

OATH (YAMIN) AS A METHOD OF PROOF AND THE RIGHT TO DUE PROCESS IN THE PHILIPPINES: A RESPONSE TO *TAMPAR v USMAN*

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Abstract

This article seeks to respond constructively to the *obiter dictum* in the Philippine case of *Tampar v Usman* declaring that oath (*yamin*) under the *Special Rules of Procedure in the Shari'ah Courts (Ijra-at al Mahakim al Shari'a)* of the Philippines is unconstitutional, as it deprives a Muslim litigant's right to due process which includes the right to confront witnesses and to cross-examine them. The author argues that oath, under the tightly compartmentalised and specific parameters of s 7(1) of the said rules, is harmonious with the constitutional right to due process vis-à-vis litigations between Muslim parties in the Philippine Shari'ah Courts. It is argued further that oath, in the *specific context* of s 7(1) of the *Special Rules*, places Muslim litigants in the Philippine Shari'ah Courts in a better position to enjoy due process contrary to what the *obiter dictum* suggests. This article also brings to the fore the far-reaching implications of the *obiter dictum* and the constructive responses thereto based on the parameters of s 7(1) of the *Special Rules* and relevant experiences in foreign jurisdictions like Malaysia.

Keywords: Oaths, right to due process, Shari'ah law.

I INTRODUCTION

The promulgation of Presidential Decree No.1083, otherwise known as the Code of Muslim Personal Laws of the Philippines ('*Muslim Code*')¹ in 1977 carried with it the creation of the Shari'ah Courts in the Philippines.² These are courts exercising jurisdiction over disputes or cases involving Philippine Muslims' personal status, marriage and divorce, matrimonial and family relations, succession and inheritance, and property

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¹ *Muslim Code 1977* (Philippines) ('*Muslim Code*').

² There are two categories of Shari'ah Courts under Presidential Decree No. 1083: (1) Shari'ah Districts Courts, and (2) Shari'ah Circuit Courts. This can be gleaned from article 137, which provides that: "There are hereby created, as part of the judicial system, courts of limited jurisdiction, to be known respectively as *Shari'a* District Courts and *Shari'a* Circuit Courts, which shall exercise powers and functions in accordance with this Title." (*Muslim Code* (n 1) art 137). Note that the Shari'ah High Court is a new creation under the Bangsamoro Organic Law (Republic Act No. 11054). This court is not yet operational.

relations between spouses.³ As with other Philippine courts,⁴ the Shari'ah Courts are governed by its own rules of procedure known as the *Special Rules of Procedure in the Shari'ah Courts* or the *Ijra-at al Mahakim al Shari'a* ('*Special Rules*').⁵ Litigation in the Shari'ah Courts applying the *Special Rules* have produced relatively few cases which have been elevated to and decided by the Supreme Court of the Philippines. Some of these decided cases have caught the attention of Philippine Muslim legal professionals for the rulings' arguably inaccurate understanding and application of Islamic law. One of these Shari'ah cases is *Midsapak Tampar, Maisalam Tampar, Heirs of Gampong Tampar, represented by Hadji Mustapha Gampong and Heirs of Pagayawan Tampar, represented by Sumapi Tampar v Esmael Usman, Mohamad Datumanong, Hadji Salik Nur and the Register of Deeds for the City of Cotabato* ('*Tampar v Usman*').⁶ This case suggested on *obiter* that *yamin* ('oath') in s 7(1) of the *Special Rules* ('§7(1) of the *Special Rules*') is unconstitutional, for it violates a litigant's right to due process expressly guaranteed under the 1987 Constitution of the Philippines. This is the provocative *obiter dictum* that the author seeks to respond to with an argument that oath in the specific context of §7(1) of the *Special Rules* and the right to due process are actually harmonious.

In this article, oath should be understood in light of its application only over cases arising from the *Muslim Code*. This code 'provides for an effective administration and enforcement of Muslim personal laws among Muslims [in the Philippines].'⁷ Further, it must be noted that 'the provisions of this Code applies only to Muslims and nothing [therein] shall be construed to operate to the prejudice of a non-Muslim.'⁸ In the same manner, oath under the *Special Rules* applies only in cases before Philippine Shari'ah Courts between parties who are all Muslims. This is the context necessary to compartmentalise the otherwise broad issues addressed in this article.

Part II of this article discusses oath as applied under §7(1) of the *Special Rules*. Part III is a recital of the facts, issues, and ruling in *Tampar v Usman*. Part IV scrutinizes the *Tampar obiter dictum* and its far-reaching implications. Part V establishes the harmony of oath as a method of proof and the constitutional right to due process against the backdrop of *Tampar v Usman*. Part VI sets forth the conclusion.

³ *Muslim Code* (n 1) arts 143-4, 155.

⁴ The other courts in the Philippines consist of the Supreme Court, the Court of Appeals, the Court of Tax Appeals, the Sandiganbayan, the Regional Trial Courts, and the Municipal Trial Courts. The rules of procedure governing the civil courts are provided in the Rules of Court of the Philippines.

⁵ *Special Rules 1983* (Philippines) ('*Special Rules*'). This was approved unanimously by the Supreme Court of the Philippines on September 20, 1983. However, the Rules of Court of the Philippines is given supplementary application under s 16, *Special Rules*.

⁶ (1991) 200 SCRA 652 ('*Tampar v Usman*').

⁷ *Muslim Code* (n 1) art 2(c).

⁸ *Ibid* art 3(3).

II YAMIN UNDER THE SPECIAL RULES OF PROCEDURE IN THE SHARI'AH COURTS OF THE PHILIPPINES (*IJRA-AT AL MAHAKIM AL SHARI'AH*)

The Philippine Shari'ah Courts under the *Muslim Code* are categorized into Shari'ah District Courts and Shari'ah Circuit Courts. They are courts of limited jurisdiction, though they are still 'part of the judicial system of the Philippines'.⁹ These courts are tasked with the adjudication and settlement of all disputes falling within their respective jurisdictions.¹⁰ It is in pursuance of this function that the *Special Rules* was promulgated with the objective to achieve an expeditious and inexpensive determination of the cases or disputes arising from the *Muslim Code*. This *Special Rules* facilitated the introduction of oath as a method of proof to the Shari'ah Court system for Philippine Muslims.¹¹

Oath, as a feature of the *Special Rules*, will be highlighted in this article as predominantly treated in §7(1).¹² This is because *Tampar v Usman* centers on the correct application of oath under this provision in relation to the constitutional right to due

⁹ Ibid art 137.

¹⁰ 'Art. 143. *Original jurisdiction*. – (1) The Shari'a District Court shall have exclusive original jurisdiction over:

- (a) All cases involving custody, guardianship, legitimacy, paternity and filiation arising under the Code of Muslim Personal Laws (PD 1083);
- (b) All cases involving disposition, distribution and settlement of estate of deceased Muslims, probate of wills, issuance of letters of administration or appointment of administrators or executors regardless of the nature or the aggregate value of the property;
- (c) Petitions for the declaration of absence and death and for the cancellation or correction of entries in the Muslim Registries mentioned in Title VI of Book Two of the Code;
- (d) All actions arising from customary contracts in which the parties are Muslims, if they have not specified which law shall govern their relations; and
- (e) All petitions for mandamus, prohibition, injunction, certiorari, *habeas corpus*, and all other auxiliary writs and processes in aid of its appellate jurisdiction.

(2) Concurrently with existing civil courts, the Shari'a District Court shall have original jurisdiction over:

- (a) Petitions by Muslims for the constitution of a family home, change of name and commitment of an insane person to an asylum.
- (b) All other personal and real actions not mentioned in paragraph 1(d) of Article 143 of the Code wherein the parties involved are Muslims except those of forcible entry and unlawful detainer, which shall fall under the exclusive original jurisdiction of the Municipal Circuit Trial Courts, Municipal Trial Courts, or Metropolitan Trial Courts; and
- (c) All special civil actions for interpleader or declaratory relief wherein the parties are Muslims or the property involved belongs exclusively to Muslims.' (*Muslim Code* (n 1) art 143).

'Art. 155. *Jurisdiction*. – The Shari'a Circuit Courts shall have exclusive original jurisdiction over:

- (1) All cases involving offenses defined and punished under the Code of Muslim Personal Laws;
- (2) All civil actions and proceedings between parties who are Muslims or have been married in accordance with Article 13 of the Code involving disputes relating to: (a) marriage; (b) divorce recognized under the Code; (c) betrothal or breach of contract to marry; (d) customary dower (*mahr*); (e) disposition and distribution of property upon divorce; (f) maintenance and support, and consolatory gifts (*mut'a*); and (g) restitution of marital rights.
- (3) All cases involving disputes relative to communal properties.' (*Muslim Code* (n 1) art 155).

¹¹ The Philippines is predominantly a Catholic country where Muslims constitute the minority. Its government is secular in that the principle of church and state is observed.

