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The decades-long conflict in Mindanao seemed to have reached some semblance of a resolution with the signing of the Comprehensive Agreement on the Bangsamoro between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front (MILF) on 27 March 2014. The agreement, a consolidation of the 12 agreements previously signed between the parties, provided for the creation of the Bangsamoro Juridical Entity, a new political entity that would replace the Autonomous Region in Muslim Mindanao. Pursuant to this signing, the draft Bangsamoro Basic Law (BBL) was submitted to Congress on 10 September 2014.

On 25 January 2015, the “Mamasapano incident” claimed the lives of 44 members of the Philippine National Police Special Action Force, 18 members of the MILF, and three civilians. In the wake of the tragedy, the already wavering support for the passage of the BBL diminished to almost nothing. The suspension of hearings on the matter and the withdrawal by key legislators of their prior endorsement eventually led to another stalemate in the peace process — symptoms of the broader conflict between the State seeking to maintain its integrity and the Moro nation struggling to gain its independence.

In this Article, Sedfrey M. Candelaria and Sang Mee A. Lee examine thoroughly the constitutional limitations of the draft BBL through the lens of the constitutional parameters set in *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*.

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The Proposed Bangsamoro Basic Law and the Primacy of the Sovereign Power of the State

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I. INTRODUCTION

On 25 January 2015, in what is known as the “Mamasapano incident,” the latest confrontation in the struggle for peace claimed the lives of 44 members of the Philippine National Police (PNP) Special Action Force, 18 members of the Moro Islamic Liberation Front (MILF), and three civilians.¹ This incident, the bloodiest police operation in recent memory, was just one of the many clashes in the cycle of violence in Mindanao that has already resulted in the deaths of at least a hundred thousand and the displacement of millions of Filipinos.²

In the wake of the tragedy, support has waned for the passage of the Bangsamoro Basic Law (BBL) — the agreement that “can finally seal genuine, lasting peace in Mindanao.”³ Senator Ferdinand R. Marcos, Jr. suspended the bill’s hearing, while Senators Alan Peter S. Cayetano and Joseph Victor G. Ejercito withdrew their sponsorships.⁴ In the House of Representatives, several legislators are already reconsidering their support.⁵ Despite this, however, President Benigno S. Aquino III remains steadfast in his belief in the BBL —

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1. Frances Mangosing, *Iqbal: Mamasapano incident strengthens MILF trust in PH gov’t*, PHIL. DAILY INQ., Mar. 12, 2015, available at <http://newsinfo.inquirer.net/672577/iqbal-mamasapano-incident-strengthens-milf-trust-in-ph-govt> (last accessed Mar. 15, 2015).
 2. Thomson Reuters Foundation, Philippines-Mindanao conflict, available at <http://www.trust.org/spotlight/Philippines-Mindanao-conflict/?tab=briefing> (last accessed Mar. 15, 2015).
 3. Benigno S. Aquino, III, 15th President of the Philippines, *Speech of His Excellency Benigno S. Aquino, III, President of the Philippines, During the Signing of the Government of the Philippines — Moro Islamic Liberation Front Framework Agreement on the Bangsamoro*, Address at Malacañang Palace, Philippines (Oct. 15, 2012) (transcript available at <http://www.officialgazette.gov.ph/2012/10/15/speech-of-president-aquino-during-the-signing-of-the-gph-milf-framework-agreement-october-15-2012>) (last accessed Mar. 15, 2015).
 4. See Leila B. Salaverria & DJ Yap, *Bangsamoro law support in Congress suffers setback*, PHIL. DAILY INQ., Jan. 28, 2015, available at <http://newsinfo.inquirer.net/668431/bangsamoro-law-support-in-congress-suffers-setback> (last accessed Mar. 15, 2015) & Lerio Bompat, Alan, JV withdraw support for Bangsamoro bill, available at <http://www.abs-cbnnews.com/nation/01/27/15/alan-jv-withdraw-support-bangsamoro-bill> (last accessed Mar. 15, 2015).
 5. *Id.*

We have already come such a long way in our quest to realize the peace that we have long desired for Muslim Mindanao. All sides exhibited great trust to reach this point. The incident in Mamasapano has already given rise to those who want to take advantage of this tragedy to undermine that trust; they wish to derail the peace process. There are even some already calling for a halt to the passage of the [BBL] in the House of Representatives and the Senate.

This should not happen. The success of the entire peace process is contingent on this law. If this law is kept from being passed at the soonest possible time, the peace process will be derailed; the status quo will remain. If that happens, we cannot hope for anything but the same results: [c]itizens who take to the mountains after losing hope; individuals kept from gaining justice who instead choose to exact violence on their fellowmen. It would be as if we helped Marwan and Usman to reach their goals. Do we want to return to the point when communities are ready, at a moment's notice, to flee to evacuation centers, because of the threat of an encounter? If this were to happen, who would benefit? If the peace process were derailed, how many more graves would we have to dig? How many more children will idolize Marwan; how many will want to grow up to be Usman; how many engineers will choose to build bombs rather than buildings?⁶

This Article examines the constitutional limitations of the draft BBL. To do this, the history of the Bangsamoro shall first be examined in order to contextualize the analysis. Then, the constitutional standards set by the Supreme Court in *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*⁷ shall be revisited to shed light on the contentious issues surrounding the evolving text of the proposed law.

II. HISTORY OF THE STRUGGLE FOR PEACE IN MINDANAO

The BBL is “an attempt to redress long historical imbalances[.]”⁸ It is an effort to “rectify historical injustice[s].”⁹ Thus, it should be read within the

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6. Benigno S. Aquino III, 15th President of the Philippines, *National Address of His Excellency Benigno S. Aquino III President of the Philippines on the Incident at Mamasapano, Maguindanao*, Address at Malacañang Palace, Philippines (Jan. 28, 2015) (transcript available at <http://www.officialgazette.gov.ph/2015/01/28/english-president-aquinos-speech-addressing-the-nation-on-january-28-2015>) (last accessed Mar. 15, 2015).
 7. *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, 568 SCRA 402 (2008).
 8. Office of the Presidential Adviser on the Peace Process (OPAPP), Bangsamoro, an attempt to redress historical imbalances — retired SC justice, available at

context of the decades-long armed conflict in Mindanao. In assessing the BBL, the deep historical roots of the conflict which caused the need for its passage should first be examined.

A. *The Sultanates*

The Government of the Republic of the Philippines' (GRP) involvement in the peace process in Mindanao has its origin in disputes that can be traced throughout the Philippines' history. Even before the arrival of the Spanish *conquistadores*, separate and independent communities among the Islamized groups had already been in existence in the Mindanao-Sulu-Palawan (MINSUPALA) region.¹⁰ The Sulu sultanate began when it was established by Sultan Sharif ul-Hashim during the latter half of the 15th century, or more than a hundred years before the Spanish colonization.¹¹ This was followed by the creation of the Maguindanao sultanate in the early 16th century and the organization of the Sultanate of Buayan and the *Pat a Pangampong ko Ranao* (Confederation of the Four Lake-based Emirates).¹² The sultanates were "independent, had sovereign power[,] and had diplomatic and trade relations with other countries in the region. Other Muslim principalities known as emirates, like those of Rajah Solaiman in Manila and the emirates of Panay and Mindoro, were also born."¹³

By the time the Spanish colonizers arrived in the Philippines, "the Muslims of Mindanao, the Sulu-Tawi-Tawi archipelago, and the islands of

<http://archive.peace.gov.ph/milf/news/bangsamoro-attempt-redress-historical-imbalance-retired-sc-justice> (last accessed Mar. 15, 2015).

9. *Id.*

10. Ramon Miguel C. Samson, *The Law of Philippine Peace Processes: Agreements, Issues, and Engagement in Peace-Building After Conflict*, 59 ATENEO L.J. 1255, 1270 (2015).

11. Abhoud Syed M. Lingga, *Understanding the Bangsamoro Right to Self-Determination*, in THE MORO READER: HISTORY AND CONTEMPORARY STRUGGLES OF THE BANGSAMORO PEOPLE 99 (Bobby M. Tuazon ed., 2008) [hereinafter Lingga, *Right to Self-Determination*].

12. *Id.*

13. Guiamel M. Alim, Executive Director, Kadtuntaya Foundation, Inc., *The Bangsamoro Struggle for Self-Determination*, Remarks at the European Solidarity Conference on the Philippines at Hoisdorf, Germany (June 23-25, 1995) (transcript available at http://www.seasite.niu.edu/Tagalog/Modules/Modules/MuslimMindanao/bangsamoro_struggle_for_self.htm) (last accessed Mar. 15, 2015).

