*, 3 *ASIAN J. OF PUB. AFF.* 49, 49 (2009).

<sup>17</sup> Holbrook, *supra* note 2, at 417.

<sup>18</sup> For example, Muslim marriages were formally exempted from civil marriage requirements and could be performed in accordance with Muslim rites for a period of twenty years. *Id.*

<sup>19</sup> *Id.* at 417-18.

<sup>20</sup> FRANCIA, *supra* note 4, at 248. According to a survivor, the Muslim troops had refused to fight other Muslims. *Id.*

<sup>21</sup> *Id.* at 247-51.

<sup>22</sup> Daniel Joseph Ringuet, *The Continuation of Civil Unrest and Poverty in Mindanao*, 24 *CONTEMP. SOUTHEAST ASIA* 33, 38-39 (2002).

<sup>23</sup> *Id.*

<sup>24</sup> FRANCIA, *supra* note 4, at 249-50.

<sup>25</sup> Ringuet, *supra* note 22, at 40.

<sup>26</sup> Tripoli Agreement, Phil.-Moro National Liberation Front, Dec. 23, 1976, *reprinted in* INT’L STUDIES INST. OF THE PHIL., *MUSLIM FILIPINO STRUGGLE FOR IDENTITY: CHALLENGE AND RESPONSE: SELECTED DOCUMENTS FOR THE CONFERENCE ON THE TRIPOLI AGREEMENT, SEPTEMBER 12-13, 2-3* (1985) [hereinafter Tripoli Agreement].

<sup>27</sup> *Id.* at 3.

result in appreciably greater autonomy for the southern Philippines.<sup>28</sup> Nonetheless, as the first substantive meeting between the Philippine government and Muslim rebels, it represented a major step in the peace process and became a benchmark for future negotiations,<sup>29</sup> including discussions pertaining to the establishment of the CMPL.

*B. The CMPL Originated to Address Fundamental Differences Between Christian and Muslim Personal Laws*

A significant source of tension arose in the form of laws that reflected a Christian approach to personal relationships while simultaneously excluding Muslim views. Relatively early in the period of violent conflict between Muslim rebel groups and the Filipino government, both sides considered the implementation of elements of Islamic law as one way of bridging the volatile divide between the two sides. Many Muslim leaders hoped that the codification of Islamic law and its incorporation into the legal system would resolve many of the problems that beset the region.<sup>30</sup> Presidential Decree 1083 achieved this goal in 1977, formally recognizing Islamic law in the Philippines in certain instances.<sup>31</sup> However, the codification of Islamic law did not have the wide-reaching impact that many anticipated.

*1. Several Provisions of the Family Code of the Philippines Clash with Traditional Muslim Law*

Differences in attitudes toward personal relationships posed problems for reconciliation between Muslims and Christians. The Family Code,<sup>32</sup> based on Catholic values, conflicts with Muslim personal law in several areas.<sup>33</sup> Tension persisted, particularly in the areas of marriage, divorce, and inheritance.<sup>34</sup> This tension is exemplified by sharply differing attitudes toward divorce, where fundamental Muslim beliefs do not fit comfortably within the prevailing Catholic views of the Family Code. Divorce, although

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<sup>28</sup> Ringuet, *supra* note 22, at 41.

<sup>29</sup> *Id.*

<sup>30</sup> G. Carter Bentley, *Islamic Law in Christian Southeast Asia: The Politics of Establishing Shari-a Courts in the Philippines*, 29 PHILIPPINE STUD. 45, 50-51 (1981).

<sup>31</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083.

<sup>32</sup> FAMILY CODE, Exec. Ord. 209, as amended.

<sup>33</sup> See generally JAINAL D. RASUL, *COMPARATIVE LAWS: THE FAMILY CODE OF THE PHILIPPINES AND THE MUSLIM CODE* (1994) (providing a detailed comparison of the Family Code and Muslim personal law as codified in the CMPL).

<sup>34</sup> *Id.*

permitted under the Family Code, is strictly circumscribed.<sup>35</sup> Legal separation may be granted only in the case of physical violence against a spouse or child, physical or moral pressure to change religious or political affiliation, an attempt to corrupt a spouse or child, a prison sentence of six years or more, drug addiction, homosexuality, bigamy, infidelity, attempted murder, or abandonment.<sup>36</sup> An “absolute divorce” is permitted only in the case of adultery on the part of the wife or concubinage on the part of the husband.<sup>37</sup> Muslim tradition, in contrast, provides for six types of divorce: a husband’s repudiation of his wife (*talaq*), a wife’s repudiation of her husband (*tafwid*), a husband’s vow to refrain from intimate relations with his wife (*ila*), a husband’s comparison of his wife to a relative (*zihar*), unproven accusations of adultery by either spouse (*li’an*), and the wife’s redemption in court (*khul’*).<sup>38</sup> The Muslim approach to divorce encompasses a much broader spectrum of activities than the Filipino Catholic approach, allowing divorce when the couple can no longer live together because they are incompatible, either party is unfaithful, the husband is impotent, or the husband is an alcoholic and abuses his wife.<sup>39</sup> Excluding central Muslim values from the laws controlling intimate matters contributed to the tension between Christians and Muslims.

## 2. *Presidential Decree 1083 Codified Muslim Personal Laws*

The Marcos administration contemplated a system of Muslim personal laws as early as the Constitutional Convention of 1971,<sup>40</sup> but this approach to resolving the conflict did not garner serious attention until 1973, when Marcos issued Memorandum Order No. 370.<sup>41</sup> This Memorandum created a research staff tasked with collecting materials on Islamic laws, reconciling the laws of the Philippines with Islamic laws, and creating a Proposed Draft of the Muslim Code (“Proposed Draft”).<sup>42</sup> The staff conducted two months

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<sup>35</sup> FAMILY CODE, § 55.

<sup>36</sup> *Id.*

<sup>37</sup> RASUL, *supra* note 33, at 111.

<sup>38</sup> See BARA-ACAL, *supra* note 12, at 141-77.

<sup>39</sup> RASUL, *supra* note 33, at 121; see also Aurelia Miller, Note and Comment, “*Until Death Do Us Part?*”: A Proposal for the Philippines to Legalize Divorce, 24 CONN. J. INT’L L. 181, 186-90 (2008) (discussing these differences, and indicating that divorce, while permitted among Muslims, is rare).

<sup>40</sup> Holbrook, *supra* note 2, at 420.

<sup>41</sup> See Hamid A. Barra, *The Shariah Law in the Philippines: An Introduction*, 13 DANSALAN Q. 2, 70 (1993) [hereinafter Barra, *Introduction*].

<sup>42</sup> Michael O. Mastura & Musib M. Buat, *The Introduction of Muslim Law into the Philippine Legal System*, in ON THE CODIFICATION OF MUSLIM CUSTOMARY (ADAT) AND QURANIC LAWS 355, 364 (2d ed. 1976). See MUSLIM LAW CODE (Proposed Draft 1974) for the result of the committee’s efforts.

of fieldwork in eleven provinces in Mindanao and Sulu<sup>43</sup> and consulted leaders throughout the southern Philippines.<sup>44</sup> The staff did not intend the Proposed Draft to be a final draft, but rather sought to provide a tool for a Code Commission to use when establishing a permanent code.<sup>45</sup> The government criticized the Proposed Draft from the start. The chair of the Judiciary Code Committee directed six pointed questions and observations to the drafters, inquiring after their motives.<sup>46</sup> Among these, the chair noted “it would appear that you gentlemen who are Muslim would rather secede than integrate.”<sup>47</sup> Critics of the Proposed Draft expressed concern that it would lead to the creation of a “state within the state.”<sup>48</sup>

Dissatisfied with the Proposed Draft, Marcos issued Executive Order No. 442, creating a Presidential Commission to review the Proposed Draft.<sup>49</sup> The commission, headed by Islamic convert Cesar Majul,<sup>50</sup> presented its own draft on August 29, 1975.<sup>51</sup> It was not until February 4, 1977, however, following the Tripoli Agreement, that Marcos finally signed the CMPL into law as Presidential Decree 1083.<sup>52</sup>

The stated purposes of the CMPL include 1) the formal recognition of the legal system of the Muslims as part of the law of the land; 2) the codification of Muslim personal laws; and 3) provision for an effective administration and enforcement of Muslim personal law.<sup>53</sup> While the CMPL had the potential to increase political power and secure additional rights for Muslims, it has remained an ineffectual afterthought in the larger framework of the legal system of the Philippines.

### III. THE CMPL HAS FAILED TO PROVIDE SUBSTANTIVE RELIEF TO MUSLIMS IN NEED OF LEGAL REMEDIES

Few Filipino Muslims experienced marked change following the advent of the CMPL. The CMPL and other government concessions had the immediate effect of reducing the violence that engulfed the Philippines throughout the 1970s and improving foreign relations between the Marcos

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<sup>43</sup> Barra, *Introduction*, *supra* note 41, at 70.

<sup>44</sup> Bentley, *supra* note 30, at 55.

<sup>45</sup> *Id.* at 57.

<sup>46</sup> Mastura & Buat, *supra* note 42, at 356-57.

<sup>47</sup> *Id.* at 356.

<sup>48</sup> Bentley, *supra* note 30, at 58.