¹² *Yamin* is also treated in s 13-A of the *Special Rules* but it will not be included in the scope of this article. Section 13-A relates to the procedural details of taking an oath under the *Special Rules* as a whole, including the requirements, appropriate time, date and place of oath-taking.

process of Muslim litigants before Shari'ah Courts. The entire provision of §7(1) of the *Special Rules* is as follows.

Section 7. *Hearing or Trial*. – (1) The plaintiff (*mudda'i*) has the burden of proof and the taking of an oath (*yamin*) rests upon the defendant (*mudda' aalai*). If the plaintiff has no evidence to prove his claim, the defendant shall take an oath and judgment shall be rendered in his favor by the court. Should the defendant refuse to take an oath, the plaintiff shall affirm his claim under oath in which case judgment shall be rendered in his favor. Should the plaintiff refuse to affirm his claim under oath, the case shall be dismissed.

Oath as method of proof is unique to Islamic procedural law and its simplicity has been maintained for ages. Alluding to the process of oath in his article about 'Mohammedan' jurisprudence, Abdur Rahim described the procedure as follows:

The procedure that used to be adopted when a dispute or claim had to be decided was to call upon the plaintiff to adduce proof in support of his claim. If he had no witnesses, the defendant, in case he denied the charge, would be given the oath, and if he took it he would be absolved thereby from all liabilities.¹³

A Oath under §7(1) of the Special Rules

Oath as a method of proof has no equivalent in the Rules of Court of the Philippines. Therefore, its introduction in the *Special Rules* highlights the unique character of these rules in relation to other procedural rules in the Philippines. Oath under Islamic law is 'an invocation of the name of Allah or of some person or object held sacred by the person using the invocation, to witness the truth of a solemn affirmation and to emphasize that affirmation.'¹⁴ Oath or the refusal of the oath is one of the grounds of judgment.¹⁵ As used in §7(1) of the *Special Rules*, oath refers to one of the methods of proof in Islamic jurisprudence.¹⁶ The Islamic procedural law provides for four (4) ways of proving a claim or a cause of action or establishing facts.¹⁷ These are (1) admission or confession (*al iqrar*), (2) testimonial evidence (*shuhud*), (3) oath (*yamin*) and (4) other evidence (*bayyina*).¹⁸

¹³ Abdur Rahim, 'A Historical Sketch of Mohammedan Jurisprudence, I. Early Customary Law' (1907) 7(2) *Columbia Law Review* 101, 107.

¹⁴ *The Holy Qur'an, English translation of the meanings and Commentary*, tr Mushaf Al-Madinah An-Nabawiyah, adopting with refinements the translation of the late Ustadh Abdullah Yusuf Ali (King Fahd Holy Qur'an Printing Complex) 1, 2004.

¹⁵ Mangontawar M Gubat, *The Special Rules of Procedure Governing the Shari'a Courts (Ijra-at Al Mahakim Al Shari'a) Annotated* (Central Professional Books, Inc., 1995) 55-6, citing art 1742, The Mejlle (as translated by C.R. Tyser, et. al.) ('Gubat, *Special Rules*').

¹⁶ Mangontawar M Gubat, *Reviewer in Procedure and Evidence Governing Philippine Shari'a Courts* (Mangontawar Gubat, 2012) (Gubat, *Procedure and Evidence*) citing Jainal Rasul, *Commentaries on Special Rules of Procedure in Shari'a Courts* (CLBPI, 1984) 54.

¹⁷ *Ibid* 95.

¹⁸ *Ibid*.

Lawrence Rosen referred to this form of oath as a ‘decisional oath’, which he described as the ultimate vehicle of fact-finding.¹⁹ When an oath is administered upon a party by order of the court, such oath constitutes as proof of fact in the absence of any other evidence.²⁰ Thus, oath under §7(1) of the *Special Rules* should not be confused with procedural oath which exacts of the witness to swear to tell “the truth and nothing but the truth” on the witness stand.²¹

It must be noted though that the process of oath-taking under §7(1) of the *Special Rules* is activated only if the plaintiff has no evidence whatsoever to prove his claim. This means that the plaintiff has no evidence whether in the form of an admission or a confession (*al iqrar*) in his favor, or testimonial evidence (*shuhud*), or other evidence (*bayyina*). In the rules of civil procedure governing the Philippine civil courts, the complaint filed in court shall be dismissed if the plaintiff has no evidence to prove his complaint. In other words, there is no way by which a judgment in such a case may be rendered in the plaintiff’s favor. As will be explained in Part V of this article, a plaintiff who has no evidence whatsoever stands no chance in the civil courts to prove a cause of action even if the same is legitimate. As the plaintiff, he must prove his cause of action by presenting evidence. However, in a Philippine Shari’ah Court the plaintiff who has a legitimate claim or cause of action but has no evidence to prove it is given another method of proof other than *al iqrar*, *shuhud*, and *bayyina*. This method is the oath under §7(1) of the *Special Rules*. ‘In Islamic procedure,’ writes Gubat, ‘the absence of evidence in favor of the plaintiff does not result to the dismissal of the case.’²² He continues to say that judgment may still be rendered in favor of the plaintiff if the defendant refuses to take the oath and the plaintiff affirms his claim under oath.²³

Needless to say, §7(1) of the *Special Rules* implicitly provides for the antithesis of its applicability. If the plaintiff has evidence in whatever form to prove his claim, then this procedural mechanism of oath will not apply. This means that the plaintiff’s evidence will be presented and also the defendant’s evidence in denial of the plaintiff’s claim. This was affirmed in the decision of the Supreme Court of the Philippines in *Mangondaya v Ampaso*.²⁴ In this case the Supreme Court held:

We affirm the following observation on the Special Rules of Procedure in Shari’a Courts:

When the plaintiff has evidence to prove his claim, and the defendant desires to offer defense, trial on the merits becomes necessary. The parties then will prove their respective claims and defenses by the introduction of testimonial (*shuhud*) and

¹⁹ Lawrence Rosen, ‘Islamic ‘Case Law’ and the Logic of Consequence’ in June Starr and Jane F. Collier (ed), *History and Power in the Study of Law* (Cornell University Press, 1989) 310 (‘Rosen’).

²⁰ Gubat, *Procedure and Evidence* (n 16) 139.

²¹ *Ibid* 98.

²² Gubat, *Special Rules* (n 15) 57.

²³ *Ibid*.

²⁴ *Sultan Cawal P. Mangondaya [Hadji Abdullatif] v Naga Ampaso* [March 21, 2018] G.R. No. 201763.

other evidence (*bayyina*). The statements of witnesses submitted at the pre-trial by the parties shall constitute the direct testimony as the basis for cross-examination.²⁵

Clearly, §7(1) of the *Special Rules* is not intended to apply in all circumstances. It applies if and only if the plaintiff has no evidence to prove his claim. If the plaintiff has evidence to prove his claim, the provision will not apply. This parameter is procedurally foundational in the application of the provision. That petitioners *Tampar; et. al.* had no evidence to prove their claim is the context why the Shari'ah District Court in *Tampar v Usman* applied §7(1) of the *Special Rules*.

How the process of oath-taking operates under §7(1) of the *Special Rules* is not complicated. If the plaintiff or claimant (*mudda'i*) has no evidence to prove his claim, the defendant (*mudda'alai*), upon challenge by the *mudda'i*, shall take the oath if he wants the judgment to be rendered in his (the defendant's) favor. If the defendant refuses to take the oath, the plaintiff can now affirm his claim by taking the oath in which case judgment shall be rendered in his (the plaintiff's) favor. If at this instance, the plaintiff should refuse to take the oath affirming his claim, then the case shall be dismissed.

B Some Issues Affecting the Acceptability of Oath under §7(1) of the Special Rules

Under the Rules of Court of the Philippines, the purpose of evidence is to ascertain in a judicial proceeding the truth respecting a matter of fact. This is clear from s 1, r 128, which defines evidence as 'the means, sanctioned by these rules, of ascertaining in a judicial proceeding the truth respecting a matter of fact.' Against this backdrop, the acceptability of oath under §7(1) of the *Special Rules* should be examined carefully.

Apparently, oath seems to be totally determinant of the issue of truth or falsehood of a party's claim. Certainly, this issue is not to be taken lightly. However, whilst the purpose of knowing the truth is intrinsic in any judicial proceeding, yet the law of evidence is not about actual truth but about *judicial* or *legal* truth. The distinguished Dean Willard Riano of the Philippines had been categorical about this. He correctly observed:

While the purpose of evidence is to know the truth, the truth referred to in the definition [of evidence] is not necessarily the actual truth but one aptly referred to as the *judicial* or *legal* truth. The limitations of human judicial systems cannot always guarantee knowledge of the actual or real truth.²⁶

True, there is a 50-50 probability that the truth will not be determined even after the oath-taking under Section 7(1) of the *Special Rules*. However, this method of proof is also not necessarily after the actual truth but the judicial or legal truth. If the defendant takes the oath because the plaintiff has no evidence to prove his claim, the judicial or

²⁵ Ibid, citing Mangontawar Gubat, *Special Rules of Procedure Governing Philippine Shari'a Courts Annotated* (Central Book Supply, 2016) 93.