Basilan and Palawan had already established their own States and governments with diplomatic and trade relations with other countries including China.”¹⁴ The Spaniards referred to the Muslims as “Moors” — a reference to their experience with the Moors that occupied the Iberian Peninsula.¹⁵ This period of Spanish colonization was marked by bitter Spanish-Moro wars (the so-called “Moro Wars”) spanning four centuries.¹⁶ The Spaniards’ attempt to conquer the Muslim States and to subjugate their political existence were futile.¹⁷ The Muslims, with their organized maritime forces and armies, succeeded in defending their territories, thus preserving the continuity of their independence.¹⁸

B. Cession of the Philippines in Favor of the United States Through the Treaty of Paris of 1898

After the Spanish rule, the Treaty of Paris, ceding the Philippines to the United States (US), was signed on 10 December 1898.¹⁹ It unilaterally included Mindanao in the agreement, thus annexing Mindanao to the Philippines despite the fact the Spaniards were never able to subjugate the *Moro* people.²⁰ In 1903, the military pacifications of the *Moros* began with the organization of the Moro Province, a military government that was distinct from the rest of the Philippines.²¹ This was later abolished in 1920 when the Bureau of Non-Christian Tribes was established.²²

14. Ahmoud Syed M. Lingga, *Understanding Bangsamoro Independence as a Mode of Self-Determination*, 27 MINDANAO J. 3, 5 (2004) [hereinafter Lingga, *Bangsamoro Independence*].

15. Samson, *supra* note 10, at 1271.

16. *Id.*

17. Lingga, *Bangsamoro Independence*, *supra* note 14, at 5.

18. *Id.*

19. Alim, *supra* note 13.

20. Nashmyleen A. Marohomsalic, *Doomed Towards Peace? An Analysis of the MOA-AD in The Province of North Cotabato v. GRP and its Implication on the Separation of Powers: Towards a Framework on Peace Negotiations*, at 22 (2011) (unpublished J.D. thesis, Ateneo de Manila University) (on file with the Professional Schools Library, Ateneo de Manila University) [hereinafter Marohomsalic, *Analysis of the MOA-AD*].

21. *Id.* at 26.

22. *Id.*

When the US government promised the Filipinos their independence, most of the Muslim leaders voiced their strong opposition to be part of the Philippine Republic.²³ In fact, in a petition to the US President, the inhabitants of the Sulu archipelago said that they would rather be a part of the US than be included in an independent Philippine nation.²⁴ This resistance and disapproval continued even after their territories were already made part of the Philippine nation after it gained independence from the US in 1946.²⁵

C. Intrusion into Moroland, the Struggle for Independence, and the Rise of the Moro National Liberation Front

In 1962, the Sultanate of Sulu ceded control and title over the territory in a formal instrument of transfer of sovereignty from the Sultanate to the Republic of the Philippines.²⁶ During Martial Law, former President Ferdinand E. Marcos enacted Presidential Decree (P.D.) No. 410, which declared alienable and disposable the ancestral lands already occupied and cultivated by cultural communities.²⁷ It turned a blind eye to the existing rights of the *Moros* and non-Christian tribes' rights over their lands.²⁸ P.D. No. 1529, the Property Registration Decree, soon followed, which gave the subsequent settlers in Mindanao a method of registering land already approved for the *Moros* who, by reason of the wars in the 1970s, had left their land and were presumed to have abandoned their claims.²⁹ Consequently, the large tracts of lands previously occupied by *Moros* were granted to these migrant settlers.³⁰

The tension between the Muslims and the GRP was pushed to a breaking point by one of the most important turning points in Bangsamoro history — the Jabidah Massacre.³¹ In what is known as Operation Merdeka,

23. See Lingga, *Bangsamoro Independence*, *supra* note 14, at 5–6.

24. *Id.* at 5.

25. *Id.*

26. Marohomsalic, *Analysis of the MOA-AD*, *supra* note 20, at 36.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Jamail A. Kamlian, *Ethnic and Religious Conflict in the Philippines: The Bangsamoro Experience*, in *THE MAKING OF ETHNIC AND RELIGIOUS CONFLICTS IN*

the Marcos administration secretly trained Muslim youths to be sent to North Borneo in order to undertake activities for the recovery of Sabah from the Malaysians.³² On March 1968, these young Muslim trainees were led out of their camps and, as if in a sophism, to their deaths.³³ This gruesome event, along with the widespread migration of Filipinos from the northern islands — reducing the former Muslim majority in the South to a minority in their own territory — marked the beginning of the decades-long armed conflict in Mindanao.³⁴

A few weeks after the incident, Governor Datu Udtog Matalam of Cotabato set up the Muslim Independence Movement, later on called the Mindanao Independence Movement (MIM).³⁵ The MIM called for the independence of Mindanao and Sulu to be known and referred to as the Republic of Mindanao and Sulu.³⁶ Furthermore, several armed separatist Muslim movements emerged, particularly the Moro National Liberation Front (MNLF) and the Moro Islamic Liberation Front (MILF), in the 1960s and 1970s.³⁷

In 1971, Nurullaji P. Misuari (Nur Misuari), a graduate of and a professor at the University of the Philippines (UP), officially established the MNLF, “a movement that sought national salvation from colonialism and setting up an independent ‘Bangsa Moro Republik.’”³⁸ The original demand for the creation of an independent Bangsamoro State was eventually tempered to calls for autonomy, primarily on the insistence of the Organization of Islamic Conference (OIC). This initiated the peace talks between the GRP and the MNLF.³⁹ The peace efforts, which were supervised by the OIC, led to the 1976 Tripoli Agreement on 23 December

SOUTHEAST ASIA: CASES AND RESOLUTIONS 111 (Frans de Djalong & Labang Trijono eds., 2004).

32. See Marites Dañguilan Vitug & Glenda M. Gloria, *Jabidah and Merdeka: The Inside Story*, available at <http://www.rappler.com/newsbreak/24025-jabidah-massacre-merdeka-sabah> (last accessed Mar. 15, 2015).

33. *Id.*

34. See Kamlian, *supra* note 31, at 110–11 & Samson, *supra* note 10, at 1271.

35. See Kamlian, *supra* note 31, at 110–11.

36. *Id.*

37. *Id.* See also Lingga, *Bangsamoro Independence*, *supra* note 14, at 7.

38. Samson, *supra* note 10, at 1271.

39. *Id.*

1976.⁴⁰ It bade for “independence” by providing for “areas of autonomy for the Muslims comprising 13 provinces in the ... [MINSUPALA area].”⁴¹

Yet, the negotiations on the implementation of the 1976 Tripoli Agreement failed. The Marcos administration immediately found it problematic to fulfill the Agreement.⁴² In March 1977, former President Marcos issued a Proclamation that created two regional autonomous governments “— thereby dividing into two groupings and reducing by three the 13 provinces under the Tripoli Agreement — and then subjecting this to a plebiscite.”⁴³ This was rejected by the MNLF, which led to the cessation of the peace process at that time.⁴⁴ In response to this —

[Nur] Misuari ... wanted to revert to armed struggle for independence, but his Vice-Chairman Salamat Hashim was for exhausting the peace process for autonomy under the Tripoli Agreement. Hashim’s group officially declared itself a separate organization in March 1984, calling itself the [MILF]. The split, which would shape the later course of the Mindanao conflict and peace process, was based on differences not only in political strategy (armed struggle v. peace negotiations) and objectives (independence v. autonomy) but also more fundamentally in ideological orientation (secular nationalist v. Islamic revivalist), leadership styles (centralized v. consultative), and ethnic allegiances (Tausug v. Maguindanao), [thus] reflecting the respective spheres of the historical Sulu and Maguindanao sultanates, respectively.⁴⁵

The overthrow of the Marcos dictatorship, and the establishment of the administration of former President Corazon C. Aquino, led to the reopening of the peace negotiations.⁴⁶ By 1987, a new Constitution was ratified, which included provisions implementing the terms of the 1976 Tripoli Agreement by mandating the formation of the Autonomous Region of Muslim

40. *Id.*

41. *Id.*

42. Alim, *supra* note 13.

43. Soliman M. Santos, Evolution of the Armed Conflict on the Moro Front (Background paper submitted to the Human Development Network Foundation, Inc. for the Philippine Human Development Report 2005) at 7, available at http://hdn.org.ph/wp-content/uploads/2005_PHDR/2005%20Evolution_Moro_Conflict.pdf (last accessed Mar. 15, 2015).

