FATWA IN THE PHILIPPINES: A RETROSPECTIVE ANALYSIS OF ITS ISSUES AND CHALLENGES

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Abstract: The aimed of the study is to identify the issues and challenges of fatwa in the Philippines through retrospective review of the 13 Shari’ah landmark cases that reached the Supreme Court of the Philippines from year 1988 to 2016. The research design was retrospective analysis of Islamic law applications utilizing the data on these litigations which were obtained from the ChanRobles™ Virtual Law Library databases. Three main topics emanating from such Shari’ah Court decided cases which include Custody and Guardianship Proceeding (n=1; 8%); Nullity of Marriage and Divorce Proceeding (n=7; 54%); and Settlement of Estate Proceeding (n=5; 38%). Most of the petitioners and respondents were male (n=7; 54%). The religion of these petitioners is 54% Islam, 23% Roman Catholic and 23% Islam by Conversion. On the other hand, respondents were 92% Muslim and 8% Muslim by Convert. It has been observed in the aforecited Shari’ah Court Proceedings that before judgment were rendered, the Shari’ah Court did not seek the opinion (fatwa) of the Jurisconsult despite the emergence of indicative difficult questions of Muslim Law and Jurisprudence. The special rules of procedure governing the Shari’ah Court, however, manifest that such legal opinion of the Jurisconsult is not binding upon the court as it is merely advisory or persuasive in force. Neither it is incumbent upon the court to seek such opinion of the Jurisconsult. The significance of fatwa, on the other hand, is observed in its relevance to court decision making function. Only it has not been fully explored due to factors that are inherently embedded in the Islamic Legal System of the Philippines. Fatwa that is part of the court decision making process has never been seriously taken. The condition upon which may be sought has likewise been limited. Therefore, the fatwa in the Philippines lacks consideration by the court.

Keywords: Fatwa, Shari’ah, Retrospective Analysis, Jurisconsult
Introduction
The Philippines was governed by Islamic law for centuries. In the early 19th century, the Islamic laws were exercised by the indigenous religious court known as Agama Court. It was in 1977 when PD 1083, otherwise known as Code of Muslim Personal Laws of the Philippines, was introduced that paved way for the creation of the Shari’ah Court in the Philippines (Busran-Lao, 2014).

Fatwa refers to legal opinion based on the authority laid down by the authentic sources of the Islamic law. The main objective of fatwa is to instil justice, mercy and wisdom for the promotion of public interest or Maslaha Al Mursalah. A nation which utilizes Islamic law shall provide a room for the natural tendency of fatwa in its continuing search for the right path. On the other hand, it is an obligation of every Muslim to follow and obey the right path or the Shari’ah.

This study therefore focused on the issues and challenges of fatwa in the Philippines as well as its relevance to the court decision making function. Those identified elements were analyzed by utilizing the four principal characteristics of the Shari’ah, namely: comprehensiveness, idealistic, realistic, and naturalistic.

Problem Statement
Islamic Legal System that does not seriously considering fatwa creates undesirable possibilities which people of sound mind tended to distrust it. The primary issue is related to that observed circumstantial value of fatwa while the secondary issue occurs when the decision to be enforced is not at par with the expectation of these people for it being appeared to be unfounded, baseless and not in light of the Qur’an and the Sunnah. Fatwa would have been an avenue for an effective administration of Islamic law because it is ordinarily clothed with recognized authorities that would inspire devotion of these people upon the force and effect of law forwarded by the court on the critical instances of these parties praying for justice. The service of fatwa would have been so desired to safeguard the public interest or welfare.

Literature Review
Benito (2005) identified the two basic components Islamic Law and Jurisprudence, namely: the fixed component which is represented by the Qur’an and Sunnah and the flexible component which is portrayed by the Fiqh or Islamic Jurisprudence. Philips (2018) defined Shari’ah as the sum total of Islamic laws which were revealed to the Prophet Muhammad sallallahu alaihi wa sallam, and which are recorded in the Qur’an as well as deducible-guided lifestyle called Sunnah. Allah’s purpose in revealing the Shari’ah is to promote man’s welfare and to prevent corruption on earth (Alauya, 2005). It is they who follow the guidance which comes from their sustainer, and it is they who shall attain to a happy state (Qur’an, 2:1 and 4).