<sup>49</sup> Barra, *Introduction*, *supra* note 41, at 72-73.

<sup>50</sup> Bentley, *supra* note 30, at 62.

<sup>51</sup> See *infra* Part III.B.2 for an extensive discussion of some of the differences between the Proposed Draft and the final draft of the CMPL.

<sup>52</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083.

<sup>53</sup> *Id.* § 3.



administration and those nations that had questioned his tactics.<sup>54</sup> However, the CMPL has had little tangible effect on the daily lives of most Muslims due to 1) practical and procedural obstacles within the current system, 2) limitations on the application of customary law, and 3) the omission of sources of authority acknowledged by Filipino Muslims. As a result of these limitations, the CMPL has not supplanted the local and customary law that many Muslims turn to for resolution of their day-to-day concerns.

A. *Shortcomings in Procedure and the Practical Application of the CMPL Have Limited Its Influence and Efficacy*

A series of procedural and practical shortcomings have prevented the CMPL from becoming an effective resource for Muslims seeking to resolve disputes. Muslims struggle to access the Shari'a court system due to inadequate staffing and a lack of familiarity with the CMPL. Muslims are also reluctant to rely upon the Shari'a courts because they are not binding on non-Muslims and the non-Muslim Supreme Court may review and reject the decisions of the Shari'a courts.

1. *The Shari'a Court System Is Understaffed and Underutilized*

Many Muslims lack awareness or understanding of the CMPL due to shortcomings in the functioning of the CMPL and the Shari'a courts. These shortcomings stem from inadequate court staffing, difficulties in physically accessing the courts, and a failure to educate people about the CMPL.

The CMPL established fifty-one circuit courts and five district courts.<sup>55</sup> The circuit courts possess jurisdiction over offenses defined and punished under the CMPL and over civil matters pertaining primarily to marriage, divorce, and inheritance.<sup>56</sup> The district courts have jurisdiction to hear all other cases under the CMPL, including appeals from the circuit courts.<sup>57</sup> While the CMPL provided for Shari'a courts in 1977, the government did not establish any courts until the mid-1980s.<sup>58</sup> More significantly, as recently as 2009, the Shari'a courts were not functioning at anywhere near capacity.<sup>59</sup>

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<sup>54</sup> Bentley, *supra* note 30, at 65.

<sup>55</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, §§ 137, 150.

<sup>56</sup> *Id.* § 155.

<sup>57</sup> *Id.* §§ 143-144.

<sup>58</sup> Holbrook, *supra* note 2, at 426.

<sup>59</sup> 2009 SUP. CT. OF PHIL. ANN. REP. 83, available at [http://sc.judiciary.gov.ph/publications/reports/SC\\_Annual\\_09.pdf](http://sc.judiciary.gov.ph/publications/reports/SC_Annual_09.pdf). In 2009, only thirty-one of fifty-five judgeships were filled. *Id.*

A lack of qualified Shari'a judges and lawyers presents perhaps the greatest practical difficulty in implementing a system of Islamic law in the Philippines. Some problems stem from the requirements for admission to the bench. The President must appoint all Shari'a judges.<sup>60</sup> The qualifications for district judges under the CMPL are the same as those for judges of a comparable rank in the Philippine legal system.<sup>61</sup> Additionally, the CMPL requires district judges to be "learned" in Islamic law and jurisprudence.<sup>62</sup> The qualifications for circuit court positions are less stringent, requiring that a judge be a natural-born citizen who is at least twenty-five years old and has passed the Shari'a bar examination.<sup>63</sup>

Low bar passage rates have been and remain a persistent problem, contributing to the shortage of judges. At the first Shari'a bar examination, held in 1983, only fourteen applicants passed out of a group of more than one hundred.<sup>64</sup> While performance improved in the following years, applicants continue to struggle. Nearly three decades after the first exam, passage rates continue to hover around—and often below—thirty percent.<sup>65</sup>

The education system has failed to adequately train Islamic jurists. This failure has had a ripple effect on the appointment of judges. Low passage rates on both the regular bar exam and the Shari'a bar exam have resulted in understaffed Shari'a courts. As of December 2009, only thirty-one of fifty-one circuit court judgeships were filled, and none of the five district court judgeships were filled with permanent judges.<sup>66</sup> Senate Bill 1346, introduced in July of 2010, proposed expanding the Shari'a court system. It would have increased the number of Shari'a districts from five to eleven, and increased the number of circuit courts to eighty-eight, eight for each district.<sup>67</sup> However, this bill had not moved past the committee stage as

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<sup>60</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, §§ 139, 151.

<sup>61</sup> *Id.* § 140; An Act Reorganizing the Judiciary, Appropriating Funds Therefor, and for Other Purposes, B.P.Blg. 129, § 15 (Aug. 14, 1981) (establishing that judges must be natural-born citizens of the Philippines, must be thirty-five years of age, and must have practiced law in the Philippines for ten years).

<sup>62</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, §140.

<sup>63</sup> *Id.* at § 152.

<sup>64</sup> Holbrook, *supra* note 2, at 426-27.

<sup>65</sup> *Id.* at 427. In 2008, only thirty-five of one hundred and thirty-three applicants (26%) passed the Shari'a bar examination. *Id.*

<sup>66</sup> 2009 SUP. CT. OF PHIL. ANN. REP., *supra* note 59, at 83. *See also* Tomawis v. Balindong, G.R. No. 182434 (S.C., March 5, 2010) (noting that a Shari'a appellate court consisting of a presiding justice and two associate justices had yet to be established).

<sup>67</sup> An Act Establishing the Shari'a District Court System in the Autonomous Region in Muslim Mindanao and in the Areas Outside the Said Autonomous Region, Amending for the Purpose Presidential Decree No. 1083 Otherwise Known as the Muslim Code of Personal Laws of the Philippines, Providing Funds Therefor and for other Purposes, S.B. 1346, 15th Cong. (July 13, 2010) [hereinafter S.B. 1346].

of November 2011<sup>68</sup> and would serve no practical purpose unless new positions could be filled with qualified jurists.

Staffing challenges have contributed to another serious impediment to the expansion of the CMPL: low caseloads. Shari'a courts tried only 314 of 363,297 cases decided by the lower courts in the Philippines in 2009, or less than 0.1%.<sup>69</sup> While a lack of adequately trained jurists limits the number of cases the courts can hear, it is not the sole cause of low caseloads. Ignorance of the courts, dissatisfaction with the courts, and a lack of familiarity with the CMPL also pose major problems.

The CMPL restricts the Shari'a courts to the southern Philippines,<sup>70</sup> a relatively underdeveloped and impoverished area<sup>71</sup> that sees fewer cases litigated. The southern Philippines remain a largely rural, agrarian society.<sup>72</sup> The Shari'a courts, on the other hand, are limited to urban areas; due to their relative locations and lack of familiarity with the CMPL, many Muslims are unable to access the courts.<sup>73</sup>

Several agencies have tried to spread awareness of the CMPL. The Asian Institute of Journalism and Communication produced several pamphlets intended to educate people about the CMPL and the Shari'a courts by explaining provisions of the CMPL, the composition of the courts, and the process involved in accessing them.<sup>74</sup> However, these publications have not achieved a noticeable change in the popularity of the Shari'a courts.

Even among Muslims who are aware of the CMPL, many simply do not understand it. In a 2007 survey of influential Muslims, more than half of the respondents who were not Shari'a lawyers indicated that they "know a little" or "don't know anything" about the CMPL.<sup>75</sup> Among traditional

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<sup>68</sup> See *Sharia District Court System*, SENATE OF THE PHILIPPINES 15TH CONGRESS, [http://www.senate.gov.ph/lis/bill\\_res.aspx?congress=15&q=SBN-1346](http://www.senate.gov.ph/lis/bill_res.aspx?congress=15&q=SBN-1346) (last visited Nov. 3, 2011).

<sup>69</sup> 2009 SUP. CT. OF PHIL. ANN. REP., *supra* note 59, at 59.

<sup>70</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, §§ 138, 150. S.B. 1346 would provide for expansion into three northern Districts: Southern Luzon, Northern Luzon, and the Visayas. S.B. 1346, *supra* note 67.

<sup>71</sup> Ringuet, *supra* note 22, at 44-45.

<sup>72</sup> See Press Release, Phil. Nat'l Statistics Office, Philippines: Urban Population Was Registered at 48.0 Percent (Oct. 10, 2003), <http://www.census.gov.ph/data/pressrelease/2003/pr0382tx.html> (last visited Sept. 24, 2011) (stating the urban population in the Autonomous Region in Muslim Mindanao was only 21.2%).

<sup>73</sup> See LINDA LUZ GUERRERO ET AL., *THE CODE OF MUSLIM PERSONAL LAWS IN PRACTICE: WHAT INFLUENTIAL MUSLIMS AND SHARIA LAWYERS THINK* 120-21 (2007).

<sup>74</sup> See ASIAN INSTITUTE OF JOURNALISM AND COMMUNICATION, *A PRIMER ON THE CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES*, available at [http://www.muslimmindanao.ph/shari%27a/pesonal\\_laws.pdf](http://www.muslimmindanao.ph/shari%27a/pesonal_laws.pdf); see also ASIAN INSTITUTE OF JOURNALISM AND COMMUNICATION, *COURTS FOR MUSLIMS: A PRIMER ON THE PHILIPPINE SHARIA COURTS*, available at [http://www.muslimmindanao.ph/shari%27a/code\\_muslim.pdf](http://www.muslimmindanao.ph/shari%27a/code_muslim.pdf).