44. *Id.*

45. HUMAN DEVELOPMENT NETWORK, PHILIPPINE HUMAN DEVELOPMENT REPORT 2005 70 (2005).

46. Alim, *supra* note 13.

Mindanao (ARMM).⁴⁷ Then President Aquino signed Republic Act (R.A.) No. 6649 into law, which created the Regional Consultative Commission (RCC).⁴⁸ The RCC, without the participation of the MNLF and the MILF, was tasked to assist the Congress in the drafting of the charter of autonomy for Muslim Mindanao.⁴⁹

This contributed little to resolve the conflict in Mindanao. Thus, in 1992, former President Fidel V. Ramos renewed negotiations with the Muslim insurgents.⁵⁰ This resulted in the signing of the GRP-MNLF Peace Agreement or the Jakarta Accord between the Ramos administration and the MNLF on 2 September 1996.⁵¹ Its terms and provisions were intended to implement the 1976 Tripoli Agreement. Nur Misuari was appointed Governor of ARMM and Chairman of the Southern Philippine Council for Peace and Development (SPCPD).⁵² However, “[t]he SPCPD under Chairman [Nur] Misuari failed to end the conflict and develop the ARMM.”⁵³

D. A New Framework for Peace Negotiations with the Moro Islamic Liberation Front

The 1996 Final Peace Agreement did not conclude nor end the Muslim secessionist movements in Mindanao. The 1996 Final Peace Agreement “excluded not just the Philippine legislature and civil society, but also the MILF, which was relegated to the side lines because of non-recognition on the part of the OIC.”⁵⁴ Hence, on 18 July 1997, the GRP and the MILF Peace Panels entered into an Agreement on General Cessation of Hostilities.⁵⁵ Despite this, fighting once again arose during former President Joseph E. Estrada’s administration when the MILF attacked a number of

47. Samson, *supra* note 10, at 1272.

48. *Id.*

49. *Id.*

50. Alim, *supra* note 13.

51. *Id.*

52. Marohomsalic, Analysis of the MOA-AD, *supra* note 20, at 43-44.

53. *Id.*

54. Samson, *supra* note 10, at 1272.

55. See *Province of North Cotabato*, 568 SCRA at 433.

municipalities in Central Mindanao.⁵⁶ This resulted in the declaration of an “all-out-war” against the MILF.⁵⁷

The clashes briefly ceased when former President Gloria M. Macapagal-Arroyo assumed office.⁵⁸ The GRP and the MILF reopened the peace talks, which concluded with the signing of the GRP-MILF Tripoli Agreement on Peace (2001 Tripoli Agreement).⁵⁹ The 2001 Tripoli Agreement contained “the basic principles and agenda on the following aspects of the negotiation: Security Aspect, Rehabilitation Aspect, and Ancestral Domain Aspect.”⁶⁰ The first two aspects were later implemented, while the last one was struck down as unconstitutional by the Supreme Court in *Province of North Cotabato*.⁶¹

A year later, both the GRP and the MILF resumed negotiations which culminated in the signing of the Framework Agreement on the Bangsamoro (FAB) on 15 October 2012.⁶² This was followed by the Comprehensive Agreement on the Bangsamoro on 27 March 2014,⁶³ and the submission of the draft BBL to the Congress on 10 September 2014.⁶⁴

56. *Id.* at 434.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 434-35.

61. *See Province of North Cotabato*, 568 SCRA at 522.

62. Government of the Republic of the Philippines & the Moro Islamic Liberation Front, Framework Agreement on the Bangsamoro, *available at* http://peacemaker.un.org/sites/peacemaker.un.org/files/PH_121015_FrameworkAgreementBangsamoro.pdf (last accessed Mar. 15, 2015).

63. Government of the Republic of the Philippines & the Moro Islamic Liberation Front, Comprehensive Agreement on the Bangsamoro, *available at* <http://www.officialgazette.gov.ph/downloads/2014/03mar/20140327-Comprehensive-Agreement-on-the-Bangsamoro.pdf> (last accessed Mar. 15, 2015) [hereinafter *Comprehensive Agreement on the Bangsamoro*].

64. An Act Providing for the Basic Law for the Bangsamoro and Abolishing the Autonomous Region in Muslim Mindanao, Repealing for the Purpose Republic Act No. 9054, Entitled “An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao,” and Republic Act No. 6734, Entitled “An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao,” and for Other Purposes, H.B. No. 4994, 16th Cong., 2d Reg. Sess. (2014).

In this brief examination of the history of the Bangsamoro, the Authors identified the causes of the *Moro* struggle and set the foundation for their claims. It is in this context that the Authors will review the draft BBL.

III. THE MEMORANDUM OF AGREEMENT ON THE ANCESTRAL DOMAIN PRECEDENT

Bearing in mind that the draft BBL had the benefit of hindsight in view of the Supreme Court's ruling in *Province of North Cotabato*, it is necessary, therefore, to review the constitutional parameters set in the said case in order to have a deeper and better evaluation of the draft BBL.

A. Overview of the Memorandum of Agreement on the Ancestral Domain

On 5 August 2008, the GRP and the MILF were scheduled to sign the Memorandum of Agreement on Ancestral Domain⁶⁵ (MOA-AD) Aspect of the 2001 Tripoli Agreement in Kuala Lumpur, Malaysia.⁶⁶ A product of the negotiations between the GRP and the MILF, the MOA-AD was “not the final peace agreement but a pivotal last step on the road towards it[.] [It] outlined the peace panels’ consensus on the issue of territory and envisaged the creation of the [Bangsamoro Juridical Entity (BJE)], thus [recognizing] that the ‘right to self-governance of the Bangsamoro people is rooted on ancestral territoriality.’”⁶⁷ And yet, the MOA-AD had strong opposition from different sectors of society.⁶⁸ Its signing failed to materialize when the

65. Government of the Republic of the Philippines & the Moro Islamic Liberation Front, Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001, available at https://peacemaker.un.org/sites/peacemaker.un.org/files/PH_080805_Memorandum%20on%20the%20ancestral%20domains.pdf (last accessed Mar. 15, 2015) [hereinafter Memorandum of Agreement on Ancestral Domain].

66. See *Province of North Cotabato*, 568 SCRA at 432-33 & Nasser M. Marohomsalic, *The Framework Agreement on the Bangsamoro: Towards Hurdling the Constitutional Obstacle to Moro Self-Determination*, IBP J., Dec. 2012, at 8 [hereinafter Marohomsalic, *The Framework Agreement on the Bangsamoro*].

67. Timothy Williams, *The MOA-AD Debacle — An Analysis of Individuals’ Voices, Provincial Propaganda and National Disinterest*, 29 J. CURRENT S. EAST ASIAN AFFAIRS 121, 123 (2010).

68. See Isagani de Castro, Jr., Lack of consultation, transparency on Moro homeland accord hit, available at <http://archives.newsbreak-knowledge.ph/2008/07/24/lack-of-consultation-transparency-on-moro-homeland-accord-hit> (last accessed Mar. 15, 2015) & Purple S. Romero, OSG asks SC to dismiss anti-MOA-AD petitions, available at <http://www.abs->

Supreme Court issued a Temporary Restraining Order (TRO) enjoining the GRP from signing the same.⁶⁹ A few months after, the Supreme Court struck down the MOA-AD for being unconstitutional.⁷⁰

Under its Terms of References (TOR), the MOA-AD includes four earlier agreements between the GRP and MILF and two agreements between the GRP and the MNLF.⁷¹ The MOA-AD also identifies as TOR two local statutes⁷² and “several international law instruments such as the [International Labor Organization] Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries in relation to the United Nations (U.N.) Declaration on the Rights of the Indigenous Peoples, and the U.N. Charter, among others.”⁷³ The Philippines is a party to all these international instruments and, therefore, the enumeration merely confirms adherence to the country’s commitments.

The MOA-AD includes as a final TOR the generic category of “compact rights entrenchment emanating from the regime of *dar-ul-mua’hada* (or territory under compact) and *dar-ul-sulh* (or territory under peace agreement) that partakes the nature of a treaty device.”⁷⁴ These terms have been clarified as follows —

With all due respect, this is not a new tool in the promotion of foreign relations, especially in the area of security and peace. During the nascency of political Islam in the City State of Madinah the Prophet Muhammad

cbnnews.com/nation/08/26/08/osg-asks-sc-dismiss-anti-moa-ad-petitions (last accessed Mar. 15, 2015).

69. See *Province of North Cotabato*, 568 SCRA at 433 & Carlo Lorenzo & Mark Merueñas, Supreme Court rules domain agreement ‘unconstitutional,’ available at <http://www.gmanetwork.com/news/story/126956/news/nation/supreme-court-rules-domain-agreement-unconstitutional> (last accessed Mar. 15, 2015).

70. *Province of North Cotabato*, 568 SCRA at 522.

71. *Id.* at 440.