²⁶ Willard B Riano, *Evidence: The Bar Lectures Series* (Rex Publishing, 2013) 3.

legal truth is established in the defendant's favor although it might not have been the actual truth. This is consistent with the nature of oath under §7(1) of the *Special Rules* as a method of proof.

Similarly, the probability of perjury of the defendant (oath-taker) is high. So, a perjuring defendant would get a favorable judgment simply by virtue of the oath. This appears to be strikingly problematic but only if the oath under §7(1) of the *Special Rules* is to be treated as a purely religious incantation, and not as a method of proof. As a method of proof, the lingual religious connotation of the oath is to be taken in its face value as a proof, not as a religious incantation. Section 7(1) of the *Special Rules* is not concerned about the supposed eschatological afflicting effect of perjury during the oath, for that would be a matter of faith. Rather, oath should be scrutinised as method of proof for that would be a matter of procedural law. In fact, the religiosity of the plaintiff or the defendant who must be both Muslims is not a requirement of §7(1) of the *Special Rules*.

As a principle of Islamic procedural law institutionalised in §7(1) of the *Special Rules*, oath is simply a method of proof. It cannot be likened to a lie detector that is capable of determining actual truth or falsehood at the first instance. Judicial systems, the Philippine Shari'ah justice system at that, being susceptible to human error, 'cannot always guarantee knowledge of the actual or real truth.'²⁷ Whether the oath-taker is telling the *actual* truth is not guaranteed by §7(1) of the *Special Rules*. This should not be surprising. Even in civil courts, there is no guarantee that witnesses who are also under oath are always telling the actual truth.

Be that as it may, as to oath's purely philosophical or even religious underpinning, suffice it to say that no *true* Muslim in his right mind would, under *normal circumstances*, invoke the name of Allah to deny truth or to support falsehood. Without specific reference to any religious affiliation, there is a familiar saying in the legal community that he who comes to court must come with clean hands.

C Legal Framework for the Institution of Oath in the *Special Rules*

The *en banc* Resolution of the Supreme Court of the Philippines, which provides for the *Special Rules*, expressly specified the constitutional and statutory bases for the promulgation of the said rules. The Resolution reads in part, 'Pursuant to the Constitution of the Philippines and Arts. 148 and 158 of Presidential Decree No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines...the Court Resolved to promulgate the following Rules on Procedure of the Shari'a Courts.'²⁸ As the Philippines had several constitutions,²⁹ the 'Constitution of the Philippines' mentioned in the *Special Rules* refers to the 1973 Constitution, which was the prevailing constitution on the date of approval of the *Special Rules* on September 20, 1983. Under §5(5), art. X of the 1973

²⁷ Ibid.

²⁸ *Special Rules* (n 5) [1].

²⁹ These are the following: 1935 Constitution, 1973 Constitution, Freedom Constitution, and 1987 Constitution. The Malolos Constitution adopted after the Philippines gained independence from Spain in 1898 was short-lived as the Americans replaced the colonial Spain in the Philippines.

Constitution,³⁰ the Supreme Court of the Philippines had the power to promulgate rules concerning procedure in all courts. This was the constitutional basis for the promulgation of the *Special Rules*. Articles 148 and 158 of the *Muslim Code* on the other hand provide for the statutory basis for the promulgation of the *Special Rules*. Both provisions state that the Shari'ah Courts, *i.e.*, Shari'ah District Courts and Shari'ah Circuit Courts, shall be governed by such special rules of procedure as the Supreme Court may promulgate.

III THE CASE OF *TAMPAR v USMAN*

In the Philippines, *Tampar v Usman* is the jurisprudential specimen of the application of oath under §7(1) of the *Special Rules* in a litigation before the Shari'ah District Court. The factual background and the *ratio decidendi* of *Tampar v Usman* are relatively brief. Petitioners *Tampar; et. al.* (plaintiffs in the court *a quo*) were allegedly the owners of a parcel of land which they inherited from their ancestor. This parcel of land was the subject of an 'Extrajudicial Settlement of Estate with Simultaneous Sale', which was purportedly executed between the petitioners and the respondent *Usman*. The sale aspect of this extrajudicial settlement had the effect of conveying upon the respondent *Usman* ownership of the subject land. This impelled petitioners *Tampar; et. al.* to have that sale annulled by the Shari'ah Court. Thus, they filed against respondents *Usman, et. al.*, a complaint for 'Annulment of Sale in an Extrajudicial Settlement of Estate with Simultaneous Sale and Delivery of Certificates of Title and Damages' before the Shari'ah District Court. In their complaint, the petitioners denied having entered into a contract of sale of the subject land, alleging that their signatures in the document of sale were forged. Respondents *Usman, et. al.*, denied all these allegations.

Since the parties failed to reach an amicable settlement during the pre-trial conference, the Shari'ah District Court ('SDC'), in accordance with §6 of the *Special Rules*, directed the parties to submit the statements ("*shuhud*") of at least two witnesses to prove their respective claims. However, the petitioners' position was that they no longer had witnesses to present as their sole witness withdrew. Thus, in accordance with §7(1) of the *Special Rules*, the petitioners challenged respondent *Usman* to take an oath to declare that there is no truth to the petitioner's claim of forgery brought against him.

The respondent *Usman* initially opposed the challenge, but his opposition was overruled by the SDC. He eventually took the oath after the SDC denied his motion for reconsideration. He took the oath in the following form:

I, Esmael Usman, swear in the name of Allah Most Gracious, most Merciful and upon the Holy Quran that I bought the land in question from the plaintiffs; that I have not forged or falsified the signatures of the plaintiffs; and that God will curse me if I am not telling the truth.

³⁰ The 1973 Constitution provides as follows: 'The Supreme Court shall have the following powers: (5) Promulgate rules concerning pleading, practice, and procedure in all courts, the admission to the practice of law, and the integration of the Bar, which, however, may be repealed, altered, or supplemented by the Batasang Pambansa. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights'. (Constitution of the Republic of the Philippines 1973 (Philippines) s 5(5), art X).

Thus, after the respondent *Usman* had taken the oath, the SDC rendered a judgment in his and the other respondents' favor in accordance with §7(1) of the *Special Rules*. This meant that the complaint against the respondents *Usman, et. al.*, was dismissed. However, the matter did not end with the dismissal by the SDC of the petitioners' complaint. The petitioners elevated the SDC's decision to the Supreme Court of the Philippines, contending that the SDC's cognizance of oath taken by the respondent *Usman* 'is not only 'unprocedural,' but likewise amounts to a deprivation of their constitutional right to be heard.'³¹

Resolving the threshold issue of whether the Shari'ah District Court committed a grave abuse of discretion in dismissing the complaint of the petitioners by virtue of the "yamin" taken by the respondent *Usman*, the Supreme Court of the Philippines held:

Under Section 1, Rule 131 of the Rules of Court of the Philippines which may apply in a suppletory manner in this case, each party must prove his own affirmative allegations. When the plaintiffs (petitioners herein) failed to adduce any evidence to support the complaint, then the complaint must be dismissed. On this basis, the dismissal of the complaint by the Shari'a court in this case should be upheld, but not because of the "yamin" taken by the respondent *Usman*.

Parenthetically, these pronouncements of the Supreme Court are sufficient for the complete disposition of the case. Under the Rules of Court of the Philippines, a complaint not supported by any evidence deserves dismissal. Therefore, the fate of the petitioners' complaint was predictable since they failed to adduce any evidence to support their complaint. In other words, the result in the Supreme Court is that the complaint was correctly dismissed by the SDC because the plaintiffs (petitioners *Tampar, et. al.*) failed to adduce any evidence to prove their claim. However, this is not the reason why *Tampar v Usman* gained notoriety in the outlook of Muslim legal professionals. It is the *obiter dictum* therein that made the *Tampar* decision controversial.

IV THE *TAMPAR OBITER DICTUM* AND ITS IMPLICATIONS

To emphasize, the Supreme Court of the Philippines upheld the decision of the Shari'ah District Court in dismissing the petitioners' complaint, but not because of the oath taken by respondent *Usman*. This seemingly straightforward clarification is the prelude to the contentious *obiter dictum*. The relevant text underscoring the *obiter* follows.

The Court shares the concern of petitioners in the use of the yamin in this proceeding, and for that matter, before Philippine Shari'a courts. Section 7 of the Special Rules of Procedure prescribed for Shari'a courts aforesaid provides that if the plaintiff has no evidence to prove his claim, the defendant shall take an oath and judgment shall be rendered in his favor by the Court. On the other hand,

³¹ *Tampar v Usman* (n 6) 655.

should defendant refuse to take an oath, plaintiff may affirm his claim under oath, in which case judgment shall be rendered in his favor.

Said provision effectively deprives a litigant of his constitutional right to due process. It denies a party his right to confront the witnesses against him and to cross-examine them. It should have no place even in the Special Rules of Procedure of the Shari'a courts of the country.