<sup>75</sup> See GUERRERO ET AL., *supra* note 73, at 19, 82-83. Even among Shari'a lawyers, 58% first learned of the CMPL during their Shari'a training. *Id.*

leaders, three quarters knew little or nothing.<sup>76</sup> Based on the backgrounds of those surveyed,<sup>77</sup> the average Muslim is likely even less familiar with the CMPL. To date, efforts to promote understanding and utilization of the CMPL among Muslims of the southern Philippines have proven inadequate.

## 2. *The CMPL Is Not Binding on Non-Muslims and Is Limited to the Southern Philippines*

The CMPL's procedural shortcomings undermine Muslims' ability to rely upon the CMPL and Shari'a courts, exacerbating practical problems. These shortcomings limit the CMPL's ability to improve the legal status of Muslims by restricting the CMPL's jurisdiction to Muslims, restricting its geographic jurisdiction almost entirely to the South, and subjecting the decisions of the Shari'a courts to review by the non-Muslim Supreme Court.

The CMPL applies only to Muslims and courts may not construe it to the prejudice of a non-Muslim.<sup>78</sup> This raises potentially significant problems for Muslim litigants in cases involving non-Muslims or converts, as illustrated in the case *Bondagjy v. Bondagjy*.<sup>79</sup> *Bondagjy* involved a custody battle between a Muslim man and a Catholic woman. The wife converted to Islam prior to marriage, then converted back to Catholicism upon separation from her husband.<sup>80</sup> The Shari'a district court decided the case by applying the CMPL, holding that the wife was unworthy to care for her children for reasons of moral depravity.<sup>81</sup> The Supreme Court, which retains power to review Shari'a court decisions,<sup>82</sup> reversed the district court, observing that the wife failed to register her conversion to Islam in accordance with the CMPL and the Court should thus consider the Family Code as it applied to a non-Muslim woman.<sup>83</sup> The Court applied the Family Code and granted the mother custody, emphasizing that the welfare of the minors was the controlling consideration under the Family Code.<sup>84</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> Of respondents, 78% were college graduates and 52% had post-graduate education; 95% could read and write English, the language used in the court system. By contrast, among the general population in 2006, only 65% could read English and only 48% could write English. *Id.* at 19-21.

<sup>78</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 3. The sole exception to this rule arises when a non-Muslim woman marries a Muslim man in a Muslim ceremony, though the Supreme Court has cast doubt on this. See *Bondagjy v. Bondagjy*, G.R. No. 140817 (S.C., Dec. 7, 2001) available at [http://www.lawphil.net/judjuris/juri2001/dec2001/gr\\_140817\\_2001.html](http://www.lawphil.net/judjuris/juri2001/dec2001/gr_140817_2001.html).

<sup>79</sup> *Bondagjy v. Bondagjy*, G.R. No. 140817.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* The Court does not go into detail regarding the wife's conduct. *Id.*

<sup>82</sup> See *infra* text accompanying notes 88-94 (discussing this power and its implications).

<sup>83</sup> *Bondagjy v. Bondagjy*, G.R. No. 140817.

<sup>84</sup> *Id.*

*Bondagjy* illustrates a major concern for Muslims who are considering utilizing the CMPL: Muslims may not rely upon the decisions of the Shari'a courts when dealing with non-Muslims. As such, the CMPL in its current form cannot serve to balance legal relationships between Muslims and non-Muslims. So long as one party is non-Muslim in the eyes of the state,<sup>85</sup> the non-Muslim party may control the choice of law used to decide the case.

The CMPL's jurisdiction is also limited geographically, applying only in the five enumerated Shari'a districts.<sup>86</sup> Under this framework, the Shari'a courts cannot render a decision in a dispute arising outside of the Shari'a districts.<sup>87</sup> As such, the Shari'a court system remains inaccessible to Muslims in provinces that lack a Shari'a district court.

While the CMPL allows Muslims to take legal action against other Muslims, it provides little opportunity to challenge the actions of the Christian majority. Christians—both individuals and the government—remain effectively immune from judgment under the CMPL and are subject to suit only in courts controlled by predominantly Christian judges who apply a system of law that has been influenced by Catholic values. The *Bondagjy* case also highlights another jurisdictional shortcoming of the CMPL: the Supreme Court's power to interpret the CMPL.

### 3. *The Supreme Court of the Philippines May Interpret the CMPL*

The Supreme Court may hear an appeal of any Shari'a court decision. The Constitution of the Philippines, revised in 1987, provides that the Supreme Court may “[r]eview, revise, reverse, modify, or affirm on appeal or certiorari . . . final judgments and orders of lower courts. . . .”<sup>88</sup> This provision allowed the Court to overturn the Shari'a court's decision in *Bondagjy v. Bondagjy*.<sup>89</sup> Eight years later, it also allowed the Court to

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<sup>85</sup> It bears mentioning that the Shari'a courts are empowered to make a finding of fact as to whether an individual is a Muslim, though this determination may be reviewed by the Supreme Court. See *Montañer v. Shari'a District Court, Fourth Shari'a Judicial District, Marawi City*, G.R. No. 174975, 576 S.C.R.A. 746, 755-56 (S.C., Jan. 20, 2009).

<sup>86</sup> Senate Bill 1346, introduced in July of 2010, would amend §138 of Pres. Dec. 1083 to provide for the creation of Shari'a courts outside of the southern Philippines. S.B. 1346, *supra* note 67.

<sup>87</sup> See Anshari P. Ali, *Legal Impediments to the Application of Islamic Family Law in the Philippines*, 27 J. OF MUSLIM MINORITY AFF. 93, 108 (2007) (citing *Vda. de Maraog v. Silapan*, G.R. 64519, 128 S.C.R.A. 470 (S.C., Mar. 29, 1984) (holding that the CMPL does not apply outside the enumerated Shari'a districts and thus distributing a deceased Muslim's estate according to the Family Code)); see also *Awadhi v. Astih*, G.R. No. 81969, 165 S.C.R.A. 771, 775-77 (S.C., Sept. 26, 1988) (holding in part that the Fourth Shari'a District Court lacked jurisdiction to hear a case involving two individuals who lived outside that district).

<sup>88</sup> CONST. (1987), art. VIII, § 5, cl. 2; see also CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 145.

<sup>89</sup> See *Bondagjy v. Bondagjy*, G.R. No. 140817.

weigh the issue of divorce between the same couple in *Bondagjy v. Artadi*.<sup>90</sup> In reaching its decision, the Court turned to Islamic law to determine which types of evidence the Shari'a court was obliged to consider when ruling on matters of *res judicata*.<sup>91</sup> The second *Bondagjy* case raises legitimate concerns about the appellate process.

The Constitution empowers the Supreme Court to examine and interpret the CMPL.<sup>92</sup> The Court's decision becomes part of the law of the Philippines.<sup>93</sup> This presents some problems for the advancement of the CMPL. The Supreme Court does not include any Muslim justices.<sup>94</sup> As a result, a group with little practical knowledge of Muslim traditions or training in Shari'a shapes the contours of Islamic law. To date, the court has been able to resolve most issues before it based on grounds of procedure and venue.<sup>95</sup> However, as more complicated issues of Islamic law reach the Supreme Court, the Justices will face significant challenges interpreting the CMPL in a fashion that is consistent with Shari'a. The Supreme Court's lack of familiarity with Islamic jurisprudence presents a serious threat to the integrity of the CMPL as an Islamic legal system.

Muslims will remain reluctant to trust the CMPL or Shari'a court rulings so long as they believe that they will not be entitled to judgment based on the CMPL when standing before the Supreme Court. The resulting fear that the CMPL and Islamic law will be interpreted incorrectly by a court that lacks subject knowledge reinforces the perception that Muslim beliefs are secondary to those of Christians.

#### *B. The CMPL Limits Customary Law and Rejects Several Sources of Authority That Are Influential in the Muslim-Filipino Experience*

While procedural and practical shortcomings have created obstacles to the widespread adoption of the CMPL throughout the southern Philippines, there is evidence that the CMPL's problems go deeper, reaching to the very heart of Filipino Muslims' conception of their religious identity. Under Shari'a, judges may draw upon a wide variety of interpretations of Islamic

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<sup>90</sup> See *Bondagjy v. Artadi*, G.R. No. 170406, 561 S.C.R.A. 633 (S.C., Aug. 11, 2008).

<sup>91</sup> *Id.* at 643-45

<sup>92</sup> CONST. (1987), art. VIII, § 5, cl. 2.

<sup>93</sup> CIVIL CODE, § 8, Rep. Act 386, as amended.

<sup>94</sup> See *Justices of the Supreme Court*, SUPREME COURT OF THE PHILIPPINES, <http://sc.judiciary.gov.ph/justices/index.php> (last visited Sept. 23, 2011).