Maslaha Al Mursalah is a consideration of public interest where fatwa is very much relevant for the various issues besetting any Muslim community. The authority of Maslaha Al Mursalah is derived from the norm that the basic objective of legislation in Islam is to secure the welfare of the people by promoting benefits in their favour or by preventing harm. It has been noticed that Fatwa sought from the ‘Ulama is in effect a resultant contribution of the Islamic schools in the said Muslim community. Said Islamic schools have helped established groundwork of peace and development in the society as a whole (Saddalani, 2015). With that premise, it is contended that with more ‘Ulama emerged, there will be more chances of having effective justice that will run a nation of becoming economically developed. Saddalani (2015)
underscores the principle of economic innovation of no nation that can ever claim of economic prosperity without investing much on human development which finds support in the contention of Philips (2018) that new matter is acceptable if it is firmly based on a principle in Shari’ah. Philips (2018), however, contended that an innovation which attempts to complete some aspect of the religion is wrong because to him it implies deficiency in the Shari’ah. He further went on saying that it is even worse if such innovation is one which is contradictory to the Shari’ah.

Rasak (1985) suggested of another evolution for the development of the Philippine Islamic Jurisprudence of local applications. No research has ever been conducted that would have identified problems associated with fatwa in the Philippines. This warrants an inception of the research study that would venture on a very difficult task of attempting to measure extends of fatwa in the Philippines by analyzing its issues and challenges.

**Methodology**

The research design was retrospective analysis using the general record of the Supreme Court of the Philippines involving cases of Islamic law applications from the year of 1988 to 2016. The data on litigation were obtained from the ChanRobles™ Virtual Law Library databases. This database is the home of the Philippine on-line legal resources that contain full text of the Philippine laws, statutes and codes, Supreme Court decisions, foreign constitutions and laws. Therefore, the general records were searched using the following: “custody shari’ah” and/or “guardianship shari’ah”; “divorce shari’ah” and/or “nullity of marriage shari’ah”; and “estate shari’ah” and/or “succession shari’ah”. Generally, these landmarked cases were chosen as presented in Table 1.

<table>
<thead>
<tr>
<th>Cases emanating from Shari’ah Court</th>
<th>Frequency (N=13)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Custody</td>
<td>1</td>
</tr>
<tr>
<td>Nullity of marriage/divorce</td>
<td>7</td>
</tr>
<tr>
<td>Settlement of estate</td>
<td>5</td>
</tr>
</tbody>
</table>

Three main topics emanating from the Shari’ah Court decided cases which include 8% Custody and Guardianship Proceeding (Rulona-Al Awadhi v Astih, 1988); 54% Nullity of Marriage and Divorce Proceeding (Centi v Shari’ah Court, 1995; Tamano v Ortiz, 1998; Abubakar v. Abubakar, 1999; Bondagjy v Artadi, 2008; Juliano-Llave v Tamano, 2011; Zamoranos v Pacasum, 2011; Mendez v Maliga, 2016); and 5% Settlement of Estate Proceeding (Mamadsual v Moson, 1990; Malang v Moson, 2000; Macawiag v Macawiag, 2006; Tomawis v Balindog, Pumbaya, Mangompia and Musor, 2010; Villagracia v Mala, 2014).

Information regarding the gender of the petitioners and respondents of these 13 cases revealed equal distribution of male (54%) and female (46%) as shown in figure 1. This result would imply equal access to justice sector service regardless of gender.
Figure 2 shows the religion profiling of the petitioners and respondents. The result revealed the involvement of non-Muslim (23% Roman Catholic) as petitioners in the three main categories under study namely custody and guardianship, nullity of marriage and divorce, and settlement of estate proceedings. The involvement of these non-Muslim petitioners is by virtue of their marriage to a Muslim.