The possible deletion of this provision from the said rules should be considered. For this purpose, a committee should be constituted by the Court to review the said special rules, including the above discussed provision, so that appropriate amendments thereof may be undertaken by the Court thereafter.³²

In a nutshell, the Supreme Court of the Philippines declared on *obiter* that the unique Islamic rule of procedure referred to as *yamin* (oath) is unconstitutional on the basis that it deprives a litigant of his constitutional right to due process, which includes the right to confront the witnesses and to cross-examine them. This *obiter dictum* culminated in a strong resolve of the *ponencia* that *yamin* 'should have no place even in the Special Rules of Procedure of the Shari'a courts of the country' and that 'the possible deletion of this provision from the said rules should be considered.'³³ This is the *obiter dictum* in *Tampar* that has never been looked upon by Muslim legal professionals with admiration for almost thirty years now since the promulgation of *Tampar v Usman* in 1991.

At this juncture, the author will uncover some of the far-reaching implications of the *obiter dictum*.

A Threat to Eradicate Oath (Yamin) in the Special Rules

The procedural mechanism of oath in the *Special Rules* was fortunate enough because the declaration that it is unconstitutional was merely an *obiter dictum*. However, this *obiter* has the effect of placing the sword of Damocles above the rule on *yamin*. This means that *yamin* as used in litigation before the Philippine Shari'ah Courts is under a constant threat of eradication. Gubat succinctly observed, "The case... threatens to eradicate Islamic procedure from the Philippines laws."³⁴ He continued to say,

Unless the Supreme Court reconsiders its decision in the foregoing case, the elementary Islamic nature of the Special Rules is at stake and the Special Rules ceases to serve the purpose for which it is intended.³⁵

The *Tampar obiter* threat to eradicate oath in the *Special Rules* was not merely superficial. In fact, the *ponente* of the decision unequivocally suggested the 'possible deletion' of the

³² Ibid 565.

³³ Ibid.

³⁴ Gubat, *Special Rules* (n 15) 65.

³⁵ Ibid.

provision on *yamin* in the *Special Rules* and the creation of a committee to review these rules precisely for appropriate amendments.

It must be clarified at this juncture that this article does not dispute the power of the Supreme Court to delete the provision on oath in §7(1) of the *Special Rules*. That the Supreme Court of the Philippines has the power to amend the *Special Rules* is beyond question. Under §5(5), art. VIII of the Philippine Constitution,³⁶ the Supreme Court shall have the power to promulgate rules concerning procedure in all courts. Thus, even without the *Tampar obiter*, the Supreme Court may amend the *Special Rules* at any time if it so desires. In the first place, the *Special Rules* owes its existence to the rule-making power of the Supreme Court.

B The Supreme Court's Unfamiliarity with Islamic Law and Jurisprudence

The *obiter* in *Tampar* is evocative of the reality that the Supreme Court of the Philippines is not well versed in Islamic law and jurisprudence. Most likely, the membership of the Supreme Court may not fully grasp, from the perspective of Islamic law and jurisprudence, the significance and efficacy of oath in litigations between Muslim parties before Shari'ah courts. Unlike judges in Shari'ah courts of the Philippines,³⁷ the Justices of the Supreme Court³⁸ are not subject to the qualification that they must be learned in Islamic law and jurisprudence.

Perhaps, any non-Shari'ah court sitting to decide on matters of Islamic law would likely commit errors or inaccuracies in the process. This can be observed in other countries where there is a limited enforcement of Muslim law, particularly personal and family law. In Nigeria, the colonial strategy of interfering with the administration of Islamic law results in one of the problems arising from Nigeria's legal pluralism, *i.e.*, a situation where 'common law judges who were totally ignorant of Islamic law could sit on Islamic law matters.'³⁹

In the entire history of the Supreme Court's existence, there was only one Philippine Muslim who has sat as Member of the Supreme Court. Incidentally, this Muslim Justice of the Supreme Court was sitting in that capacity at the time of the deliberation and

³⁶ The 1987 Constitution provides as follows: The Supreme Court shall have the following powers: (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the Integrated Bar, and legal assistance to the underprivileged. (*Constitution of the Republic of the Philippines 1987* (Philippines) s 5(5), art VIII) ('1987 Constitution').

³⁷ Art. 140. *Qualifications.* – No person shall be appointed *Shari'a* District judge unless, in addition to the qualifications for judges of First Instance fixed in the Judiciary Law, he is learned in Islamic law and jurisprudence.' (*Muslim Code* (n 1) art 140); 'Art. 152. *Qualifications.* – No person shall be appointed judge of the *Shari'a* Circuit Court unless he is a natural born citizen of the Philippines, at least twenty-five years of age, and has passed an examination in the *Shari'a* and Islamic jurisprudence (*fiqh*) to be given by the Supreme Court for admission to special membership in the Philippine Bar to practice in the *Shari'a* Courts.' (*Muslim Code* (n 1) art 152).

³⁸ 'No person shall be appointed Member of the Supreme Court or any lower collegiate court unless he is a natural-born citizen of the Philippines. A Member of the Supreme Court must be at least forty years of age, and must have been for fifteen years or more a judge of a lower court or engaged in the practice of law in the Philippines.' (1987 Constitution (n 36) s 7(1), art VIII).

³⁹ Abdulmumini A Oba, 'Harmonisation of Shari'ah, Common law and Customary Law in Nigeria' (2019) 45 *Journal of Malaysian and Comparative Law* 119-146.

promulgation of *Tampar v Usman*. But ironically, he was not assigned as the Justice-in-charge of the case. One may wonder why there was no dissenting opinion coming from the Muslim Justice who merely *concurred in the result* of the *Tampar* decision. Perhaps, it was high time then for a separate opinion rejecting the *obiter* that oath under §7(1) of the *Special Rules* violates due process. However, as this pronouncement was just *obiter*, the issue on violation of due process was not necessary to the ultimate resolution of the case. This means that when the Muslim Justice concurred in the result of *Tampar v Usman*, *i.e.*, dismissal of the petition, he did not necessarily concur with the *obiter* that oath violates due process. *Concurring in the result* of the Court's *opinion* in *Tampar v Usman* did not mean concurrence in everything that is said in the text of the decision. Such concurrence is limited to the *ratio decidendi* of *Tampar v Usman*, *i.e.*, the *Tampar* complaint was correctly dismissed by the Shari'ah District Court because the plaintiffs failed to adduce evidence to prove their claim. Besides, the *obiter* in *Tampar* did not have the propensity to be self-executing. "[S]ince the ruling is merely an *obiter dictum*," wrote the *late* Shari'ah Judge Alauya, "Section 7 of the Special Rules of Procedure in Shari'a Courts is still applicable in Shari'a cases unless amended by the Supreme Court," he concluded.⁴⁰

An imperfect appreciation of Islamic law as applied by a non-Shari'ah court is arguably caused by the insufficiency of knowledge and understanding of Islamic law and jurisprudence of the membership of that court. Because Shari'ah cases decided by Philippine Shari'ah courts are appealable to the Supreme Court, then it becomes necessary that the latter court should at least be guided by a Member thereof who is learned in Islamic law and jurisprudence. This remedial proposition therefore goes into the membership of the Supreme Court itself.

It has been the consistent desire of the Muslims in the Philippines to have representation in the various offices of the national government including the Supreme Court. It is perceived that a qualified Muslim Justice is necessary to be appointed to the Supreme Court because Islamic law is somehow applied in the Philippines in a limited way through the *Muslim Code*. It is hoped that a Muslim Justice who is learned in Islamic law and jurisprudence can guide the membership of the Supreme Court whenever it decides cases involving the proper application of Islamic law or principles. 'In the construction and interpretation of [the Muslim] Code and other Muslim laws, the court shall take into consideration the primary sources of Muslim law.'⁴¹ The Supreme Court's judicial power includes the interpretation of all laws including the *Muslim Code*. Thus, in the interpretation of the latter law, the Court will have to take into consideration the Qur'an and *Sunnah*.⁴² This requires knowledge and understanding of Islamic law and jurisprudence.

This consistent desire of the Muslims in the Philippines has yet to be responded to by the government even if the objective of 'guiding' the Supreme Court in matters of Islamic law and jurisprudence has become necessary in view of some Shari'ah cases reaching the dockets of the Court. *Bondagjy v Bondagjy*⁴³ is another case involving

⁴⁰ Ameladin M Alauya, *Shari'a Remedial Law Compendium* (Central Professional Books, Inc., 2005) 260.

⁴¹ *Muslim Code* (n 1) art 4(1).

⁴² See below Part IV(D).

⁴³ (2001) 371 SCRA 642 (*'Bondagjy v Bondagjy'*).

issues affecting Muslim personal law that may have been inaccurately resolved insofar as Muslim law is concerned.⁴⁴

C Limitations of Islamic Law in the Philippines

The legal system of the Muslims in the Philippines is recognized as part of the law of the land. In fact, this is one of the purposes of the Muslim Code in that it ‘recognizes the legal system of the Muslims in the Philippines as part of the law of the land and seeks to make Islamic institutions more effective.’⁴⁵ However, the extent of enforcement of the Philippine Muslims’ legal system is subject to limitations. Islamic law as recognized in the Philippines is to be given effect only if it is consistent with the Philippine Constitution. Thus, the validity of an Islamic law or rule of procedure is conditioned upon its consistency with the Philippine Constitution.