<sup>95</sup> See, e.g., *Musa v. Moson*, G.R. No. 95574, 200 S.C.R.A. 715, 721 (S.C., Aug. 16, 1991) (finding Shari'a court was a proper venue to resolve a dispute over a Muslim decedent's property that was located within a Shari'a district even though decedent had resided outside of that district); *Awadhi v. Astih*, G.R. No. 81969, 165 S.C.R.A. 771 (S.C., Sept. 26, 1988).

law that have developed over the course of one and a half millennia.<sup>96</sup> As such, sources of law play a crucial role in a given community's understanding of what it means to be Muslim. The CMPL identifies several sources of law upon which judges may draw when making their decisions, including the CMPL itself, Islamic law as interpreted by the four orthodox schools of thought, and customary law. While the CMPL allows for the use of customary law, its failure to provide a vehicle by which customary law may be introduced into the legal system limits the ability of judges to do so.

1. *The CMPL Implies a Distinction Between Customary Law and Shari'a That Many Filipino Muslims Do Not Acknowledge*

One of the CMPL's principal shortcomings stems from its preference for Shari'a that has been specifically codified within the CMPL or drawn from the four traditional Sunni schools of thought. This tendency minimizes the role of Shari'a drawn from customary law, or *adat*. *Adat* holds a powerful place in the lives of many Filipino Muslims, but the CMPL limits the manner in which it can be introduced into the Shari'a courts.

More than two-thirds of the CMPL's 190 articles consist of fairly specific statutory provisions covering marriage, divorce, paternity, guardianship, and inheritance.<sup>97</sup> To the extent that they are clear, these provisions constitute the Islamic law of the Philippines. When dealing with issues that are not covered by express provisions, courts may take other sources of Islamic law into account.<sup>98</sup> Among these sources are the teachings of the four orthodox schools of thought, or *madhhabs*.<sup>99</sup> Over the course of centuries, the *madhhabs* have created vast libraries to impart their view of Shari'a based on various methods of interpretation.<sup>100</sup> The CMPL indicates that these scholarly works may be given persuasive weight.<sup>101</sup>

The CMPL also provides for the use of *adat*.<sup>102</sup> The word *adat* is Arabic, literally translated as "customs."<sup>103</sup> When Islam arrived in the Philippines, local tribes gradually combined it with customary laws that

<sup>96</sup> See Barra, *Introduction*, *supra* note 41, at 5-22 (discussing various sources of Shari'a).

<sup>97</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083.

<sup>98</sup> *Id.* § 4.

<sup>99</sup> *Id.* §§ 4, 6.

<sup>100</sup> See Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari'a into Egyptian Constitutional Law in STUD. IN ISLAMIC LAW AND SOC'Y* 19, 13-18 (Ruud Peters & Bernard Weiss eds., 2006) for a concise introduction to the *madhhabs*.

<sup>101</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 4.

<sup>102</sup> *Id.* §§ 5, 7.

<sup>103</sup> Salipada S. Tamano, *Mindanao State University: Its Role in the Development of the Study of Adat Laws*, in *ON THE CODIFICATION OF MUSLIM CUSTOMARY (ADAT) AND QURANIC LAWS*, 355, 15-16 (2d ed. 1976).

predated Islam in the region, resulting in a system of law that is neither entirely Islamic nor entirely customary.<sup>104</sup> *Adat* in its modern manifestation in the Philippines is “founded on the bedrock of Islamic traditions and handed down through various generations.”<sup>105</sup> While *adat* can vary greatly from one region to the next, taking the form of extensive codifications or simply establishing certain procedures for the administration of laws, it generally proscribes community conduct and individual behavior.<sup>106</sup> Despite geographic variations, most Filipino Muslims share a strong concept of *adat*.<sup>107</sup> Tellingly, the CMPL distinguishes “Muslim law” and “*adat*.”<sup>108</sup>

Despite their intertwined nature, some Filipino Muslims in the legal profession, including several who were involved in the CMPL’s drafting process, speak of *adat* and Muslim law as though the two are distinct. Michael Mastura, a Muslim and the only person to serve on the drafting committees for both the Proposed Draft and the CMPL, distinguished Islamic law from customary law when identifying factors that shaped the spiritual, social, and political environment of the Muslim community in the Philippines.<sup>109</sup> Other prominent Muslims have drawn the same distinction.<sup>110</sup> There is an implication in their statements that the phrases “Muslim law” or “Islamic law” refer to the scholarly interpretations of Shari’a set forth in the works of the *madhhabs*. The CMPL’s apparent adoption of this position is at odds with the conceptions and experiences of many Muslims in rural areas.

The CMPL’s portrayal of *adat* as distinct from Shari’a misrepresents the importance of *adat* not only as a legitimate source of law but also as an expression of Islam. Educated Muslims living in cities tend to consider themselves Muslim Filipinos.<sup>111</sup> By contrast, the vast majority of those

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<sup>104</sup> Macapanton Y. Abbas, Jr., *The Historical, Political, Social and Legal Justification for the Codification and Enforcement of Muslim Laws and Adat Laws*, in ON THE CODIFICATION OF MUSLIM CUSTOMARY (ADAT) AND QURANIC LAWS 163, 182 (2d ed. 1976).

<sup>105</sup> Tamano, *supra* note 103, at 16.

<sup>106</sup> *Id.* at 16-19.

<sup>107</sup> *Id.* at 16.

<sup>108</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 5.

<sup>109</sup> Michael O. Mastura, *The Philippine State and “Secularized” Muslim Concepts: Aspects and Problems*, in ON THE CODIFICATION OF MUSLIM CUSTOMARY (ADAT) AND QURANIC LAWS 217, 223 (2d ed. 1976).

<sup>110</sup> See Mamitua Saber, *The Contact Between Traditional and Legal Authority Systems in a Muslim Setting*, in ON THE CODIFICATION OF MUSLIM CUSTOMARY (ADAT) AND QURANIC LAWS 288, 294 (2d ed. 1976); M. Sc. Soeraharjo, *The Law Within the Legal System to Overcome Legal Conflicts Between Customary (Adat) Law, Islamic and Western Laws in Force in Indonesia*, in ON THE CODIFICATION OF MUSLIM CUSTOMARY (ADAT) AND QURANIC LAWS 339, 344-45 (2d ed. 1976).

<sup>111</sup> Robert McAmis, *Muslim Filipinos: 1970-1972*, in ON THE CODIFICATION OF MUSLIM CUSTOMARY (ADAT) AND QURANIC LAWS 65, 68 (2d ed. 1976).



living in rural areas identify themselves primarily by reference to their tribe or religious subgroup.<sup>112</sup> These people rely upon the traditional order and its inherent authority.<sup>113</sup> Within that order, *adat* plays a crucial role in shaping personal and legal relationships and is seen as a vital part of the Shari'a.

For many tribal groups in the southern Philippines, *adat* supplies the primary source of law.<sup>114</sup> The Tausug, one of the most prominent Muslim tribes of the southern Philippines,<sup>115</sup> look to the so-called “headman” or *sarah* to serve as the “arbiter of conflicts and disputes.”<sup>116</sup> The *sarah*—a term derived from Shari'a<sup>117</sup>—embraces a role that entails religious, political, social, and legal duties.<sup>118</sup> The *sarah* applies *adat*.<sup>119</sup> To the Tausug, *adat* is an expression of Islam and the Shari'a. In contrast to the drafters of the CMPL, who effectively conflate Shari'a and with its scholarly interpretations, the Tausug distinguish these two legal concepts.<sup>120</sup> Shari'a is the body of revealed laws, and the interpretations of the *madhhabs* comprise only one expression of it;<sup>121</sup> to the Tausug, *adat* is as legitimate an expression of revealed law as orthodox interpretation.<sup>122</sup>

The enduring importance of *adat* can also be seen in the approach to clan violence in rural areas of the southern Philippines. The *rido*, a term which refers to prolonged feuds between families or clans, has cost thousands of lives over the last century.<sup>123</sup> Recently, Muslim communities have relied upon three alternative concepts of justice by which a feud may be resolved: customary law, Islamic law, and Philippine law.<sup>124</sup> Despite the availability of three viable approaches to conflict resolution, customary law predominates.<sup>125</sup> This is due in part to abuse of state institutions,<sup>126</sup> resulting in a lack of trust in the justice administered by those institutions. Customary law also appeals because the parties to a dispute generally accept the

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<sup>112</sup> *Id.*

<sup>113</sup> Saber, *supra* note 110, at 291.

<sup>114</sup> See, e.g., HADJI MASHUR BIN-GHALIB JUNDAM, TUNGGAL HULAH-DUWA SARAH: ADAT AND SHAREE'AH LAWS IN THE LIFE OF THE TAUSUG 33 (2006).

<sup>115</sup> See JAINAL D. RASUL, SR, ISLAM AND THE FILIPINO MUSLIMS 77 (2009).

<sup>116</sup> BIN-GHALIB JUNDAM, *supra* note 114, at 33.

<sup>117</sup> *Id.* at 31.

<sup>118</sup> *Id.* at 38-39.

<sup>119</sup> *Id.* at 33.

<sup>120</sup> *Id.* at 86.

<sup>121</sup> *Id.*

<sup>122</sup> See *id.* at 108 for a discussion of sources of Shari'a and, in particular, custom, or *urf*. The term *urf* is generally considered to be roughly synonymous with *adat*. See, e.g., GUERRERO, ET AL., *supra* note 73, at 198.