72. *Id.* at 440-41. See also An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, Republic Act No. 6734 (1989) & An Act to Recognize, Protect and Promote the Rights of Indigenous Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes [The Indigenous Peoples’ Rights Act], Republic Act No. 8371 (1997).

73. *Province of North Cotabato*, 568 SCRA at 441.

74. *Id.*

(peace be upon him) established a commonwealth with non-Muslim tribes within its surrounding environs — the Jews in the oases of Maqna, Adhruh[,] and Jarba to the south and the Christians of Aqaba, who were taken under the protection of the city [S]tate in consideration of a payment later called *jizyah*, which included land and head tax.

For intents and purposes, these areas are territories under compact, each an associate [S]tate of Madinah.⁷⁵

The Supreme Court has declared that this category simply refers to all other agreements between the GRP and the MILF. In this case,

the Philippines being the land of compact and peace agreement that partake of the nature of a treaty device, ‘treaty’ being broadly defined as ‘any solemn agreement in writing that sets out understandings, obligations, and benefits for both parties which provides for a framework that elaborates the principles declared in the [MOA-AD].’⁷⁶

A discussion of the MOA-AD’s basic principles may be divided into the following: (1) Concepts and Principles; (2) Territory; (3) Resources; and (4) Governance.⁷⁷

1. Concepts and Principles

According to the MOA-AD, the “Bangsamoro people” comprises the “original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest or colonization, and their descendants whether mixed or of full blood, including their spouses.”⁷⁸ The MOA-AD also used the term “the First Nation” to describe the Bangsamoro people.⁷⁹

75. Sedfrey M. Candelaria, Comparative Analysis of the Memorandum of Agreement on the Ancestral Domain (MOA-AD) Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 and Framework Agreement on the Bangsamoro (FAB) (Paper delivered on the occasion of the Chief Justice Artemio V. Panganiban Professorial Chair on Liberty and Prosperity Second Lecture Series) at 10, available at http://teehankeeruleoflaw.org/uploads/files/comparative-analysis_moa-ad-and-fab.pdf (last accessed Mar. 15, 2015) (citing Marohomsalic, *The Framework Agreement on the Bangsamoro*, *supra* note 66, at 16).

76. *Province of North Cotabato*, 568 SCRA at 442.

77. Memorandum of Agreement on Ancestral Domain, *supra* note 65.

78. *Id.* at 2.

79. The Supreme Court ruled that —

The “Bangsamoro homeland” is then defined as exclusively owned by the Bangsamoro people by virtue of their prior rights of occupation.⁸⁰ It must be noted that both parties to the MOA-AD acknowledge that ancestral domain does not form part of the public domain.⁸¹ The MOA-AD also provides for the creation of the BJE, which should have authority and jurisdiction over the Ancestral Domain and Ancestral Lands of the Bangsamoro.⁸²

2. Territory

The Bangsamoro territory, as expressed in the MOA-AD, consists of the “land mass as well as the maritime, terrestrial, fluvial[,] and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the [MINSUPALA] geographic region.”⁸³ Included in this are territories already part of the ARMM and those other provinces whose inclusion will be subject to a plebiscite.⁸⁴

The MOA-AD also stipulated the extent of the BJE’s jurisdiction over the natural waters found within its internal waters.⁸⁵ As specified, the BJE shall also exercise joint jurisdiction with GRP over the authority and

The [Memorandum of Agreement on Ancestral Domain] goes on to describe the Bangsamoro people as the ‘*First Nation*’ with defined territory and with a system of government having entered into treaties of amity and commerce with foreign nations.

The term ‘*First Nation*’ is of Canadian origin referring to the indigenous peoples of that territory, particularly those known as Indians. In Canada, each of these indigenous peoples is equally entitled to be called ‘*First Nation*,’ hence, all of them are usually described collectively by the plural ‘*First Nations*.’ To that extent, the MOA-AD, by identifying the Bangsamoro people as ‘the *First Nation*’ — suggesting its exclusive entitlement to that designation — departs from the Canadian usage of the term.

Province of North Cotabato, 568 SCRA at 445.

80. Memorandum of Agreement on Ancestral Domain, *supra* note 65, at 2.

81. *Id.*

82. *Id.* at 3.

83. *Id.*

84. *Id.*

85. *Id.* at 4-5.

management over all natural resources within its territorial waters.⁸⁶ The minerals found in the territorial waters should be divided, in favor of the BJE, through a production and economic cooperation agreement.⁸⁷ The MOA-AD also provides a list of activities which the parties are allowed to conduct on the territorial waters.⁸⁸ No similar arrangements are found regarding the internal waters of the BJE.

3. Resources

Under the MOA-AD, the BJE has the obligation and right to develop, conserve, and dispose the natural resources within the homeland.⁸⁹ This right is limited by the GRP's right to assume or direct the operation of the resources, for a fixed period or under reasonable terms agreed upon, in times of national emergency or when public interest requires it.⁹⁰ As mentioned earlier, the natural resources are to be shared by the GRP and the BJE, in a 75:25 ratio, favoring the former.⁹¹ The BJE is also authorized to enter into

86. Memorandum of Agreement on Ancestral Domain, *supra* note 65, at 5.

87. *Id.*

88. According to Paragraph (i) on Territory, the following are authorized activities on *territorial waters*:

- (a) Exploration and utilization of the natural resources, whether living or non-living, within the territorial waters;
- (b) Establishment and use of artificial islands, installations[,] and structures;
- (c) Marine scientific research;
- (d) Protection and the preservation of the marine environment;
- (e) Conservation of living resources;
- (f) Regulation of shipping and fishing activities;
- (g) Enforcement of police and safety measures, including interdiction of the entry and use of the waters by criminal elements and hot pursuit of suspected criminal elements;
- (h) Regulation and control of contraband and illegal entry of prohibited materials and substances, including smuggling; and
- (i) Such other measures as the Parties may otherwise mutually agree.

Id.

89. *Id.*

90. *Id.* at 8.

91. *Id.*

any economic relations and environmental cooperation agreements with other countries.⁹²

4. Governance

The relationship between the GRP and the BJE is described as “associative.”⁹³ Authority and responsibility are shared between the two.⁹⁴ As stated in the MOA-AD, the “structure of governance is to be based on executive, legislative, judicial[,] and administrative institutions with defined powers and functions in the Comprehensive Compact.”⁹⁵ Considering that there are provisions requiring amendments to existing laws, the MOA-AD provides that these changes shall take effect “upon the signing of the Comprehensive Compact and upon effecting the aforesaid amendments, with due regard to the non-derogation of prior agreements and within the stipulated timeframe to be contained in the Comprehensive Compact.”⁹⁶ The said Compact should also include a discussion on the authority of the BJE “to build, develop[,] and maintain its own institutions inclusive of civil service, electoral, financial and banking, education, legislation, legal, economic, police and internal security force, judicial system[,] and correctional institutions[.]”⁹⁷

B. Procedural Issues

1. Ripeness

The GRP argued for the dismissal of the case on the ground that the petitions presented no controversy which is ripe for judicial review.⁹⁸ Citing the provisions on Territory and Governance, it contended that the unsigned MOA-AD was a mere proposal that created no legally demandable rights and obligations.⁹⁹ According to the GRP, there should have been concrete acts in order to render the controversy ripe for adjudication.¹⁰⁰ Otherwise, the

92. Memorandum of Agreement on Ancestral Domain, *supra* note 65, at 7-8.

93. *Id.* at 10.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Province of North Cotabato*, 568 SCRA at 451.

99. *Id.* at 452-53.

100. *Id.* at 451.

provisions of the assailed agreement could not have possibly violated any existing rights.¹⁰¹ It was merely a step towards the formulation of a final peace agreement.

The Supreme Court, however, reasoned otherwise. As held in *Pimentel, Jr. v. Aguirre*,¹⁰² a dispute is considered ripe simply through an enactment of the challenged law or an approval of a questioned action. Thus, “even a singular violation of the Constitution and/or the law is enough to awaken judicial controversy.”¹⁰³

In *Province of North Cotabato*, the petitioners asserted that the GRP exceeded their authority and violated their duties when they failed to consult and inform the affected communities and local government units (LGUs) in drafting the terms of the MOA-AD.¹⁰⁴ It was further claimed that provisions of the MOA-AD contravened the Constitution and other existing laws.¹⁰⁵ In particular, the petitioners contended that the provision requiring amendments to the current legal framework to accommodate the agreement constituted a promise of constitutional amendment to the MILF.¹⁰⁶ These arguments seriously alleged an infringement of the Constitution, thus necessitating judicial review and action.