The learned Justice Cruz of the Supreme Court, one of the Justices who participated in the deliberation of *Tampar v Usman*, observed in his treatise on Constitutional Law that:

The Constitution is the basic and paramount law to which all other laws must conform and to which all persons, including the highest officials of the land, must defer. No act shall be valid, however noble its intentions, if it conflicts with the Constitution. The Constitution must ever remain supreme. All must bow to the mandate of this law...⁴⁶

Applying the principle of supremacy of the constitution as explained in *Manila Prince Hotel Corporation v Government Service Insurance System*,⁴⁷ the 1987 Constitution as the fundamental law in the Philippines is deemed or impliedly written in the *Muslim Code* or the *Special Rules*. This means that the Constitution is an inherent limitation upon these law and rules. Thus, when there was a potential conflict between oath under §7(1) of the *Special Rules* on one hand and the constitutional right to due process on the other hand, the *obiter dictum* did not hesitate to categorically push for the deletion of the oath. Oath, though a unique Islamic rule of procedure institutionalised in the *Special Rules*, must inevitably comply with the applicable limitations of the Constitution. This demonstrates the principle that all laws, rules and regulations, issuances, rules of procedure, etc., have to conform to the Constitution being the fundamental law to which all other laws must conform. Thus, the Supreme Court, as the final arbiter of all legal and constitutional issues, cannot be ousted of jurisdiction to rule on cases involving constitutional questions. If there is a sufficient allegation of constitutional violation like the assertion in *Tampar v Usman* that oath under §7(1) of the *Special Rules* is violative of the constitutional right

⁴⁴ See generally Norhabib Bin Suod S. Barodi, ‘The Code of Muslim Personal Laws of the Philippines: Beyond the Lenses of *Bondagjy v. Bondagjy*’ (2019) 27(2) *International Islamic University Malaysia Law Journal* 367-396.

⁴⁵ Art. 2. *Purposes of Code*. – ...this Code: (a) Recognizes the legal system of the Muslims in the Philippines as part of the law of the land and seeks to make Islamic institutions more effective.’ (*Muslim Code* (n 1) art 2(a)).

⁴⁶ Isagani A Cruz and Carlo L Cruz, *Constitutional Law* (Central Book Supply, Inc., 2015) 4 (‘Cruz and Cruz’).

⁴⁷ (1997) 267 SCRA 408.

to due process, then the Supreme Court has jurisdiction. This is the constitutional *status quo* in the Philippines.⁴⁸

This brings me to the last implication of the *Tampar obiter* that I wish to highlight.

D The Longstanding Islamic Law-Constitution Dilemma of the Muslims in the Philippines

The *Tampar obiter* is yet another instance that depicts the friction between Islamic law and the Constitution. It appears that whenever this friction surfaces in a case, the Supreme Court would resolve it predictably in favor of the Constitution following the principle of supremacy of the Constitution. However, every time this happens too, a Muslim backlash is created inflating in effect the Philippine Muslim sentiment that Islamic law is treated as secondary in relation to Philippine law. Of course, this friction is not to be taken in a political sense for that would highlight centuries of Philippine Muslims' struggle for self-determination dating back arguably to 1521. Dr Mamitua Saber, a renowned Muslim historian in the Philippines, once concluded that the Muslim is torn between the compliance of *adat-Islamic* laws, on one hand, and Constitutional law, on the other hand.⁴⁹

For Muslim legal professionals in the Philippines, the *Tampar obiter* on *yamin* comes as a bitter pill to swallow. This is because *yamin*, as an Islamic rule of procedure, is based on the Prophetic tradition that evidence is incumbent upon the *mudda'i* (claimant) and *yamin* rests on the *mudda' alai* (defendant). Oath under §7(1) of the *Special Rules* therefore rests on *Sunnah*, which is one of the primary sources of Muslim law (*Adilla Shar'iyah*). *Sunnah*, as used in this article, 'is what is narrated at the authority of the companions about the Prophet's sayings, actions, or approvals.'⁵⁰ It 'literally means way, custom, habit of life, and technically connotes the utterances of the Prophet (other than the *Qur'an*) known as *hadith* (plural, *ahadith*), or his personal act or acts and sayings of others tacitly approved by him.'⁵¹ Thus, an *obiter* which declares an Islamic rule based on *Sunnah* as unconstitutional would certainly earn the dissent of Muslim legal professionals in the Philippines.

Parenthetically, this article does not belabor on why Muslim legal professionals view the *obiter* with disfavor because of Prophetic traditions. As a decision promulgated by a secular court, the *Tampar* decision's *obiter* on violation of due process is scrutinised in this article outside the parameters of Prophetic traditions. Independent of these traditions, this article will show that *yamin* and due process are actually harmonious. Besides, they

⁴⁸ 'The Supreme Court shall have the following powers: (2) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts in: (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.' (1987 Constitution (n 36) s 5(2)(a), art VIII).

⁴⁹ Norhabib Bin Suod S Barodi, *Shari'ah for the Muslim Region in the Philippines: The Essence of Moro Self-Determination* (Ivory Printing and Publishing House, 2017) 7-8, citing Mamitua Saber, 'Majority-Minority Situation in the Philippines' (1974) 1(1) *Mindanao Journal* 3,14-15.

⁵⁰ Jasser Auda, *Maqāsid Al-Sharī'ah As Philosophy of Islamic Law: A Systems Approach* (Islamic Book Trust, 2010) 79.

⁵¹ Saaduddin A Alauya, *Fundamentals of Islamic Jurisprudence with Appendix: Islamic Penal Law* (Rex Book Store, 1999) 41.

can only oppose so much as the issue of *yamin*'s validity is within the constitutional jurisdiction of the Supreme Court of the Philippines, which is a non-Shari'ah court.

Unlike the Shari'ah courts in other jurisdictions like Malaysia, the Philippine Shari'ah Courts owe their creation not to a specific provision of the Philippine Constitution. Further, their jurisdiction is not defined in the Constitution itself. It is the Congress of the Philippines which has the power to define, prescribe, and apportion the jurisdiction of various courts in the Philippines. Against this backdrop, Philippine Shari'ah Courts are truly inferior courts the exercise of whose jurisdiction or judgment is correctible by the Supreme Court under the Philippine Constitution. As shown in *Tampar v Usman*, there is no constitutional impediment for the Supreme Court to declare that an Islamic rule or principle is unconstitutional if, according to the Supreme Court's reasoning, it violates the Philippine Constitution. This is true even if the Islamic rule or principle is applied in a Shari'ah case within the exclusive jurisdiction of the Shari'ah Courts.

In Malaysia, Syariah courts owe their existence to a provision in the Federal Constitution.⁵² However, Malaysia too is faced with the problem where the civil courts purportedly interferes in the administration of justice by the Syariah Courts.⁵³ This 'had sparked the dissatisfaction of various Muslim religious organizations.'⁵⁴ The Parliament hoped to resolve this 'conundrum' by introducing article 121(1A) as an amendment to the Federal Constitution.⁵⁵ Article 121(1A) of the Federal Constitution⁵⁶ provides that the two courts referred to in clause (1) [High Court in Malaya and the High Court in Sabah and Sarawak] shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

In his comparative study on Kadhis' Court in Zanzibar and the Syariah Courts in Malaysia, Dr Moh'd Makame Haji observed,

With respect to the administration of Islamic law, which is the core of this article, Malaysia unlike Zanzibar has taken many positive steps. The Federal Constitution of Malaysia has reiterated under Article 121(1A) that the *Syariah* Courts, have the power to administer Islamic law hence enjoy exclusive jurisdiction over Muslim personal matters under their jurisdiction.

On the contrary there being ambiguity in Zanzibar with respect to jurisdiction of the Kadhis' Courts on the matters of personal status which almost is similar to one that existed in Malaysia for more than two decades ago this is now only a part of

⁵² Moh'd Makame Haji, 'Administration of Islamic Law in Kadhis' Court in Zanzibar' (2014) 41(1) *Journal of Malaysian and Comparative Law* 107-124, 115 ('Moh'd Makame Haji').

⁵³ *Ibid* 119.

⁵⁴ Lim Wei Jiet and Abraham Au Tian Hui, 'Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545 – From Conflict of Jurisdictions to Reaffirmation of Constitutional Supremacy' (2018) 45(1) *Journal of Malaysian and Comparative Law* 73-93, 74, (citing Abdul Hamid bin Haji Mohamad, 'Civil and Syariah Courts in Malaysia: Conflict of Jurisdiction' (2002) 1 *Malaysian Law Journal* cxxx, cxxxiv) ('Lim and Au').

⁵⁵ *Ibid*, citing Malaysia, *Parliamentary Debates*, Dewan Rakyat, 17 March 1988, 1364 (Dr Mahathir bin Mohamad).

⁵⁶ '(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.' *Federal Constitution* (Malaysia) (Art. 121(1A)).