Jurisconsult was created by virtue of Section 164, paragraph 2 of P. D. No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines. Under that P.D. 1083, a Jurisconsult in Islamic Law or Mufti is an officer who renders legal opinions on any question relating to Muslim law. He assists the Qadi or Judge, by giving him fatwa or legal opinions. The opinions thus rendered shall merely serve to enlighten the court or the parties concerned, who, however are not necessarily bound to follow the same.

The issues and challenges of fatwa in the Philippines as well as its relevance were analyzed by utilizing the four principal characteristics of Shari’ah introduced by Abdulrahman (2017), namely: comprehensiveness, idealistic, realistic, and naturalistic.
Results and Discussion

Issues
The issuance of fatwa is a material evidence to strengthen the decree of court at any of its particular instances. Under the present rules, it provides that before judgment is rendered the court may seek the opinion (fatwa) of the Jurisconsult of the Islamic law created under PD 1083 in matter concerning difficult questions of Muslim law and jurisprudence (Sec. 12, IJRA-AT AL MAHAKIM).

However, the legal opinion of the Jurisconsult is not binding upon the court. It is merely advisory or persuasive. Neither it is incumbent upon the court to seek the opinion of the Jurisconsult. In other words, before rendering judgment may or may not consult the Jurisconsult and once opinion is rendered by the Jurisconsult, it may not follow such opinion. As a consequence thereof, the Jurisconsult whose mandate is to render legal opinion has been seldom requested on that matter as observed in the 13 Shari’ah landmark cases herein used for retrospective analysis to identify the issues itself. It defeats the characteristic of Shari’ah being morally bounded. Abd al ‘Ati (1977) views Shari’ah as a comprehensive system of law that is divine in origin, religious in essence, and moral in scope.

The existence of Shari’ah Court in the Philippines has made itself a recipient of fatwa. It would definitely widen its decision making function and thereby enriching its rational choice with more powerful legal basis. The emergence of such alternatives have not extensively explored in the Philippine Islamic Jurisprudence for a variety of factors. One is the limited jurisdiction of the Shari’ah Court as only those that are fundamentally personal in nature are cognizable by it. There is however some specific criminal offenses enumerated under article 181 to 185 of PD 1083 which the Philippine Shari’ah Court can hear, try and decide. Those jurisdictional cases inspire deeper devotion of the service of fatwa but it was not averred in Rulona-Al Awadhi v. Astih, a case which involved custody and guardianship of male party, though Muslim but foreigner, and female party, though Filipino but not Muslim. The Supreme Court of the Philippines in this case had reversed the decision of the Shari’ah Court, however on the grounds of jurisdictional error and applicability of PD 1083.

On the other hand, the IJRA-AT AL MAHAKIM AL-SHARI’A, the special procedure to be applied by the Shari’ah Court in the Philippines in applying and interpreting the Muslim Code of the Philippines (PD 1083), has not extensively subjected fatwa to be part of that compulsory rules of procedure despite the fact that said procedure has been promulgated upon a condition to achieve an expeditious and inexpensive determination of cases brought before the Shari’ah Court of the Philippines. Under section 6 thereof which states “should the court find, upon consideration of the pleadings, evidence and memoranda, that a judgment may be rendered without need of a formal hearing, the court may do so within fifteen (15) days from the submission of the case for decision”. This provision of the rules does not intend to spell out the efficacy of fatwa in relation to latter application to court decision making. This could be a possible cause of grave abuse of discretion as observed in a specific Motion to Implement a Writ of Execution in the Batugan v. Balindong.

The court may result to making judgment without any reference to the legal opinion issued by the Jurisconsult. Its undesirable possibilities is observed in Bondagjy v. Artadi where the Supreme Court of the Philippines reversed the decision of the Shari’ah Court thereby awarding the custody of their children to the mother who reverted back to Catholicism despite the fact
that their marriage was in accordance with Islamic law. In Tamano case, on the other hand, the second wife of the Muslim couples was deprived of successional rights because their marriages were registered under the Civil Registrar which does not allowed polygamous marriage pursuant to the civil code of the Philippines. That would be unnatural condition of the Shari‘ah having absence of reliance on the opinion of Jurisconsult created for that purpose. It may be said that the more man follow Allah’s law, the more he stays close to his nature (Benito, 2005).