2. *Locus Standi*

Jurisprudence shows that *locus standi* generally means that a person has “a personal and substantial interest in a case such that the party has sustained or will sustain direct injury as a result of the governmental act that is being challenged.”¹⁰⁷ Hence, when it comes to public rights, the Supreme Court has held it “sufficient that the petitioner is a citizen and has an interest in the execution of the laws.”¹⁰⁸ In any event, the Supreme Court exercised its discretion in relaxing the procedural requirement on *locus standi* seeing as the

101. *Id.*

102. *Pimentel, Jr. v. Aguirre*, 336 SCRA 201 (2000).

103. *Id.* at 222.

104. *Province of North Cotabato*, 568 SCRA at 455.

105. *Id.* at 477-78.

106. *Id.* at 462.

107. *Galicto v. Aquino III*, 667 SCRA 150, 170 (2012).

108. *Province of North Cotabato*, 568 SCRA at 456.

constitutional issues involved were of paramount public interest or of transcendental importance.¹⁰⁹

3. Mootness

Respondents assert that the non-signing of the MOA-AD and the dissolution of the GRP Peace Panel rendered the petitions moot.¹¹⁰ It must be noted though that the “moot and academic” principle has its exceptions:

- (a) there is a grave violation of the Constitution; []
- (b) the situation is of exceptional character and paramount public interest is involved; []
- (c) the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and []
- (d) the case is capable of repetition yet evading review.¹¹¹

Another exception is when the defendant or the doer voluntarily ended the complained activity.¹¹²

The Supreme Court ruled that the instant case falls under the exceptions.¹¹³ First, the Supreme Court emphasized that the reason behind the non-signing of the MOA-AD is its issuance of a TRO.¹¹⁴ Second, the MOA-AD being a part of a series of agreements to implement the 2001 Tripoli Agreement, the Decision on the topic has constitutional implications to future negotiations and agreements necessary for its realization.¹¹⁵ Lastly, the petitions are of paramount public interest, involving changes that affect both territorial and governmental integrity.¹¹⁶ Clearly, with these, it cannot be said that the petitions are already moot and academic.

109. *Id.* at 518.

110. *Id.* at 461.

111. *Id.* at 460.

112. *Id.* at 461.

113. *Id.*

114. *Province of North Cotabato*, 568 SCRA at 461.

115. *Id.* at 463.

116. *Id.* at 462.

C. Substantive Issues

Petitioners attacked the MOA-AD for its unconstitutional provisions, particularly the alleged creation of a separate independent State; and for the failure of the GRP to consult with affected Local Government Units (LGUs) and local communities, thus, violating the right to public information.¹¹⁷ The Supreme Court's ruling for each issue is discussed as follows:

I. Right to Information on Matters of Public Concern

Section 7, Article III of the Constitution states —

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.¹¹⁸

This right has been recognized as self-executory.¹¹⁹ It is anchored on the right of the people to acquire or access information on matters of public concern because of the “fundamental role of free exchange of information in a democracy. There can be no realistic perception by the public of the nation's problems, or a meaningful democratic decision-making if they are denied access to information of general interest.”¹²⁰

The right to information goes hand in hand with the policy of public disclosure under Section 28, Article II of the Constitution, which declares that “[s]ubject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.”¹²¹ This right, though not self-executory, recognizes the State's responsibility to provide information to the public without need of demand.

According to the Supreme Court, there are at least three statutes which justified the exercise of the right to be consulted on relevant matters relating to the peace process:

117. *Id.* at 465.

118. PHIL. CONST. art. III, § 7.

119. *Legaspi v. Civil Service Commission*, 150 SCRA 530, 534-35 (1997).

120. *Baldoza v. Dimaano*, 71 SCRA 17, 19 (1976).

121. PHIL. CONST. art. II, § 28.

One, Executive Order No. 3 itself is replete with mechanics for continuing consultations on both national and local levels and for a principal forum for consensus-building. In fact, it is the duty of the Presidential Adviser on the Peace Process [(PAPP)] to conduct regular dialogues to seek relevant information, comments, advice, and recommendations from peace partners and concerned sectors of society.

Two, [R.A.] No. 7160 or the Local Government Code of 1991 requires all national offices to conduct consultations before any project or program critical to the environment and human ecology including those that may call for the eviction of a particular group of people residing in such locality, is implemented therein. The MOA-AD is one peculiar program that unequivocally and unilaterally vests ownership of a vast territory to the Bangsamoro people, which could pervasively and drastically result to the diaspora or displacement of a great number of inhabitants from their total environment.

Three, [R.A.] No. 8371 or the Indigenous Peoples Rights Act of 1997 [(IPRA)] provides for clear-cut procedure for the recognition and delineation of ancestral domain, which entails, among other things, the observance of the free and prior informed consent of the Indigenous Cultural Communities/Indigenous Peoples. Notably, the statute does not grant the Executive Department or any government agency the power to delineate and recognize an ancestral domain claim by mere agreement or compromise.¹²²

Thus, the Supreme Court pronounced that the public had the right to be consulted on the peace agenda, as a corollary to the constitutional right to information and disclosure.¹²³ Hence, it was ruled that the PAPP gravely abused his authority and discretion when he failed to consult with the affected LGUs and communities.¹²⁴

2. The Memorandum of Agreement on the Ancestral Domain is Inconsistent with the Constitution and Laws as Presently Worded

The Supreme Court ruled that, as presently worded, the MOA-AD is inconsistent with the present Constitution and laws.¹²⁵ The very concept underlying the relationship between the two parties is unconstitutional.¹²⁶

122. *Province of North Cotabato*, 568 SCRA at 520.

123. *Id.* at 473.

124. *Id.*

125. *Id.* at 522.

126. *Id.* at 482.

Paragraph 4 of the MOA-AD on Governance characterized the relationship between the GRP and the BJE as “associative.”¹²⁷ The Supreme Court interpreted this term in light of the international legal concept of association, and described this arrangement as a usual transitional device of former colonies on their way to full independence.¹²⁸ According to the Supreme Court, the following provisions of the MOA-AD were consistent with the international law concept of association —

the BJE’s capacity to enter into economic and trade relations with foreign countries, the commitment of the Central Government to ensure the BJE’s participation in meetings and events in the ASEAN and the specialized U.N. agencies, and the continuing responsibility of the Central Government over external defense. Moreover, the BJE’s right to participate in Philippine official missions bearing on negotiation of border agreements, environmental protection, and sharing of revenues pertaining to the bodies of water adjacent to or between the islands forming part of the ancestral domain[.]¹²⁹

Thus, the Supreme Court ruled that these provisions demonstrate that the parties intended for the BJE to have the status of an associated State or something closely similar.¹³⁰ Corollary, because the Constitution does not recognize the concept of association, amendments would have to be made to Sections 1 and 15 of Article X.¹³¹

127. See Memorandum of Agreement on Ancestral Domain, *supra* note 65, at 10.

128. *Province of North Cotabato*, 568 SCRA at 478.

129. *Id.* at 480-81.

130. *Id.*

131. Section 1, Article X of the Constitution provides that “[t]he territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities, and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordilleras as hereinafter provided.” While Section 15 of the same Article states —

There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.

PHIL. CONST. art. X, §§ 1 & 15.

a. Bangsamoro Juridical Entity as a More Powerful Entity than the Autonomous Region Recognized in the Constitution

According to the Supreme Court, the powers granted to the BJE exceeded those given to any LGUs existing, and even went beyond the powers of the present ARMM.¹³² The Supreme Court ruled that the “BJE is a [S]tate in all but name as it meets the criteria of a [S]tate laid down in the Montevideo Convention.”¹³³ Thus, the Supreme Court held that the underlying relationship between the GRP and the BJE is contrary to the Constitution.

In addition to this, the Supreme Court held that the provisions of the MOA-AD failed to comply with Section 20, Article X of the Constitution,¹³⁴ and is inconsistent with prevailing statutory law, among which are the Organic Act of the ARMM¹³⁵ and the IPRA.¹³⁶

132. *Province of North Cotabato*, 568 SCRA at 482.

133. *Id.*

134. See PHIL. CONST. art. X, § 20.

135. The Supreme Court said that the “use of the term Bangsamoro sharply contrasts with that found in the Article X, Section 3 of the Organic Act, which, rather than lumping together the identities of the Bangsamoro and other indigenous peoples living in Mindanao, clearly distinguishes between Bangsamoro people and [t]ribal peoples[.]” *Province of North Cotabato*, 568 SCRA at 486.

Section 3, Article X of the Organic Act of the ARMM provides the following

As used in this Organic Act, the phrase ‘indigenous cultural community’ refers to Filipino citizens residing in the autonomous region who are:

- (a) Tribal peoples. These are citizens whose social, cultural, and economic conditions distinguish them from other sectors of the national community; and
- (b) [Bangsamoro] people. These are citizens who are believers in Islam and who have retained some or all of their own social, economic, cultural, and political institutions.