Malaysian history. Now the Constitutional amendment in 1988 helped to correct the problem. As a result it has helped to straighten the jurisdiction of the Common law and the Islamic law courts.⁵⁷

There is no quandary that article 121(1A) of the Federal Constitution of Malaysia is a positive step in the administration of Islamic law in Malaysia. Indeed, the amendment seems to demarcate the jurisdictional boundaries between the civil courts and the Syariah courts to avoid conflict of jurisdiction. However, this notwithstanding, Article 121(1A) has not decisively avoided the collision of civil courts and the Syariah courts. The amendment according to Lim Wei Jiet and Abraham Au Tian Hui, both Advocates and Solicitors of the High Court of Malaya, ‘had in effect, regrettably, the opening of a can of worms with the courts treading along fine lines when they decide on preliminary issues of jurisdiction’.⁵⁸ Borrowing their words, even the courts’ formulation of approaches in the determination of conflict of jurisdiction ‘failed to address the fundamental question as to when the Civil Courts should intervene or to restrain itself from treading the sensitive province of Islamic matters.’⁵⁹ It is hoped that this thorny issue of resolving the conflict of jurisdiction between the civil courts and the Syariah courts is now put to rest by the landmark judgment of the Federal Court of Malaysia in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* (*‘Indira Gandhi’*),⁶⁰ which Lim Wei Jiet and Abraham Au Tian Hui uphold as a reaffirmation of Malaysia as a secular state and of the supremacy of its Constitution.⁶¹

Any observation now on article 121(1A), to be accurate, must be correlated with the decision of *Indira Gandhi*. In this landmark case, the Federal Court of Malaysia resolved the issue of interpretation of article 121(1A), ‘in particular whether the clause has the effect of granting exclusive jurisdiction on the Syariah Court in all matters of Islamic law including those relating to judicial review.’⁶² Interpreting articles 121 and 121(1A) against the backdrop of the Federal Constitution as a whole, the Federal Court held in part, as follows:

... Clause (1A) does not remove the jurisdiction of civil courts where constitutional interpretation is concerned. Per Abdul Hamid Mohamed FCJ in *Latifah* (supra):

“Interpretation of the Federal Constitution is a matter for this court, not the syariah court.” This is the case even where the determination of Islamic law is required for the purpose of such interpretation...⁶³

⁵⁷ Moh’d Makame Haji (n 52) 119.

⁵⁸ Lim and Au (n 54) 74.

⁵⁹ Ibid.

⁶⁰ (2018) 1 MLJ 545 (*‘Indira Gandhi’*).

⁶¹ See generally Lim and Au (n 54).

⁶² *Indira Gandhi* (n 60) [73].

⁶³ Ibid 54-5 [87].

Clause (1A) also does not remove the jurisdiction of civil courts in the interpretation of legislation. This is the case even in relation to legislation enacted for the administration of Muslim law...⁶⁴

Article 121(1A) does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. The inherent judicial power of civil courts in relation judicial review and questions of constitutional or statutory interpretation is not and cannot be removed by the insertion of clause (1A).⁶⁵

The confusion as to the purport of Article 121(1A) has now been laid to rest by the lucid pronouncement of Raus Sharif PCA (as his Lordship then was) in *Viran* (supra):-

“It is clear that Article 121(1A) was introduced not for the purpose of ousting the jurisdiction of the civil courts. It was introduced in order to avoid any conflict between the decision of the Syariah Courts and the civil courts which had occurred in a number of cases before.”⁶⁶

The import of article 121(1A) of the Federal Constitution as interpreted by the Federal Court of Malaysia is an important lesson for the Shari’ah Courts of the Philippines and the enforcement of Muslim personal laws of the Philippines as a whole. Under the Philippine Constitution, the Supreme Court’s jurisdiction is not limited to issues of constitutionality. Its judicial power includes the duty to settle all legal issues. This means that it can resolve even a purely Islamic law issue that does not involve a constitutional question. Therein lies a concern because the Supreme Court is not well-versed in Islamic law and jurisprudence. Thus, if the *Indira Gandhi* view is adopted in the Philippines by constitutional fiat, the Islamic law-Constitution tension in the Philippines would be reduced in some way. This means that as to purely Islamic law issues that do not involve constitutional interpretation, jurisdiction thereof by the Shari’ah Courts shall not be encroached upon by the civil courts. In the status quo, the Supreme Court has the constitutional authority to decide all legal questions even those concerning Islamic law that do not involve the Constitution in whatever way.

As a word of caution though, this proposal must be given careful attention with regards to the major differences between Malaysia and Philippines. Whilst Malaysia is ostensibly a Muslim country and is thus in a better to position to determine the jurisdictional boundaries of the civil courts and Syariah courts and the status of the latter courts by constitutional fiat, the Philippines is apparently a non-Muslim country and thus has the strength of numbers to design, at its discretion, the jurisdictional and power relations of the Shari’ah Courts and the Supreme Court by constitutional fiat.

⁶⁴ Ibid 56 [89].

⁶⁵ Ibid 57 [92].

⁶⁶ Ibid 57-8 [93].

V HARMONIZING OATH AS A METHOD OF PROOF AND THE RIGHT TO DUE PROCESS AGAINST THE BACKDROP OF *TAMPAR v USMAN*

To clarify, this article does not dispute the power of the Supreme Court of the Philippines to exercise judicial review to determine the constitutionality of oath under §7 of the *Special Rules*.⁶⁷ What it seeks to examine is whether or not the oath, even under its tightly compartmentalised parameters and application in §7(1) of the *Special Rules*, violates the right to due process. Another important reiteration is that the oath under the said provision applies only between parties who are Muslims.

The right to due process is articulated in §1, Art. III of the 1987 Constitution of the Philippines which states, ‘No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.’ For Justice Frankfurter of the U.S. Supreme Court, due process is ‘the embodiment of the sporting idea of fair play.’⁶⁸ This definition is flexible enough to include the issue of whether the petitioners *Tampar, et. al.* were really deprived of the protection of ‘fair play’ demanded by their right to due process, which includes the right to confront witnesses and to cross-examine them. According to the *Tampar obiter*, *yamin* deprives a litigant of his right to confront the witnesses against him and to cross-examine them. Admittedly, the Supreme Court has consistently declared that the ‘right of a party to confront and cross-examine opposing witnesses in a judicial litigation, be it criminal or civil in nature, or in proceedings before administrative tribunals with quasi-judicial powers, is a fundamental right which is part of due process.’⁶⁹ Elucidating cross-examination as a fundamental right, Justice Pronove asked, ‘Indeed, of what use is an opportunity to be heard if one cannot test or question, for veracity and truthfulness, the very evidence being presented against him?’⁷⁰

A closer look on the *Tampar v Usman* decision would indicate that the *obiter dictum* did not probe thoroughly as to why oath under §7(1) of the *Special Rules* violates the constitutional right to due process. In fact, the *obiter dictum* consists only of two short paragraphs.⁷¹ There was no attempt in the decision to harmonise oath and the right to due process. The present author argues that an attempt to harmonise the two would have yielded tremendous benefit in the administration of justice in cases where Islamic law and Philippine law interact.

The concept of due process is not intended to operate in predetermined circumstances. In Philippine constitutionalism, the meaning or definition of due process has not been made with some degree of exactitude.⁷² ‘Due process...’ it is correctly observed, ‘continues to be dynamic and resilient, adaptable to every situation calling for its application.’⁷³ In other words, what could be violative of due process in a set of circumstances may not be

⁶⁷ See above Part IV(C).

⁶⁸ Cruz and Cruz (n 46) 205, quoting Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938) 32-3.

⁶⁹ *Vertudes v Buenaflores* (2005) 487 SCRA 210.

⁷⁰ Ricardo L Pronove, Jr, *The Art and Technique of Cross Examination* (Ricardo L Pronove, Jr, 2004) 18.

⁷¹ See above Part IV citing in the text these short paragraphs.

⁷² Cruz and Cruz (n 46) 204.

⁷³ *Ibid* 205.

so in another. To be precise, what could be violative of due process in a case governed by civil procedure may not be true in another case governed by the *Special Rules*. To recall, the process in §7(1) of the *Special Rules* is triggered by a very specific context, *i.e.*, the plaintiff has no evidence whatsoever to prove his claim or cause of action. Further, oath in §7(1) of the *Special Rules* applies only to Muslim parties. These specific parameters must be considered in resolving the issue of whether oath violates due process.