<sup>123</sup> Bacaron, *supra* note 16, at 52.

<sup>124</sup> *Id.* at 54.

<sup>125</sup> *Id.* at 55.

<sup>126</sup> *Id.*

procedure, respect the integrity of the mediators, and will consent to be bound by the result.<sup>127</sup>

Although the CMPL provides for the use of *adat* in rendering decisions, its inability to recognize the decisions of local Muslim courts impedes its functional ability to include *adat*. There are three traditional vehicles for conflict resolution under *adat*, roughly translated as resolution by genealogy, consensus, and the Book.<sup>128</sup> Resolution by the Book draws on the *Qur'an* as interpreted by a judge, or *kali* (Ar: *qadi*).<sup>129</sup> The *kali* courts—effectively local trial courts—are pillars of the Muslim community.<sup>130</sup> Their jurisdiction extends to matters of communal life, particularly dispute resolution.<sup>131</sup> Despite their significance within many Muslim communities, the CMPL does not recognize the decisions of these courts.

The *kali* courts are, at root, tribal courts. They remain marginalized due to their omission from the CMPL.<sup>132</sup> The Supreme Court dashed what little hope these courts had of official recognition in *Badua v. Cordillera Bodong Administration*.<sup>133</sup> In *Badua*, the Court held that tribal courts lie outside the Philippine judicial system, thus lacking judicial power: the decisions of these courts are given no consideration when challenged in the Philippine judiciary.<sup>134</sup> The exclusion of the *kali* courts from the Shari'a court system eliminates one of the clearest avenues for *adat* to influence interpretations of Islamic law.

Over centuries, *adat* has become tightly interwoven with Muslims' understanding of their religion and identity.<sup>135</sup> While the CMPL allows judges to utilize *adat* in theory, there is no vehicle by which they may easily incorporate *adat* into their decisions. This limited approach to the incorporation of *adat*, exacerbated by the Supreme Court's refusal to recognize the *kali* courts, has alienated thousands of Filipino Muslims who see these courts as a primary source of justice. The CMPL's failure to draw upon this crucial source of law has limited its influence.

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<sup>127</sup> *Id.*

<sup>128</sup> Hamid A. Barra, *Conciliation, Amicable Settlement and Arbitration Under Islamic, Philippine, and Customary Adat Laws*, 14 *DANSALAN Q.* 3, 17-19 (1994) [hereinafter Barra, *Conciliation*].

<sup>129</sup> *Id.* at 19.

<sup>130</sup> Barra, *Introduction*, *supra* note 41, at 57.

<sup>131</sup> *Id.* at 56.

<sup>132</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083.

<sup>133</sup> *Badua v. Cordillera Bodong Admin.*, G.R. No. 92649, 194 S.C.R.A. 101 (S.C., Feb. 14, 1991)

<sup>134</sup> *Id.* at 105-06.

<sup>135</sup> BIN-GHALIB JUNDAM, *supra* note 114, at 2.

2. *The CMPL Rejects Several Sources of Authority That Play a Central Role in the Muslim-Filipino Experience*

While sources of law play an important role in Islamic law, sources of authority are equally important. However, the CMPL curtailed or eliminated several instrumental sources of Muslim authority. Muslims will remain reluctant to turn to the judiciary so long as it is governed by bodies that they do not trust. Fearing Muslims' desire to be wholly independent of the Philippine nation, the government ignored several recommendations that would have recognized familiar sources of Muslim authority. In doing so, the government erected significant obstacles to the CMPL's successful implementation.

President Marcos created a research staff that spent two months conducting research throughout the southern Philippines and several more composing the Proposed Draft.<sup>136</sup> However, when the staff completed its work, the administration rejected its proposal.<sup>137</sup> The administration's discomfort with the proposed draft was unsurprising, given their intentions. As scholar G. Carter Bentley noted shortly after the adoption of the CMPL,

Instead of introducing progressive new practices, [the Proposed Draft] would serve to institutionalize existing practices. It would answer Muslim demands that their religion and customs be preserved, but it would not serve to "inculcate new habits and attitudes among Muslims." Inclusion of adat considerations lessened the possibility that "old customs" would be eliminated.<sup>138</sup>

To further its goal of assimilation, the administration created a new drafting committee.<sup>139</sup> The committee invited twenty-six senior Muslim lawyers to a two-day conference to share their thoughts on the proposed Muslim code.<sup>140</sup> In stark contrast to the diversity of individuals with whom the original committee had conferred, the eighteen lawyers who attended this conference were trained in Philippine law rather than Shari'a and virtually all had achieved status under Marcos.<sup>141</sup> Based on the recommendations of this rather homogenous group, and on its members' own beliefs, the new

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<sup>136</sup> See *supra* text accompanying notes 40-45 (discussing the Proposed Draft and its formation).

<sup>137</sup> Bentley, *supra* note 30, at 59.

<sup>138</sup> *Id.*

<sup>139</sup> Barra, *Introduction*, *supra* note 41, at 70.

<sup>140</sup> Bentley, *supra* note 30, at 60.

<sup>141</sup> *Id.*

committee prepared a code that differed from the original in several important ways.

A comparison of the Proposed Draft and the CMPL indicates that the Marcos administration made several crucial decisions that reduced the likelihood that the CMPL would be embraced by the Muslim population. In contrast to the religious and traditional leaders who drew upon personal knowledge of and experience with people who would utilize Shari'a courts to influence the Proposed Draft, the academics who contributed to the CMPL were disconnected from the wants, needs, and religious beliefs of the average Filipino Muslim.

The Proposed Draft was primarily procedural while the CMPL consists primarily of substantive laws.<sup>142</sup> While many of the substantive laws recommended by the Proposed Draft and ultimately adopted by the CMPL were similar, the final form of the CMPL reduced and altered the proposed sources of authority that would guide the administration of laws. The final version retained the Shari'a courts, the office of the jurisconsult ("Mufti"), and the Agama Arbitration Council in reduced roles; it also eliminated the consultative council ("*majlis*") and the board of the *ulama*.<sup>143</sup> The administration justified the removal of these administrative bodies by claiming that they existed for purely religious reasons or were not urgent.<sup>144</sup> This reasoning overlooks the fact that Shari'a is inherently connected to religion. Efforts to separate it from its Islamic roots serve only to undermine the influence of the CMPL. The decision to eliminate the *majlis*, in particular, dealt a tremendous blow to the CMPL's efficacy by depriving Muslims of a group with the requisite knowledge to interpret the law to fit the expectations of those the CMPL was intended to serve, and the power to do so.

*a. Limitations on the Influence of the Shari'a Courts, the Mufti, and the Agama Arbitration Council Weakened the CMPL*

The CMPL retained three sources of authority from the Proposed Draft, but altered each to limit its influence and autonomy. By restricting the power and independence of the Shari'a courts, the Mufti, and the Agama

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<sup>142</sup> *Id.* at 61-62. See also Barra, *Introduction*, *supra* note 41, at 75. Compare CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, with MUSLIM LAW CODE (Proposed Draft 1974) (the Proposed Draft dedicated roughly 120 sections to establishing the governing apparatus of the Muslim judicial system, compared to only thirty-two such sections in the CMPL).

<sup>143</sup> Compare CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, with MUSLIM LAW CODE (Proposed Draft 1974).

<sup>144</sup> Bentley, *supra* note 30, at 61.

Arbitration Council, the administration deprived Muslims of effective leadership roles in shaping the implementation of the CMPL.

The government placed the Shari'a courts under the supervision of the judiciary<sup>145</sup> in the apparent hope that this would create a single, seamless judicial system. The CMPL does not address the decision process.<sup>146</sup> This omission implies that the decision-making process should follow that of the regular courts, which differs sharply from the Proposed Draft. Under the Proposed Draft, Shari'a court judges were to be given greater autonomy in reaching decisions.<sup>147</sup> The draft explicitly urged judges to take *adat* into account.<sup>148</sup> It also required that preliminary proceedings take the form of arbitration or mutual concession based on equity and justice.<sup>149</sup> This flexibility offered a decision-making process that was more familiar to most Muslims than the trial procedure the government adopted. Nevertheless, the CMPL rejected this approach.<sup>150</sup> As a result, the highest-ranking judges rely primarily on scholarly rather than customary expressions of Islam.

The CMPL retained the Agama Arbitration Council ("Agama Council"), a body with limited jurisdiction to consider certain cases that do not require a formal trial.<sup>151</sup> Specifically, the Agama Council may resolve cases involving two types of divorce,<sup>152</sup> subsequent marriages, and some offenses against customary law.<sup>153</sup> While the function of this body remained effectively the same between the draft and the CMPL, the draft provided for a Muslim chair who was appointed annually by the presiding judge in every district.<sup>154</sup> Shari'a judges would likely be more willing to refer matters to the Agama council if they regularly interact with a standing chair responsible for assembling and supervising the council rather than assembling the council themselves every time an issue arises that lends itself to arbitration. Arbitration is a popular tool among the Muslim population<sup>155</sup> and would have been more familiar than the trial-based system that the CMPL favors.

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<sup>145</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 137.