An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, Amending for the Purpose Republic Act No. 6734, Entitled “An Act Providing for the Autonomous Region in Muslim Mindanao,” as Amended, Republic Act No. 9054, art. X, § 3 (2001).

136. As for the IPRA, the Supreme Court held that “[t]he MOA-AD’s manner of delineating the ancestral domain of the Bangsamoro people is a clear departure from that procedure [found in Chapter VIII of the IPRA.]” *Province of North Cotabato*, 568 SCRA at 486. See also *The Indigenous Peoples’ Rights Act*.

Ultimately, the Supreme Court ruled that the MOA-AD is contrary to the Constitution and existing laws. They ratiocinated that

[w]hile there is a clause in the MOA-AD stating that the provisions thereof inconsistent with the present legal framework will not be effective until that framework is amended, the same does not cure its defect. The inclusion of provisions in the MOA-AD establishing an associative relationship between the BJE and the Central Government is, itself, a violation of the Memorandum of Instructions from the President dated [1 March] 2001, addressed to the government peace panel. Moreover, as the clause is worded, it virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place. Neither the GRP Peace Panel nor the President herself is authorized to make such a guarantee. Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process.

While the MOA-AD would not amount to an international agreement or unilateral declaration binding on the Philippines under international law, [R]espondents' act of guaranteeing amendments is, by itself, already a constitutional violation that renders the MOA-AD fatally defective.¹³⁷

IV. THE PROPOSED BANGSAMORO BASIC LAW

On 27 March 2014, the Comprehensive Agreement on the Bangsamoro (CAB) was signed — concluding years of negotiations between the GRP and the MILF.¹³⁸ The CAB is a consolidation of 12 agreements signed between the two parties with the aim of ending the decades-long armed conflict in Mindanao.¹³⁹ It provides for the creation of a new political entity — the Bangsamoro — that shall replace the ARMM. In order to give life to the goals of the CAB, the Transition Commission drafted and submitted the BBL to the Congress for deliberation.¹⁴⁰ Once passed and signed by the President, a plebiscite will be conducted to identify the territories to be included.¹⁴¹

137. *Province of North Cotabato*, 568 SCRA at 521-22.

138. Comprehensive Agreement on the Bangsamoro, *supra* note 63.

139. *Id.*

140. *Id.*

141. *Id.*

Lawmakers, legal luminaries, and politicians have voiced their support, criticisms, and concerns regarding its provisions and implications.¹⁴² Critics of the proposal such as Senator Miriam P. Defensor-Santiago,¹⁴³ retired Supreme Court Associate Justice Vicente V. Mendoza,¹⁴⁴ former UP College of Law Dean Merlin M. Magallona,¹⁴⁵ and the Philippine Constitutional Association (PHILCONSA)¹⁴⁶ have pointed out provisions of the law that are of questionable constitutionality. However, it must be noted that a consensus among advocates and critics alike is that there are still several issues to be resolved and clarifications to be addressed especially on the ramifications of the proposed BBL on the existing legal regime of the Philippines. The Article provides an inquiry into selected contentious issues surrounding the proposed BBL and examines its legal implications under municipal law through a comparative analysis of the provisions of the BBL vis-à-vis Philippine laws and the Constitution.

142. See Angela Casauay, Legal experts take on Bangsamoro bill, *available at* <http://www.rappler.com/nation/special-coverage/peacetalks/73291-legal-experts-bangsamoro-basic-law-hearing> (last accessed Mar. 15, 2015) [hereinafter Casauay, Legal experts] & Angela Casauay, Two schools of thought on the Bangsamoro bill, *available at* <http://www.rappler.com/nation/special-coverage/peacetalks/73338-bangsamoro-bill-schools-of-thought> (last accessed Mar. 15, 2015) [hereinafter Casauay, Two schools of thought].

143. See Press Release by the Senate of the Philippines, *Miriam: Bangsamoro Agreement Unconstitutional* (Apr. 2, 2014).

144. See Paolo Romero, *Ex-SC justice: BBL unconstitutional*, PHIL. STAR, Oct. 29, 2014, *available at* <http://www.philstar.com/headlines/2014/10/29/1385658/ex-sc-justice-bbl-unconstitutional> (last accessed Mar. 15, 2015) [hereinafter Romero, *Ex-SC*].

145. See Earl Victor L. Rosero, Experts debate legality of Bangsamoro pact, *available at* <http://www.gmanetwork.com/news/story/356063/news/nation/experts-debate-legality-of-bangsamoro-pact> (last accessed Mar. 15, 2015) & Rita Linda V. Jimeno, The new Bangsamoro political entity, MANILA STAND. TODAY, Feb. 3, 2014, *available at* <http://manilastandardtoday.com/2014/02/03/the-new-bangsamoro-political-entity> (last accessed Mar. 15, 2015).

146. See Lira Dalangin-Fernandez, Peace pact with MILF contains ‘illegal commitments, unconstitutional provisions’ — PhilConsa, *available at* www.interaksyon.com/article/86679/peace-pact-with-milf-contain-illegal-commitments-unconstitutional-provisions---philconsa (last accessed Mar. 15, 2015).

A. Preamble

A Preamble's purpose is to "aid in ascertaining the meaning of ambiguous provisions[.]"¹⁴⁷ However, a quick perusal of the proposed BBL's Preamble¹⁴⁸ shows that the law introduces terms and phrases that have yet to be defined in legislation or jurisprudence. Although the Preamble highlights that the law will be "[i]n consonance with the Constitution[.]"¹⁴⁹ this is not a guarantee that its provisions will stand the test of constitutionality. Phrases such as "*asymmetrical political relationship with the Central Government founded on the principles of subsidiarity and parity of esteem*"¹⁵⁰ confuse and open the law to questions such as whether the term "asymmetrical relationship" is simply another term for "associative relationship," the latter of which was already

147. JOAQUIN BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 4 (2009).

148. The Preamble provides —

We, the Bangsamoro people and other inhabitants of the Bangsamoro, imploring the aid of the Almighty, aspiring to establish an enduring peace on the basis of justice in our communities and a justly balanced society, and asserting our right to conserve and develop our patrimony; In consonance with the Constitution and the universally accepted principles of human rights, liberty, justice, democracy, and the norms and standards of international law, reflective of our system of life prescribed by our faith, and in harmony with our customary laws, cultures[,] and traditions;

Affirming the distinct historical identity and birthright of the Bangsamoro people to their ancestral homeland and their right to self-determination — beginning with the struggle for freedom of their forefathers in generations past and extending to the present — to chart their political future through a democratic process that will secure their identity and posterity, and allow for genuine and meaningful self-governance as stipulated under the Comprehensive Agreement on the Bangsamoro;

With the blessings of the Almighty, do hereby ordain and promulgate this Bangsamoro Basic Law, through the Congress of the Republic of the Philippines, as the basic law of the Bangsamoro that establishes the asymmetrical political relationship with the Central Government founded on the principles of subsidiarity and parity of esteem.

H.B. No. 4994, pmb. (emphases supplied).

149. *Id.*

150. *Id.*

declared unconstitutional by the Supreme Court in *Province of North Cotabato*.¹⁵¹

The use of the phrases “principles of subsidiarity” and “parity of esteem” has also been described as an oxymoron by PHILCONSA, to wit —

Asymmetrical means not balanced or disproportionate. Subsidiarity means in the state of being a subsidiary or subordinate to a more dominant entity. Parity, on the other hand, means in the condition of being equal, that is, in rank, in status, in character[,] and in nature. To establish an asymmetrical political relationship between Bangsamoro and the Central Government founded on the principles of subsidiarity and parity of esteem is an oxymoron[.]¹⁵²

However, it must be noted that Associate Justice Marvic Mario Victor F. Leonen, in his concurring opinion in *League of Provinces of the Philippines v. Department of Environment and Natural Resources*,¹⁵³ has described an “asymmetrical relationship” thus —

Autonomous regions are granted more powers and less intervention from the national government than territorial and political subdivisions. They are, thus, in a more asymmetrical relationship with the national government as compared to other local governments or any regional formation. The Constitution grants them legislative powers over some matters, e.g.[,] natural resources, personal, family[,] and property relations, economic and tourism development, educational policies, that are usually under the control of the national government. However, they are still subject to the supervision of the President. Their establishment is still subject to the framework of the Constitution, particularly, Sections 15 to 21 of Article X, national sovereignty and territorial integrity of the Republic of the Philippines.¹⁵⁴

Asymmetrical relationship in this sense does not mean that the national government and the Bangsamoro government are on equal footing. Rather, asymmetry pertains to when a territorial unit within a political system — the Bangsamoro in this case — is granted more powers and less intervention from the national government than other territorial and political

151. See *Province of North Cotabato*, 568 SCRA at 482.

152. Jimeno, *supra* note 145.

153. *League of Provinces of the Philippines v. Department of Environment and Natural Resources*, 696 SCRA 190, 230 (2013) (J. Leonen, concurring opinion).