In his treatise which has been cited with approval by the Supreme Court of the Philippines, Mangontawar M. Gubat asserts the following observations about oath under the *Special Rules*:

Neither does the oath “*yamin*” violate the constitutional right to due process. In every stage of the proceedings under Section 7 of the *Special Rules* each party is given an opportunity to be heard. If the defendant who is challenged to take the oath has a rightful claim over the subject matter of the action, there is no reason why he should refuse to affirm under oath his claim. On the other hand, if he refuses to take the oath for one reason or another, he may return the challenge to the plaintiff who must re-affirm his claim in which case the defendant is in estoppel for refusing to affirm under oath his claim and for allowing the plaintiff to take the oath instead.⁷⁴

True, after the respondent *Usman* took the oath upon being challenged by the petitioners, judgment was rendered by the Shari’ah District Court in his favor without the petitioners having the opportunity to confront the respondent’s witnesses if any, and to cross-examine them. From here, the *Tampar obiter* would have us believe that *yamin* deprives a litigant, either plaintiff (*mudda’i*) or defendant (*mudda’aalai’*), of the constitutional right to due process. With due respect, the author begs to disagree. A reading of §7(1) of the *Special Rules* would readily show *yamin*’s intrinsic harmony with the right to due process of each party to the case.

Section 7. *Hearing or Trial*. – (1) The plaintiff (*mudda’i*) has the burden of proof and the taking of an oath (*yamin*) rests upon the defendant (*mudda’aalai’*). If the plaintiff has no evidence to prove his claim, the defendant shall take an oath and judgment shall be rendered in his favor by the court. Should the defendant refuse to take an oath, the plaintiff shall affirm his claim under oath in which case judgment shall be rendered in his favor. Should the plaintiff refuse to affirm his claim under oath, the case shall be dismissed.

This provision will be analysed from the perspective of both the plaintiff and the defendant in relation to due process.

⁷⁴ Gubat, *Special Rules* (n 15) 66.

A *Observance of Due Process under §7(1) of the Special Rules from the Plaintiff's Perspective*

Under this provision, there are three (3) instances of opportunity where due process is observed from the plaintiff's perspective.

First opportunity. A plaintiff who has a legitimate claim or cause of action is entitled to a day in court in compliance with due process. A cause of action is the act or omission by which a party violates a right of another.⁷⁵ However, the plaintiff must have evidence to prove his cause of action. In the absence of that evidence, he has no opportunity to prosecute his cause of action in court because civil procedure provides that the burden of proof rests on him being the plaintiff. He who alleges a cause of action must prove the same. To remedy this anomaly of a plaintiff being deprived of a day in court even if his cause of action is legitimate, §7(1) of the *Special Rules* provides a way for Muslim plaintiffs who are similarly situated. Thus, a Muslim plaintiff who has a legitimate cause of action but without evidence to support it can nonetheless go to the Shari'ah court and challenge the defendant, who must also be a Muslim, to take the oath under §7(1) of the *Special Rules*.

As the plaintiffs in the court *a quo*, the petitioners *Tampar, et. al.* had the burden of proof in relation to their complaint. This is consistent with the basic principle of the law on evidence that he who alleges must prove the same. They had therefore the first opportunity of having a day in court by filing their complaint before the Shari'ah court and to prove their cause of action. If they have no evidence to prove their complaint, then the complaint deserves nothing but dismissal under the Rules of Court governing the civil courts of the Philippines. In fact, this was the relevant *ratio decidendi* which is sufficient to dispose the case of *Tampar v Usman*.

Even without requiring the respondent *Usman* to take the oath, the petitioners' complaint was dismissible under §1, Rule 131 of the Rules of Court of the Philippines because the petitioners (then plaintiffs) had no evidence to prove their affirmative allegations. Yet, they were given a day in court even if they had no evidence because of the procedural mechanism in §7(1) of the *Special Rules*.

Second opportunity. A plaintiff's complaint that lacks supporting evidence whatsoever deserves nothing but dismissal if it is filed in the civil court. However, a Muslim plaintiff's complaint that is similarly situated is given another opportunity under §7(1) of the *Special Rules*. The complaint will not be dismissed outright for lack of evidence to prove it. Under the *Special Rules*, even if the petitioners *Tampar, et. al.* had no evidence to support their complaint, such complaint was not yet dismissible at that stage. They could still challenge the defendant (herein the respondent *Usman*), as they did, to take the oath.

Third opportunity. In civil courts, the plaintiff, who has no evidence to support his cause of action, cannot demand from the defendant to present his evidence in defense. However, a Muslim plaintiff who is similarly situated is given the option to challenge the Muslim defendant to take the oath under §7(1) of the *Special Rules*, instead of the plaintiff presenting his evidence. In the first place, the Muslim plaintiff must have no evidence

⁷⁵ *Rules of Court of the Philippines 1997* (Philippines) s 2, r 2 ('*Rules of Court*').

to support his claim or cause of action. If the Muslim defendant refuses to take the oath, then the Muslim plaintiff can affirm his claim under oath, in which case judgment would be rendered in his (the plaintiff's) favor.

Had the respondent *Usman* ultimately refused to take the oath, then the petitioners *Tampar, et. al.* could have affirmed their claim under oath, in which case judgment would have been rendered in their favor. This constitutes the third opportunity where due process is observed from the plaintiff's perspective.

To summarise, the following are the three due process-compliant opportunities in favor of the Muslim plaintiff under §7(1) of the *Special Rules*.

1. The plaintiff takes the first opportunity by having a *day in court* even if he has no evidence whatsoever to prove his claim or cause of action.
2. Even if the plaintiff has no evidence, his complaint is *not yet immediately dismissible*. He can *challenge* the defendant to take the oath where there is a possibility that the defendant may refuse to do so.
3. If the defendant refuses to take the oath, the plaintiff can *affirm his claim under oath*, in which case judgment shall be rendered in his favor.

In contrast, the Rules of Court of the Philippines affords the plaintiff only one opportunity to enjoy due process in relation to the *burden of proof* placed on his shoulder. If the plaintiff has no evidence to support his legitimate cause of action, then it is pointless to file the complaint in a civil court for it must necessarily be dismissed. Had the petitioners *Tampar, et. al.*, been plaintiffs in the civil courts, they would have the duty to present evidence on the facts in issue necessary to establish their claim by the amount of evidence required by law.⁷⁶ This is the singular opportunity in the plaintiffs' favor to convince the civil court that they are entitled to a favorable judgment. In the civil procedure, there is no mechanism where the plaintiff, having no evidence to present, can challenge the defendant to take the oath as a method of proof. Clearly, contrary to what the *Tampar obiter* advances, oath under §7(1) of the *Special Rules*, affords more opportunities where due process is observed from the plaintiff's perspective.

B Observance of Due Process under §7(1) of the Special Rules from the Defendant's Perspective

1. *First scenario: The defendant takes the oath*

To recall, under §7(1) of the *Special Rules* if the plaintiff has no evidence to prove his claim, the defendant may take an oath and judgment shall be rendered in his favor by the court. This process is never to the disadvantage of the defendant. All that the defendant must do is to take the oath denying the claim or cause of action of the plaintiff who has no evidence whatsoever. If the defendant takes the oath, judgment shall be rendered in his favor.

⁷⁶ '*Burden of proof*. – Burden of proof is the duty of a party to present evidence on the facts in issue necessary to establish his claim or defense by the amount of evidence required by law.' (*Rules of Court* (n 75) s 1, r 131).

True, the judgment in favor of the defendant in this scenario is dictated by his oath and not the totality of evidence. His witnesses are not cross-examined by the plaintiff. But why bother the defendant to present his evidence in defense against the claim or cause of action of the plaintiff who has no evidence at all? The defendant is not under obligation to present his evidence in defense. Instead, he is simply required to take the oath. And that oath is the proof of defendant's denial of the plaintiff's claim because the oath under §7(1) of the *Special Rules* is a method of proof. To require the defendant to present his evidence so that the plaintiff can cross-examine his witnesses is unfair to the defendant because the plaintiff does not have his own evidence in the first place.

Thus, when the defendant takes the oath he is afforded, not denied, due process by defeating through his oath the 'no-evidence' claim or cause of action of the plaintiff. At this stage, the plaintiff cannot demand cross-examination of the defendant's witnesses because the prelude to the defendant's oath is the plaintiff's challenge. So, there is no denial of due process to the plaintiff. In the first place, his lack of evidence to support his claim or cause of action is what triggers the oath of the defendant. If the plaintiff wants to avoid §7(1) of the *Special Rules*, then he should present his evidence if he has any.

2. *Second scenario: The defendant refuses to take the oath and the plaintiff affirms his claim under oath*

With the simplicity of the process under §7(1) of the *Special Rules*, there is hardly any reason to discourage a Muslim defendant from taking the oath. If placed on a civil procedure perspective, why would a defendant refuse to specifically deny the plaintiff's claim or cause of action when such specific denial⁷⁷ is precisely what is required of him by the Rules of Court of the Philippines? Under s 11, r 8 of the Rules of Court of the Philippines,⁷⁸ if the defendant does not specifically deny the material allegations of the complaint, then he is deemed to have admitted these allegations.