<sup>146</sup> *See id.*

<sup>147</sup> MUSLIM LAW CODE § 53 (Proposed Draft 1974).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See* CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083.

<sup>151</sup> *Id.* § 163.

<sup>152</sup> The two types of divorce are *talaq* and *tafwid*, repudiation by the husband or by the wife, respectively.

<sup>153</sup> CODE OF MUSLIMS PERSONAL LAWS, Pres. Dec. 1083, §§ 161-162.

<sup>154</sup> MUSLIM LAW CODE § 75 (Proposed Draft 1974).

<sup>155</sup> *See* Barra, *Conciliation*, *supra* note 128, at 10-13, 19 (discussing arbitration under Islamic and customary law).

Finally, the CMPL retained the position of jurisconsult, or Mufti.<sup>156</sup> Under the CMPL, a learned Muslim scholar appointed by the President may issue legal opinions known as *fatwas* to inform a judge or other interested party.<sup>157</sup> However, the Mufti may only issue advisory legal opinions; the opinion may not bind parties.<sup>158</sup> By contrast, under the Proposed Draft, the *ulama*—the community of learned Muslims—would have nominated candidates for the President to appoint.<sup>159</sup> The Mufti would have derived most of his powers through a relationship with the consultative council, or *majlis*. The Mufti was intended to work closely with a legal committee of the *majlis*, and, while the Mufti could not issue binding legal opinions, the legal committee could.<sup>160</sup> When the administration eliminated the *majlis* from the CMPL, it curtailed the Mufti's authority and influence over the CMPL.

The minimization of these three sources of authority weakened the CMPL. However, this damage pales in comparison to that done by the administration's rejection of several other sources of authority.

*b. The Elimination of the Majlis and the Board of the Ulama Deprived the CMPL of Crucial Sources of Muslim Leadership and Guidance*

The Marcos administration's decision to eliminate the *majlis* and the board of the *ulama* crippled the CMPL. By eliminating the *majlis*, or consultative council, the administration removed the single most important source of authority within the Proposed Draft. It is clear from its structure and language that the drafters intended the *majlis* to be the center of power and administration of Islamic law in the Philippines.<sup>161</sup> The *majlis* was to have corporate status.<sup>162</sup> It was empowered to sue or be sued; to enter into contracts and hold property; to act as administrator of Muslim estates or the trustee of Muslim trusts; to hold administrative and supervisory control over the traditional Muslim tax, the Shari'a courts, and the Agama Council; and to promulgate *fatwas* and other legal rules that could bind the Shari'a courts.<sup>163</sup> The Proposed Draft intended to establish this body as the power behind the CMPL. Instead, the Marcos administration did away with it.<sup>164</sup>

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<sup>156</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 164.

<sup>157</sup> *Id.* § 166.

<sup>158</sup> Ali, *supra* note 87, at 103.

<sup>159</sup> MUSLIM LAW CODE § 34 (Proposed Draft 1974).

<sup>160</sup> *Id.* §§ 35-36.

<sup>161</sup> See MUSLIM LAW CODE, §§ 11-51 (Proposed Draft 1974).

<sup>162</sup> *Id.* § 12.

<sup>163</sup> *Id.*

<sup>164</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083.

The administration did not replace the *majlis* with another body possessing comparable powers and duties. Consequently, the elimination of the *majlis* removed any real hope that Muslims would exercise significant control within the CMPL framework. The system created by the CMPL lacks a central body of Muslims with the power to implement and administer the CMPL as it sees fit. Instead, the executive and judicial branches administer and supervise the CMPL. These branches of government, preoccupied with other pressing concerns, have let the CMPL languish in obscurity.

Under the Proposed Draft, the *majlis* would have been empowered to create a board of the *ulama*, a permanent group of between seven and eleven Muslims selected as equitably as possible from among the Muslim provinces.<sup>165</sup> The drafters intended the board to advise the *majlis* on difficult questions or points of Muslim law.<sup>166</sup> While the CMPL does not bar contact with the *ulama*—the term is used generally here to refer to the community of learned Muslims—it does not create a vehicle for eliciting the *ulama*'s advice.<sup>167</sup> Nor does it create a standing body that the courts may easily consult on challenging questions of law. This deprives the provinces of a voice and creates significant obstacles to seeking the input of the most qualified and respected Muslim jurists in the provinces.

The CMPL's failure to provide for appropriate sources of authority weakens an already tenuous structure. The elimination of the *majlis* and the board of the *ulama*, coupled with the minimization of the Mufti and the Agama council, restricted the role that the Muslim community plays in shaping the implementation of Islamic law in the Philippines. The administration's reluctance to accept *adat* as a legitimate source of law established an unfamiliar legal system. Aligning the Shari'a courts with the national judicial system rather than traditional Islamic courts drastically reduced their appeal. As a result of these decisions, the governing bodies and procedures that dominate the CMPL appear foreign to many Filipino Muslims and indicate that the government does not consider their traditions valid.

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<sup>165</sup> MUSLIM LAW CODE § 43 (Proposed Draft 1974).

<sup>166</sup> *Id.* § 44.

<sup>167</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083. The *ulama* is mentioned only in § 166, which states that the Mufti may consult the *ulama* if he so wishes. *Id.* § 166.

#### IV. THE CMPL MUST BE AMENDED TO CORRECT PROCEDURAL AND PRACTICAL SHORTCOMINGS AND TO MORE ACCURATELY REFLECT FILIPINO MUSLIM SOURCES OF LAW AND AUTHORITY

While it is possible that the Marcos administration viewed the CMPL as little more than a tool to mollify opposition forces while changing little in the actual power structure of the nation,<sup>168</sup> the current government should take action to transform the CMPL into an effective tool for conflict resolution. This will both improve Muslims' access to justice and indicate that the government is committed to resolving long-standing inequities. The government must rectify practical and procedural shortcomings that have stymied the development of the CMPL in order for the CMPL to become more than an empty promise of equality for Muslims and the southern Philippines.

##### A. *The Government Must Institute a Campaign to Promote Awareness and Understanding of the CMPL, Improve Legal Education in the Southern Philippines, and Increase the Number of Shari'a Courts*

So long as the Shari'a courts bear only a tiny fraction of the caseload of Filipino courts, the CMPL will remain an afterthought in the legal system of the Philippines. Jurisdictional and substantive changes have great potential to positively affect the expansion of the CMPL, but they will have little success without several practical changes.

The government can increase the effectiveness of the CMPL cheaply and easily by raising public awareness of the CMPL and the Shari'a courts. While dissemination of information pertaining to the CMPL presents some challenges, especially in predominantly rural areas of the southern Philippines, it is crucial in order to expand the influence of the Shari'a courts. Private organizations have made some efforts to distribute materials explaining the CMPL and the role of the Shari'a courts,<sup>169</sup> but a sustained information campaign is necessary to popularize the CMPL.<sup>170</sup> The government should become involved in distributing educational materials and should consider making the CMPL part of the curriculum in secondary schools in Shari'a districts. If Muslims are not aware of the CMPL, no changes in the structure or operation of the law itself will be effective.

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<sup>168</sup> See Bentley, *supra* note 30, at 64-65 (voicing this fear shortly after the adoption of the CMPL).

<sup>169</sup> See A PRIMER ON THE CODE OF MUSLIM PERSONAL LAWS OF THE PHILIPPINES, *supra* note 74; COURTS FOR MUSLIMS: A PRIMER ON THE PHILIPPINE SHARIA COURTS, *supra* note 74.

<sup>170</sup> See GUERRERO ET AL., *supra* note 73, at 122 (recommending, among other things, a sustained information drive to spread awareness of the CMPL in order to improve its efficacy).



In addition to spreading awareness, the government should increase the number of Shari'a courts and make them more accessible to people in rural communities. The courts remain limited almost exclusively to urban areas, preventing Muslims in rural regions from accessing them. Furthermore, given the shortage of qualified jurists, new courts will have little practical impact.

So long as the Shari'a courts are understaffed, they will not be able to assume a prominent role in the nation's legal system. The government should take concerted action to supply the courts with talented legal professionals to fill the integral positions of judges and lawyers within the system created by the CMPL. The southern provinces, impoverished, underdeveloped, and racked by years of conflict, have struggled to implement adequate training programs for Shari'a lawyers and judges. Passage rates have remained persistently low on the Shari'a bar examination.<sup>171</sup> The government should take steps to increase enrollment in law schools that teach Shari'a. These schools must become more accessible and improve their curriculum, a challenge that will not be remedied easily. Many of the difficulties that persist in improving the quality of legal education continue to restrict advances throughout the southern Philippines.<sup>172</sup> Large-scale institutional changes will be necessary to effect substantive improvement. These changes, beginning with modernizing and developing the economy of the southern Philippines, speak to issues concerning the allocation of government funds, government corruption, and educator performance that lie well outside the scope of this comment. However, these problems remain a significant obstacle to the development of the CMPL.

The government must also improve its administration of the Shari'a court system. The five district court judgeships have been filled by three acting presiding judges rather than permanent district judges.<sup>173</sup> There is no obvious reason why the administration did not appoint these presiding judges as permanent district judges. All had been members of the integrated bar for decades<sup>174</sup> and had satisfied the requirements for district court judges,<sup>175</sup> yet the judgeships remained vacant.<sup>176</sup> As recently as July 2011,

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<sup>171</sup> See Holbrook, *supra* note 2, at 427.