154. *Id.* at 238.

subdivisions.¹⁵⁵ It is suggested that the proposed BBL be amended in order to include a definition of “asymmetrical relationship.”

B. Article I: Name and Purpose

Bangsamoro comes from the Malay word “*bangsa*” (nation or people) and the Spanish word “*moro*” (Moor or Muslim).¹⁵⁶ The term, as used in the BBL, refers to the political entity,¹⁵⁷ people,¹⁵⁸ and territory.¹⁵⁹

Article III, Section 1 of the BBL enshrines the BBL’s primary purpose — “to establish a political entity, provide for its basic structure of government in recognition of the justness and legitimacy of the cause of the people and their aspiration to chart their political future through a democratic process that will secure their identity and posterity and allow for meaningful self-governance.”¹⁶⁰ The creation of a separate entity was inspired by the constitutional foundation under Article X, Section 15 of the Constitution.¹⁶¹ However, the Bangsamoro entity has been called unconstitutional for creating a new and distinct political unit not included in those mentioned in Article X, Section 1 of the Constitution. Thus, the Bangsamoro political entity must be seen and considered as an autonomous region, and its creation must be only established “within the framework of the Constitution and national sovereignty as well as [the] territorial integrity of the Republic of the Philippines.”¹⁶² The creation of this new separate entity “does not mean the establishment of a sovereign[y] distinct from that of the Republic.”¹⁶³

155. Abraham Sakili, *The Bangsamoro Framework Agreement and Mindanao Problem: Foregrounding Historical and Cultural Facts and Concepts for Social Justice and Peace in the Southern Philippines*, 48 *ASIAN STUDIES: J. CRITICAL PERSPECTIVES ASIA* 1, 4–5 (2012).

156. WILLIAM LAROUSSE, *A LOCAL CHURCH LIVING FOR DIALOGUE: MUSLIM-CHRISTIAN RELATIONS IN MINDANAO-SULU, PHILIPPINES: 1965–2000* 229 (2001) & Rosero, *supra* note 145.

157. H.B. No. 4994, art. I, §§ 2 & 3.

158. *Id.* art. II, § 1.

159. *Id.* art. III, § 1.

160. *Id.*

161. *Id.*

162. PHIL. CONST. art. X, § 15.

163. BERNAS, *supra* note 147, at 1139.

C. Article II: Bangsamoro Identity

Article II of the BBL provides for the Bangsamoro identity. A contentious provision in this Article is the definition of who comprises the “Bangsamoro people.” According to Section 1 of this Article,

[t]hose who at the time of conquest and colonization were considered natives or original inhabitants of Mindanao and the Sulu archipelago and its adjacent islands including Palawan, and their descendants, whether of mixed or of full blood, shall have the right to identify themselves as Bangsamoro by ascription or self-ascription. Spouses and their descendants are classified as Bangsamoro.¹⁶⁴

The Section defines who the Bangsamoro people are. This results in issues on whether the law discriminates against those not covered such as non-Muslims and other indigenous people, thus depriving them of certain rights. An important matter that needs to be addressed is the fact that the BBL’s definition of Bangsamoro people is closely similar to the definition provided in the MOA-AD.¹⁶⁵ The Supreme Court declared the latter definition to be inconsistent with Section 3, Article X of the ARMM Organic Act.¹⁶⁶ The Supreme Court held in the decision that —

Article X, Section 3 of the Organic Act of the ARMM is a bar to the adoption of the definition of ‘Bangsamoro people’ used in the MOA-AD. Paragraph 1 on Concepts and Principles states:

- (a) It is the birthright of all [Moros] and all [i]ndigenous peoples of Mindanao to identify themselves and be accepted as ‘Bangsamoros.’ *The Bangsamoro people refers to those who are natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of conquest or colonization of its descendants whether mixed or of full blood. Spouses and their descendants are classified as Bangsamoro. The freedom of choice of the [i]ndigenous peoples shall be respected.*
- (b) This use of the term Bangsamoro sharply contrasts with that found in the Article X, Section 3 of the Organic Act, which, rather than lumping together the identities of the Bangsamoro and other indigenous peoples living in Mindanao, clearly distinguishes between Bangsamoro people and Tribal peoples, as follows:

164. H.B. No. 4994, art. II, § 1.

165. See Memorandum of Agreement on Ancestral Domain, *supra* note 65, at 2.

166. See *Province of North Cotabato*, 568 SCRA at 485.

‘As used in this Organic Act, the phrase ‘indigenous cultural community’ refers to Filipino citizens residing in the autonomous region who are:

- (a) *Tribal peoples. These are citizens whose social, cultural[,] and economic conditions distinguish them from other sectors of the national community; and*
- (b) *[Bangsamoro] people. These are citizens who are believers in Islam and who have retained some or all of their own social, economic, cultural, and political institutions.’¹⁶⁷*

The proposed BBL also has a similar provision found in the MOA-AD on respecting the freedom of choice of other indigenous peoples,¹⁶⁸ the Supreme Court, however, has already declared this provision to be vague in *Province of North Cotabato*.¹⁶⁹

In addition to this, concerns have been raised regarding the constitutionality of Section 3 of the same Article which states that “[t]he Bangsamoro Parliament shall adopt the official flag, emblem[,] and anthem of the Bangsamoro.”¹⁷⁰ Critics have argued that the Section violates Section 1, Article XVI of the Constitution and Section 44 of the Flag and Heraldic Code of the Philippines.¹⁷¹ It must be noted that although the law only allows government entities to adopt “appropriate coat-of-arms, administrative logo, insignia, badges, patches, and banners[,]”¹⁷² the ARMM Organic Act has already empowered the Regional Assembly “to pass a law adopting an official regional emblem, seal[,] and hymn.”¹⁷³

167. *Id.* at 485-86 (emphasis supplied).

168. H.B. No. 4994, art. II, § 2 & Memorandum of Agreement on Ancestral Domain, *supra* note 65, at 2.

169. *See Province of North Cotabato*, 568 SCRA at 443-44.

170. H.B. No. 4994, art. II, § 3.

171. PHIL. CONST. art. XVI, § 1 & An Act Prescribing the Code of the National Flag, Anthem, Motto, Coat-Of-Arms and Other Heraldic Items and Devices of the Philippines [FLAG AND HERALDIC CODE OF THE PHILIPPINES], Republic Act No. 8491, § 44 (1998).

172. PHIL. CONST. art. XVI, § 1.

173. R.A. No. 6734, art. XVII, § 1.

D. Article III: Territory

Section 1, Article III provides that the Bangsamoro territory shall refer “to the land mass as well as the maritime, fluvial, terrestrial, fluvial, and alluvial domains, and the aerial domain above it. [It] shall remain a part of the Philippines.”¹⁷⁴ What constitutes the Bangsamoro territory has always been a problematic issue. It must be noted that the ARMM Organic Act did not provide a definition of its territory.¹⁷⁵ Some fear that referring to the Bangsamoro region as a “territory” will ultimately lead to its separation from the rest of the national territory of the Philippines.

1. Core and Contiguous Territory

The core territory of the Bangsamoro will be composed of the present geographical area of the ARMM, municipalities that voted for inclusion in the ARMM during the 2001 plebiscite, Cotabato City, Isabela City, and “contiguous areas where the [LGU passes a resolution] or a petition of at least [10%] of the registered voters in the area asking for their inclusion at least two months prior to the conduct of the ratification of the [BBL] and the process of delimitation of the Bangsamoro.”¹⁷⁶ The word “contiguous” is vague and must be defined and limited.

Section 3 or the “opt-in anytime” provision provides that “areas which are contiguous and outside the core territory may opt at any time to be part of the territory upon petition of at least [10%] of the registered voters and approved by a majority of qualified votes cast in a plebiscite.”¹⁷⁷ Allowing contiguous areas to vote for inclusion to the Bangsamoro at any given time may lead to the disruption of governmental functions thus leading to the instability and dismemberment of the LGUs. The ARMM governors, echoing the Constitution, have criticized this provision and said that rather than contiguity and the petition of at least 10% of registered voters, what is more important is for areas of the Bangsamoro to share a “common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics[.]”¹⁷⁸ After all, “the basis for the establishment of autonomous regions is diversity of cultures and not just

174. H.B. No. 4994, art. III, § 1.

175. See R.A. No. 9054.

176. *Id.* art. III, § 2.