Back to the *Special Rules*, why would a Muslim defendant refuse to take the oath when such oath is precisely what is required of him by §7(1) of the *Special Rules*? As logically pointed out by Gubat, 'If the defendant who is challenged to take the oath has a rightful claim over the subject matter of the action, there is no reason why he should refuse to affirm under oath his claim.'⁷⁹ If the defendant refuses to take the oath, the plaintiff shall affirm his claim under oath in which case judgment shall be rendered in his favor. If under s 11, rule 8 of the Rules of Court of the Philippines, the defendant is deemed to have admitted the material allegations of the plaintiff's complaint if the defendant does not specifically deny them, then it would not be too difficult to believe that the Muslim defendant who refuses to take the oath is also deemed to have admitted the claim or cause

⁷⁷ 'Specific denial. – A defendant must specify each material allegation of fact the truth of which he does not admit and, whenever practicable, shall set forth the substance of the matters upon which he relies to support his denial [...]'. (*Rules of Court* (n 75) s 10, r 8).

⁷⁸ 'Allegations not specifically denied deemed admitted. – Material averment in the complaint, other than those as to the amount of unliquidated damages, shall be deemed admitted when not specifically denied. Allegations of usury in a complaint to recover usurious interest are deemed admitted if not denied under oath.' (*Rules of Court* (n 75) s 11, r 8).

⁷⁹ Gubat, *Special Rules* (n 15) 66.

of action of the plaintiff. Hence, under §7(1) of the *Special Rules*, the plaintiff can affirm his claim under oath in which case judgment shall be rendered in his favor.

True again, the judgment in favor of the plaintiff in this scenario is dictated by the oath and not the totality of evidence. His witnesses are not cross-examined by the defendant. However, the lack of evidence of the plaintiff is precisely at the heart of oath under §7(1) of the *Special Rules*. The defendant cannot demand cross-examination of witnesses that the plaintiff does not have. When the plaintiff affirms his claim under oath because the defendant refused to take the oath, judgment shall be rendered in plaintiff's favor. And the proof of his claim is the oath he has taken because oath under §7(1) of the *Special Rules* is a method of proof. If the defendant desires to prevent the plaintiff from affirming his claim under oath, then the defendant should not refuse to take the oath upon challenge by the plaintiff.

All said, the simplicity and justice intrinsic in §7(1) of the *Special Rules* could not be any clearer. The plaintiff who has no evidence to prove his claim or cause of action can nonetheless file his case in the Shari'ah court and challenge the defendant to take the oath. As a counterbalance, to defeat the plaintiff's claim or cause of action which is not backed up by evidence, all the defendant has to do is to take the oath denying the said claim or cause of action. Therefore, in every stage of the process in §7(1) of the *Special Rules*, neither the plaintiff nor the defendant is denied due process.

Further, a closer look at the process embodied in §7(1) of the *Special Rules* would show that the favorable judgment for the plaintiff or defendant is dependent on whoever takes the oath first. However, this should not be taken to mean that the plaintiff and defendant are literally in a race to take the oath. The taking of the oath by either of the parties is successive and each stage has a prerequisite without which the oath would not occur. The first party who is challenged to take the oath is the defendant. And the prerequisite is the lack of evidence of the plaintiff. If the defendant takes the oath, judgment shall be rendered in his favor. If he refuses, the challenge is thrown back to the plaintiff who can affirm his claim by taking the oath. The prerequisite of the plaintiff's oath is the refusal of the defendant to take the oath upon challenge from the plaintiff. If the plaintiff refuses to affirm his claim under oath, the case will be dismissed. This is the process under §7(1) of the *Special Rules*, which is also true in other Muslim jurisdictions. For instance under Moroccan law, Lawrence Rosen explains that:

Oath-taking [...] allows the defendant to swear to his or her statements and thus bring the case to an end favorable to the oath-taker. However, the defendant may choose to refer the oath back to the plaintiff, who can successfully conclude the case by then swearing to his or her claims. Whoever takes the oath first wins.⁸⁰

C Estoppel of Petitioners Tampar et. al.

On another point. It cannot be denied that the petitioners *Tampar, et. al.* can raise at the Supreme Court the issue of constitutionality of oath on due process grounds. However, whether that challenge should be sustained can also be resolved by determining whether

⁸⁰ Rosen (n 19) 310.

the petitioners were guilty of estoppel. This article asserts that they were. Petitioners *Tampar, et. al.* were already estopped from mounting a due process challenge against oath under §7(1) of the *Special Rules* because they were the ones who invoked its provisions by challenging the respondent *Usman* to take the oath.

Estoppel is defined as '[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.'⁸¹ Estoppel may also be defined to be 'a legal result or 'conclusion' arising from an admission which has either been actually made, or which the law presumes to have been made, and which is binding on all persons whom it affects.'⁸² Another form of estoppel which is also relevant to the case of the petitioners *Tampar, et. al.* is *estoppel by election*. This is '[t]he intentional exercise of a choice between inconsistent alternatives that bars the person making the choice from the benefits of the one not selected.'⁸³ The concept of estoppel is sanctioned under the Rules of Court of the Philippines in that '[w]henver a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.'⁸⁴

Based on the foregoing, the petitioners' estoppel is clearly evident in this case. One must not lose sight of the fact that the petitioners had to challenge the respondent *Usman* because they had no evidence to prove their complaint against him. When the petitioners challenged the respondent *Usman* to take the oath, they had led him to believe that if he does so they would not question its legal effect under §7(1) of the *Special Rules, i.e.*, a judgment shall be rendered in the respondent's favor. From there, their estoppel to question the judgment had already set in.

The petitioners had a number of choices. First, they could have forever kept their peace outside court litigation because they had no evidence to support their cause of action. Secondly, they could have endeavoured to secure evidence before pursuing the complaint in the Shari'ah Court. And thirdly, having no evidence of their own, there is the option to challenge the defendant to take the oath under §7(1) of the *Special Rules*. The petitioners *actively, intentionally* and *voluntarily* elected the *third* option knowing full well the possibility that the respondent might take the challenge thereby getting a judgment in his favor. If after this, the petitioners can still claim a denial of due process, then it has truly become tremendously difficult to harmonise oath under §7(1) of the *Special Rules* and due process.

Justice Paras, one of the Justices who took part in the deliberation in *Tampar v Usman*, concurred in the result (dismissal of the *Tampar* petition) 'because petitioner is in *estoppel*.'⁸⁵ The late learned Justice did not expound on this one-line concurring opinion. Understandably, there was no need because estoppel was clearly applicable against the petitioners.

⁸¹ *Black's Law Dictionary* (9th ed, 2009) 'estoppel' (def 1) ('*Black's Law*').

⁸² *Ibid*, quoting Lancelot Feilding Everest, *Everest and Strode's Law of Estoppel* (3rd ed, 1923).

⁸³ *Black's Law* (n 82) 'estoppel by election'.

⁸⁴ *Rules of Court* (n 75) s 2(a), r 131.

⁸⁵ *Tampar v Usman* (n 6) 656.

VI CONCLUSION

This article argued that the *obiter dictum* in *Tampar v Usman* has overlooked the harmony of oath as a method of proof and due process in the specific context of §7(1) of the *Special Rules*. The oath under this provision applies only between parties who are Muslims. Its application is triggered only when the plaintiff has no evidence to prove his claim. When so applied at the instance of the plaintiff's lack of evidence, all the defendant has to do is to take the oath and judgment shall be rendered in his (the defendant's) favor. The defendant's refusal to take the oath, which is unlikely if he has rightful claim, gives the plaintiff an opportunity to affirm his claim under oath in which case judgment shall be rendered in his (the plaintiff's) favor. In this process, oath is to be viewed as a method of proof to establish judicial or legal truth, not necessarily actual truth which could sometimes be elusive even in civil courts. Within these tightly compartmentalised and specific parameters, neither the plaintiff nor the defendant will likely suffer a denial of due process. In fact, a plaintiff whose claim is legitimate but without evidence to prove it is given a due process-compliant remedy in the *Special Rules* that is absent in the civil procedure rules for civil courts. In the civil courts, such a legitimate claim or cause of action unsupported by any evidence whatsoever is 'dead on arrival' at the court dockets. The defendant on the other hand is not to be burdened unreasonably because all he has to do is to take the oath and the plaintiff's 'no-evidence' claim or cause of action is defeated.

Although the Supreme Court has not acted upon the almost 30-year old *obiter* in *Tampar* to delete the oath in the *Special Rules*, the *obiter dictum* presents far-reaching implications that already demand constructive responses in the form of proposed solutions. Specifically, a qualified Philippine Muslim who is learned in Islamic law and jurisprudence should be appointed to the Supreme Court to guide the Court in deciding cases emanating from Shari'ah courts requiring the application of Islamic law and jurisprudence. Further, the experience in Malaysia where its Syariah Courts are separate and independent is a lesson to be reckoned with. Be that as it may, it must be clarified that civil courts in Malaysia, particularly the Federal Court, are not ousted of jurisdiction to decide matters of Islamic law when they involve constitutional questions, consistent to the Federal Court's power of judicial review and other basic principles of Malaysian constitutionalism like separation of powers and constitutional supremacy. These solutions have the propensity to enhance further the effective administration and enforcement of Muslim personal laws among Muslims, without necessarily deviating from the supremacy of the Constitution. After all, the Philippines is a secular country, which has accommodated for the Philippine Muslims the enforcement of Muslim personal laws through the *Muslim Code*.