<sup>172</sup> See Ringuet, *supra* note 22, at 44-45.

<sup>173</sup> COURTS FOR MUSLIMS: A PRIMER ON THE PHILIPPINE SHARIA COURTS, *supra* note 74, at 5.

<sup>174</sup> See *Filipino Lawyers Directory*, PHILIPPINELAW.INFO, <http://lawph.com/lawyers> (last visited Sept. 15, 2011). Acting Presiding Judge Tibing Asaala has been a member of the integrated bar since 1970, Acting Presiding Judge Bensaudi Arabani since 1971, and Acting Presiding Judge Rasad Balindong since 1981. *Id.*

<sup>175</sup> See *supra* text accompanying notes 60-63 (discussing the requirements for district court judges).

<sup>176</sup> See *supra* text accompanying note 66.

many Shari'a courts had not been organized or their judgeships remained vacant.<sup>177</sup> The government must be more attentive to the needs of the Shari'a courts and more diligent in both training qualified jurists and filling vacant district court positions.

*B. The CMPL's Jurisdiction Should Be Expanded to Apply to Muslims Throughout the Philippines and to Apply to Non-Muslims in Appropriate Situations*

The jurisdictional limitations placed on the CMPL must be removed or altered to expand the influence of the CMPL. A few relatively minor adjustments in the application of the CMPL would create a significant shift in the perceived legitimacy of the CMPL. Specifically, the CMPL should apply to all Muslims in the Philippines regardless of their geographic location and it should apply to non-Muslims in certain cases.

The government should expand the jurisdiction of the Shari'a courts to apply to individuals based on their religious identity and not their physical location. A jurisdictional limitation based primarily upon geography magnifies tensions between the North and the South rather than mitigating them. It serves as a reminder that the government does not truly view the different provinces of the Philippines as a unified nation of equal partners, but rather as a collection of states that do not share equal political or legal standing. So long as the CMPL is restricted to enumerated provinces, it will serve as a force of division rather than unification.

The capital city of Manila poses particular problems. While the Muslim population outside of the southern Philippines is fairly small, estimates indicate that more than 120,000 Muslims may live in Manila.<sup>178</sup> More than thirty years after the official recognition of Shari'a, this sizeable population still lacks access to a court system that is attuned to Muslim values and traditions.

In addition to expanding the jurisdiction of Shari'a courts from a geographic standpoint, the government should expand the jurisdiction of the CMPL to apply to non-Muslims in certain circumstances. In its current manifestation, the CMPL incentivizes segregation based on religion. Because Muslims and Christians rarely intermarry in the Philippines—the practice has in fact been actively discouraged by prominent religious

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<sup>177</sup> See JUDICIAL AND BAR COUNCIL, MASTER LIST OF INCUMBENT JUDGES (July 7, 2011), available at [http://jbc.judiciary.gov.ph/masterlist/\\_Sharia.pdf](http://jbc.judiciary.gov.ph/masterlist/_Sharia.pdf).

<sup>178</sup> Akiko Watanabe, *Migration and Mosques: The Evolution and Transformation of Muslim Communities in Manila, the Philippines 2* (Afrasian Ctr. for Peace & Dev. Stud., Working Paper No. 37, 2008).

figures<sup>179</sup>—considerations of the applicability of the CMPL to non-Muslims might seem of secondary importance. Even so, the prospect of resolving familial difficulties, especially those that bear on child custody and inheritance, in a court controlled by the Christian majority and on the basis of a Family Code rooted in explicitly Catholic ideology acts as an additional deterrent to interfaith marriages.<sup>180</sup>

The jurisdictional shortcomings of the CMPL drive a wedge further between Muslims and Christians. The implementation of the CMPL temporarily reduced violence between these groups, but over the long term it has done little to solve the ultimate cause of the conflict: the political and social marginalization of Muslims. On the contrary, jurisdictional limitations magnify the divide between the two groups.

The application of the CMPL to cases involving non-Muslims is a delicate issue that will likely draw opposition from non-Muslims. However, to avoid conflict, the government may extend the CMPL's jurisdiction to non-Muslims only according to contract. Couples may agree to allow the CMPL to govern their union rather than the Family Code. Similarly, Muslims who wish to avoid complications in inheritance may create wills that indicate a desire to settle disputes according to the CMPL. This change, easily effected and only mildly disruptive, will signify to Muslims that their values are equally worthy of consideration.

### *C. The Supreme Court Must Improve Its Understanding of Islamic Law and the CMPL*

Muslims may be skeptical of the decisions of Shari'a courts in part because they are appealable to the Supreme Court.<sup>181</sup> This body, which as of November 2011 had no Muslim members,<sup>182</sup> is the final voice in interpreting the CMPL and decisions of the lower courts.<sup>183</sup> This casts doubt on the influence that the CMPL and the Shari'a courts may have within the judiciary and raises concerns about proper interpretations of Islamic law.

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<sup>179</sup> *Bishop: Interfaith Dialogues Ok; Mixed Marriages Not Yet*, GMA NEWS, June 15, 2008, <http://www.gmanews.tv/story/101106/bishop-interfaith-dialogues-ok-mixed-marriages-not-yet> (last visited Oct. 8, 2011).

<sup>180</sup> Outcomes such as that in *Bondagjy v. Bondagjy*, G.R. No. 140817, would naturally make Muslims skeptical of marriage to anyone not born a Muslim. See *supra* text accompanying notes 79-85.

<sup>181</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 145.

<sup>182</sup> Domini M. Torrevillas, Op.-Ed., *Why Not a Muslim for the Supreme Court?*, THE PHILIPPINE STAR, July 7, 2011, <http://www.philstar.com/Article.aspx?publicationSubCategoryId=64&articleId=703528> (last visited October 8, 2011).

<sup>183</sup> CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 145.

Decisions by Shari'a courts must remain appealable to the Supreme Court. Altering that requirement would undermine the Supreme Court, cast doubt upon the Constitution, and threaten irreparable harm to the legitimacy of the government and the legal system. Nonetheless, a number of changes would improve the Supreme Court's understanding of the CMPL. The most obvious approach to this problem would be to include one or more Muslims on the Court. The Tripoli Agreement stated that Muslims "shall be represented in all courts including the Supreme Court."<sup>184</sup> However, only a single Muslim has ever served on the Court.<sup>185</sup> Abdulwahid Bidin was appointed by President Aquino in 1987 and served on the Court until 1997.<sup>186</sup> Since his retirement, the Court has lacked Muslim representation.<sup>187</sup> Adding a Muslim voice to the Supreme Court would further enfranchise Muslims throughout the Philippines while simultaneously providing the Court with insight into Muslim customs and belief. The government considered this course of action when filling two vacancies in the summer of 2011.<sup>188</sup> One of the strongest candidates for an opening on the Supreme Court was the accomplished Muslim jurist Japar Dimaampao.<sup>189</sup> However, the government instead appointed Christian judges Bienvenido Reyes and Estela Perlas-Bernabe.<sup>190</sup> In doing so, the government missed an opportunity to grant Muslims stronger representation in the government.

The opportunity to appoint a Muslim justice has passed for the moment. However, the Supreme Court should take steps to ensure a more effective and accurate interpretation of the CMPL. The justices should obtain a baseline education on the CMPL and Shari'a in general. The justices face a disadvantage when trying to render fair and consistent judgments based on the CMPL if they do not understand its context. In the interest of furthering educational goals, law schools throughout the Philippines should offer courses in both the CMPL and Islamic law, and the

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<sup>184</sup> Tripoli Agreement, *supra* note 26, at 3.

<sup>185</sup> Torrevillas, *supra* note 182.

<sup>186</sup> *Memorabilia Room, Associate Justices' List: Abdulwahid A. Bidin*, SUPREME COURT OF THE PHILIPPINES, <http://elibrary.judiciary.gov.ph/index3.php?justicetype=Associate+Justice&justiceid=a45475a11ec72b843d74959b60fd7bd64564dc0d31979> (last visited Nov. 5, 2011).

<sup>187</sup> Torrevillas, *supra* note 182.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See Sophia Dedace, *Aquino Names CA Justice Bienvenido Reyes to Supreme Court*, GMA NEWS, Aug. 19, 2011, <http://www.gmanews.tv/story/229898/nation/aquino-names-ca-justice-bienvenido-reyes-to-supreme-court>; Maria Garriga and Jomar Canlas, *High Court Gets Newest Member*, MANILA TIMES, Sept. 17, 2011, <http://www.manilatimes.net/index.php/news/top-stories/7512-high-court-gets-newest-member>.

integrated bar examination should include the CMPL.<sup>191</sup> So long as the CMPL comprises a portion of the law of the Philippines, legal professionals must have access to education in the nuances of Islamic law and the CMPL, at the very least.