**Challenges**
The unfair internal environment and external forces of the Shari‘ah Court decision making process proved to have been caused by the lack of interest on the serviceability of fatwa. The values observed on the issuance of legal opinion are themselves the manifested challenges of fatwa that need to be addressed.

**Rules on the Issuance of Fatwa**
The Office of the Jurisconsult being mandated by law to give legal opinion has discretion not to issue any opinion if it feels unnecessary for any given circumstances (Par 2, Sec 166, PD 1083). If its opinion is given, however, the court on the other hand is under no obligation to follow it. This seemingly inconsistent with the Shari‘ah being idealistic in character considering the highest standard of Islamic qualifications required of a Jurisconsult (See Sec. 165 in relation to Sec 152 and 140 all of PD 1083). In a very simple case of changing the surname after the divorce has been decreed, the Shari‘ah Court finds it difficult to order the agency concerned to revert back the surname of the petitioner Centi to that of her father which had been transferred to that of her former husband by virtue of their defunct marriage, luckily however the Supreme Court decided in her favour citing the automatic legal effect of divorce (Centi v. Shari‘ah Court). Had the fatwa been sought, the aforecited case would have not reached the Supreme Court because under the strict Islamic Law the surname of a woman is never that of her husband.

Allah said: “then we put you on a straight path (Shari‘ah) in your affairs, so follow it and do not follow the desires of those who have no knowledge” (Qur’an, 45:18). In the formation of opinion of the Jurisconsult, he may necessarily ask for the consensus of the ‘Ulama (Par 1, Sec 166, PD 1083). In Mendez v. Maliga, neither Shari‘ah District Court nor Shari‘ah Circuit Court had prompted Jurisconsult for an opinion. It was the Supreme Court of the Philippines when the case was elevated to it that an opinion of the Muslim legal luminary was sought on issues of jurisdictional conflict between the Shari‘ah Circuit Court and the Shari‘ah District Court. The principle of Darurah (liberal construction of rules interpretation) was then applied to settle the ancillary controversy of jurisdictional issue involving child custody.

The ‘Ulama have not yet been formally instituted as part of the Office of the Jurisconsult. This appears to be unrealistic considering the fact that Jurisconsult is monetarily compensated under the Philippine law while there is no such similar provision for the ‘Ulama who will carry out the exercise of Ijithad. An ‘Ulama cannot be given share of public fund pursuant to restriction enshrined in the Philippine Constitution. The 1987 Philippine Constitution provides for the principle of the Separation of the State and the Church (Cruz, 1991). Under the concept of realism, however, it suggests that the system of law should have a built-in capacity to accommodate the economic needs of all the parties involved in the implementation of justice. More challenges have to be undertaken to establish the glorious day of fatwa. It is significant that the administrative enactments and regulations of neighbouring countries such as Malaysia and Indonesia where made perusable to other Muslim Communities including the Philippines.
Conclusion

Fatwa that is part of the court decision making has never been seriously taken. The condition upon which may be sought has likewise been limited. Therefore, the fatwa in the Philippines lacks consideration by the court.

The binding force of fatwa casts doubts upon the affairs of the Philippine Shari’ah Court since the former has never been intended to be superior in character. It is inconsistent with the hierarchy of order of authority which places fatwa after the primary sources of Islamic law such as the Qur’ān, Hadith and Ijma.

The seemingly dichotomy of fatwa with other judicial processes is unhealthy for the integrity of court decree thereby further aggravating the condition of peace upon the losing litigant. For the best interest of the people, therefore, there is an in dire need to compulsorily intertwine the service of fatwa into the administration of justice.

The significance of fatwa to court decision making function has been established despite all the odds and the problems. However, it has not been fully explored due to factors that are inherently embedded in the Islamic Legal System of the Philippines. There is still much to be anticipated of judicial reform specifically tailors for the Philippine Islamic Legal System.

It is hoped therefore that this pieces of work will serve as a reference for more Islamic studies by the researchers across the Muslim minority communities who may come into contact with it, and by the Filipino who may have desire for further studies in that specific legal topic as this may help them in formulating responsive actions for the developmental interest of the Philippine Islamic Legal System.

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