These practical and procedural changes, if implemented, will lead to greater awareness of the CMPL and somewhat greater faith in the decisions rendered by the Shari'a courts. However, more significant substantive changes are necessary for the CMPL to offer effective legal remedies for Muslims in the Philippines. The practical and procedural problems that have stymied the expansion of the CMPL pose legitimate obstacles to its influence. Within the last few years, the government has shown a willingness to work with Muslims to correct some of these problems. Nevertheless, without more fundamental changes within the CMPL, particularly in terms of the CMPL's recognition of appropriate sources of law and authority, it remains unlikely that it will become an effective legal construct. Until and unless the CMPL adopts an approach to Islamic law that resembles the experience of Muslims in the Philippines, it will struggle to gain popularity throughout the southern Philippines and beyond.

*D. The CMPL Should Create a More Integral Role for Adat by Including the Kali Courts in the Structure of the Shari'a Court System*

*Adat* continues to play a central role in the lives of Muslims throughout the Philippines, particularly those living in rural areas.<sup>192</sup> To these people, *adat* is an expression of Shari'a.<sup>193</sup> It is not possible, hundreds of years after the fact, to simply remove *adat* from their understanding of their culture and religion. While the CMPL provides for the application of *adat*, it does not provide a mechanism by which *adat* may be introduced into the legal system.<sup>194</sup> *Adat* can only enter the legal system through the decisions of Shari'a court judges or Supreme Court justices.<sup>195</sup> However, many of these judges lack a refined understanding of or appreciation for the *adat* that prevails in rural villages throughout the southern Philippines.<sup>196</sup> Acknowledging the role of *kali* courts in local jurisprudence will remedy this problem.

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<sup>191</sup> This might resemble the bar examinations of several United States that test on American Indian law.

<sup>192</sup> See *supra* text accompanying notes 114-35.

<sup>193</sup> See *id.*

<sup>194</sup> See *supra* text accompanying note 135.

<sup>195</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 137-159.

<sup>196</sup> See *supra* notes 109-10 and accompanying text for common misconceptions of *adat*.

The *kali* courts remain popular and effective in resolving community disputes to this day,<sup>197</sup> particularly outside of urban areas. While integration of the *kali* courts into the structure of the Shari'a courts will pose some challenges, doing so will not impose undue burdens on the system and will provide a ready mechanism for incorporating *adat* into the Shari'a court system. The *kali* courts, if successfully integrated, may function in effect as local trial courts whose decisions may be appealed to the Shari'a circuit courts. This will require some changes. *Kalis* require education in both the CMPL and the Constitution of the Philippines to identify provisions of *adat* that conflict with the Constitution and thus are not admissible under the CMPL. They must also become familiar with the procedure and sources of law to which the circuit courts must adhere.

This type of educational program does not present insurmountable challenges. Identifying *kalis* throughout the Philippines is a relatively simple task. Once identified, the government can establish week-long conferences or seminars to bring *kalis* from a given region together and provide an adequate foundation in constitutional law so that the *kalis* will be able to identify *adat* that violates the law of the land. While this may limit the use of certain elements of *adat*, it will strengthen the elements that are retained. Shari'a judges will also need to undergo some training in local *adat* so that they may review the decisions of the *kali* courts. However, as the CMPL requires that *adat* be proven as fact,<sup>198</sup> this training need not be extensive. The party relying on *adat* bears the burden of proving to the judges that it is valid.

Many Muslims already rely upon the *kali* courts.<sup>199</sup> By including the *kali* courts within the framework of the Shari'a courts and the CMPL, the government can create a natural appeals process that validates traditional Muslim beliefs and methods of dispute resolution.

*E. The CMPL Should Be Amended to Establish the Majlis, Create a More Defined Role for the Ulama, and Grant the Mufti Greater Influence.*

While incorporating *adat* is imperative, the CMPL must also allow Muslims to participate in shaping the interpretation of Islamic law that prevails in the Philippines. While the Shari'a courts empower certain individuals, Islam has relied upon a communal approach to resolving legal

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<sup>197</sup> Barra, *Introduction*, *supra* note 41, at 57.

<sup>198</sup> See CODE OF MUSLIM PERSONAL LAWS, Pres. Dec. 1083, § 5.

<sup>199</sup> Barra, *Introduction*, *supra* note 41, at 57.

issues for well over a thousand years.<sup>200</sup> Scholars, openly engaging in discussion and debate, have shaped the course of Islamic law throughout the world.<sup>201</sup> While the CMPL did not halt this phenomenon, it did not provide for this sort of dialogue in the interpretation of its provisions. According to the Proposed Draft, the *majlis* and the board of the *ulama* were to play this role.<sup>202</sup> Without these entities, the CMPL has failed to engage the communal spirit that has infused Islamic law throughout its history. In correcting these shortcomings, the government should reconsider sources of authority set forth in the Proposed Draft.

Providing for the creation of the *majlis* should be relatively simple, as the Proposed Draft provided specific criteria for adopting such a body.<sup>203</sup> Its approach may be adopted with limited revisions. Contrary to the objections of the Marcos administration,<sup>204</sup> the *majlis* is not primarily a religious body; rather, it is a legal body that draws on religion, as any entity responsible for shaping Islamic law must.

The resurrection of the *majlis* will allow other important sources of authority to take on a more prominent role in administering the CMPL. The board of the *ulama* should be established within a more formal structure, allowing the community of Islamic scholars to raise concerns or offer suggestions. Any recommendations that are adopted will emanate from a respected and authoritative group. Similarly, incorporating the *majlis* into the CMPL will allow the Mufti to take on a more significant role. The government should adopt the Proposed Draft's recommendation to incorporate the Mufti into the legal committee of the *majlis*,<sup>205</sup> allowing the Mufti to issue *fatwas* that may bind Muslims if adopted by the *majlis*.<sup>206</sup>

Not only will these changes serve to give Muslims more of a voice in the interpretation of Islamic law, they will aid the Supreme Court in reviewing cases appealed from the Shari'a courts. The Supreme Court could turn to the *majlis* or the Mufti for assistance in formulating opinions regarding the proper interpretation of the law. Indeed, the government should require the Supreme Court to consult the Mufti before ruling on cases arising within the CMPL. Although the Mufti's decisions cannot bind the

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<sup>200</sup> See, e.g., WAEL B. HALLAQ, SHARIA: THEORY, PRACTICE, TRANSFORMATIONS 44 (2009) (discussing circles of learning in the years following the Prophet's death); see *id.* at 60-71 (discussing the formation of the *madhhab* as a community of jurists); see *id.* at 75 (discussing the "four sources" of Islamic law, including *ijma* or juristic consensus); see *id.* at 355-550 (discussing modern Islam).

<sup>201</sup> *Id.*

<sup>202</sup> See *supra* text accompanying notes 161-63.

<sup>203</sup> See *id.*

<sup>204</sup> Bentley, *supra* note 30, at 61.

<sup>205</sup> See MUSLIM LAW CODE § 35 (Proposed Draft 1974).

<sup>206</sup> See, e.g., *id.* § 36.

Court,<sup>207</sup> they may inform the Court's decision-making process. If the Court determines that the CMPL does not govern, it need not consult the Mufti. However, when the case does involve an interpretation of Islamic law, the Court should consult an expert on the subject of Islamic law.

While these suggestions may concern the Christian majority, they should not. The President would still enjoy remarkable power to appoint members of the *majlis* and the Mufti, as well as the Shari'a judges.<sup>208</sup> The President would be wise to fill the *majlis* with a diverse group of Islamic scholars who would draw on different backgrounds to bring unique perspectives to potentially challenging issues. This would not only provide a wealth of perspectives, but would furnish Muslims from different backgrounds with representation and a voice in the judicial process. Given the President's power over them, the *majlis* and Mufti are unlikely to overreach, and are unlikely to accomplish much if they do.

These changes, which will reestablish several important sources of Filipino Muslim authority, will lead to a system of decision-making and administration within the framework of the CMPL and the Shari'a court system that is more familiar to Muslims. They will allow Muslims to feel ably represented and in control of the judicial system that was implemented in an attempt to enfranchise them. While these suggested changes may not resolve all of the difficulties presented by the failure of the CMPL, they will go a long way toward integrating the system that the CMPL has established not only into the judiciary of the Philippines, but also into the customary legal system of Filipino Muslims.

## V. CONCLUSION

By eliminating or marginalizing significant sources of law and authority, the CMPL created a system that appears foreign to many Filipino Muslims. Compounded by practical and procedural shortcomings, the CMPL has been doomed to an existence as a largely symbolic apparatus that has had little effect on the lives of Muslims.

While improving the efficacy of the CMPL and the Shari'a courts will not be easy or instantaneous, it may be accomplished by instituting the changes proposed in this comment. Widespread changes in the attitudes of Muslims toward the CMPL, and in their practical ability to access the courts, will inevitably take many years. However, by incorporating a perspective on

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<sup>207</sup> Even under the Proposed Draft, *fatwas* of the Mufti are binding only when adopted by the entire *majlis*. MUSLIM LAW CODE § 36 (Proposed Draft 1974).

<sup>208</sup> See *supra* text accompanying notes 60, 159.



Islamic law that more accurately reflects its practice in the Philippines, these changes could begin to pay dividends in the near future. If the government increases knowledge of the CMPL and the Shari'a courts, and is willing to cede some of its control over the administration of Islamic law to Muslims, the CMPL may assume a vibrant, effective, and culturally competent role within the judicial system in the Philippines, and it may eventually become a source of pride and accomplishment for Muslims and the nation as a whole.