177. *Id.* art. III, § 3.

178. PHIL. CONST. art. X, § 15.

geographic accidents.”¹⁷⁹ Any movement towards autonomy which is not based on cultural identity invites suspicion.¹⁸⁰ There clearly is a need for parameters in order for the provision not to be subject to abuse and misuse.

2. Waters

Section 4 provides that “[a]ll inland waters, such as lakes, rivers, river systems, and streams within the Bangsamoro territory shall be part of the Bangsamoro. The preservation and management thereof shall be under the jurisdiction of the Bangsamoro government.”¹⁸¹ Section 5, a new provision, states that the “Bangsamoro waters shall extend up to 22.224 kilometers (12 nautical miles) from the low-water mark of the coasts that are part of the Bangsamoro territory. [It] shall be part of the territorial jurisdiction of the Bangsamoro political entity.”¹⁸² The question now arises whether these Sections violate the Constitution which provides that the national territory embraces all kinds of waters.¹⁸³

From these two Sections alone, it is not clear on whether the Bangsamoro shall have exclusive authority and jurisdiction over the enumerated waters. However, Sections 3 (35), 3 (36), and Article V state that the Bangsamoro government shall have exclusive authority and jurisdiction over inland waters and inland waterways.¹⁸⁴ The scope and limitation of the term “exclusive authority and jurisdiction” must be clarified as to the extent of the power given to the Bangsamoro and the power surrendered by the national government. Failure to resolve this is problematic because it opens up questions of power and control over these waters. In fact, the phrase has been interpreted by some¹⁸⁵ as a clear violation of the Constitution¹⁸⁶ and

179. BERNAS, *supra* note 147, at 1139.

180. *Id.*

181. H.B. No. 4994, art. III, § 4.

182. *Id.* art. III, § 5.

183. PHIL. CONST. art. I.

184. H.B. No. 4994, art. V, § 3 (35) & (36).

185. See Rigoberto D. Tiglao, *Bangsamoro bill: Have they lost their minds?*, MANILA TIMES, Sep. 11, 2014, available at <http://www.manilatimes.net/bangsamoro-bill-lost-minds/126047> (last accessed Mar. 15, 2015) & Federico D. Pascual, Jr., *Why Bangsamoro bill should not pass*, PHIL. STAR, Sep. 14, 2014, available at <http://www.philstar.com/opinion/2014/09/14/1368884/why-bangsamoro-bill-should-not-pass> (last accessed Mar. 15, 2015).

186. PHIL. CONST. art. I.

the Water Code of the Philippines¹⁸⁷ for it may divest the national government of its authority and ownership over these waters.

E. Article IV: General Principles and Policies

One of the main arguments against the proposed BBL is that its form of government is parliamentary,¹⁸⁸ and that it will “adopt an electoral system suitable to a ministerial form of government[.]”¹⁸⁹ It has been argued that these Sections are unconstitutional because it violates the tripartite form of government enshrined in the Constitution.¹⁹⁰ However, it is to be noted that Section 18, Article X of the Constitution provides that —

The Congress shall enact an organic act for each autonomous region with the assistance and participation of the regional consultative commission composed of representatives appointed by the President from a list of nominees from multi[-]sectoral bodies. *The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units.* The organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.¹⁹¹

The Constitution clearly provides that the Organic Act will define the basic structure of the government for the region. There is no express limitation on its form of government. What is of importance is that the form of government shall consist of an executive department and a legislative assembly, which shall be elective and representative of the constituent political units.¹⁹² Under the Bangsamoro parliamentary system, the executive is formed by the legislature. The legislature will be elected as representatives of the Bangsamoro people. Hence, eligible citizens still participate, directly

187. See A Decree Instituting a Water Code, Thereby Revising and Consolidating the Laws Governing the Ownership, Appropriation, Utilization, Exploitation, Development, Conservation and Protection of Water Resources [WATER CODE], Presidential Decree No. 1067 (1976).

188. H.B. No. 4994, art. IV, § 1.

189. *Id.* art. IV, § 3.

190. See Casauay, Legal experts, *supra* note 142; Casauay, Two schools of thought, *supra* note 142; Senate of the Philippines, *supra* note 143; Rosero, *supra* note 145; & Jimeno, *supra* note 145.

191. PHIL. CONST. art. X, § 18 (emphasis supplied).

192. PHIL. CONST. art. X, § 18.

or indirectly, in the election of their representatives in government. Thus, the provision is arguably consistent with the Constitution.

F. Article V: Powers of Government

The powers to be exercised by the Bangsamoro Parliament are classified into three:

- (1) Reserved powers — “matters over which the authority and jurisdiction are retained by the Central Government.”¹⁹³
- (2) Concurrent powers — “powers shared between the Central Government and the Bangsamoro Government within the Bangsamoro.”¹⁹⁴
- (3) Exclusive powers — “matters over which the authority and jurisdiction shall pertain to the Bangsamoro Government.”¹⁹⁵

193. Section 1, Article V of the draft Bangsamoro Basic Law (BBL) provides the following —

Section 1. Reserved Powers. — Reserved powers are matters over which authority and jurisdiction are retained by the Central Government. The Central Government shall exercise the following reserved powers:

- (a) Defense and external security;
- (b) Foreign policy;
- (c) Coinage and monetary policy;
- (d) Postal service;
- (e) Citizenship and naturalization;
- (f) Immigration;
- (g) Customs and tariff as qualified by Section 2 (10), Article V of this Basic Law;
- (h) Common market and global trade, provided that the power to enter into economic agreements given to the ARMM under R.A. No. 9054 is hereby transferred to the Bangsamoro Government as provided in Article XII, Section 25 of this Basic Law; and
- (i) Intellectual property rights.

H.B. No. 4994, art. V, § 1.

194. *Id.* art. V, § 2.

195. *Id.* art. V, § 3.

1. Reserved Powers

Section 1, Article V, the provision on reserved powers, has been criticized as depriving the national government of certain powers in relation to the Bangsamoro government.¹⁹⁶ By providing a list of only nine reserved powers, it has been contended that the proposed BBL actually “attempts to redefine the sovereignty of the Philippine [S]tate”¹⁹⁷ by limiting the powers that the national government may actually retain and exercise.¹⁹⁸ This has been interpreted as contrary to Article X, Section 17 of the Constitution which provides that “[a]ll powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the national government.”¹⁹⁹ Instead of having a list of reserved powers, it is suggested that the BBL should state in clear terms that the national government may exercise the totality of its sovereign powers, save for those provided by the Constitution and the BBL to the Bangsamoro.

2. Concurrent Powers

There are 14 concurrent powers provided in Section 2, Article V of the proposed BBL. These powers include the creation of an auditing arm²⁰⁰ and a civil service.²⁰¹

Section 2 (7) of the same Article provides that “[t]he Bangsamoro auditing body shall have auditing responsibility over public funds utilized by the Bangsamoro, without prejudice to the power, authority, and duty of the national Commission on Audit (COA).”²⁰² The proposed BBL must clarify the term “auditing responsibility” and reconcile it with the constitutional provision granting COA the “*exclusive authority* ... to define the scope of its audit and examination, establish the techniques and methods required therefor, and promulgate accounting and auditing rules and regulations,

196. See Casauay, Legal experts, *supra* note 142; Casauay, Two schools of thought, *supra* note 142; Senate of the Philippines, *supra* note 143; & Romero, *Ex-SC*, *supra* note 144.

197. Maila Ager, *Santiago: Bangsamoro deal unconstitutional*, PHIL. DAILY INQ., Apr. 2, 2014, available at <http://newsinfo.inquirer.net/591230/santiago-bangsamoro-deal-unconstitutional> (last accessed Mar. 15, 2015).

198. *Id.*

199. PHIL. CONST. art. X, § 17.

200. H.B. No. 4994, art. V, § 2 (7).

201. *Id.* art. V, § 2 (8).

202. *Id.* art. V, § 2 (7).

including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties.”²⁰³ The proposed BBL must also provide a solution in determining who shall prevail when there is a disparity between the reports of the COA and the Bangsamoro COA.

The Bangsamoro Government also has the power to create a Bangsamoro Civil Service Office (BCSO) and enact a civil service law for its purpose.²⁰⁴ It will have the primary disciplinary authority over its own officials and employees.²⁰⁵ The Civil Service Commission (CSC) had no objection to this, but it did reiterate that the BCSO must uphold the constitutional provisions on the Civil Service. The CSC also noted that the powers granted to the Bangsamoro government should not “prejudice the power, authority, and duty of the national CSC.”²⁰⁶

3. Exclusive Powers

Enumerating 57 exclusive powers, Article V, Section 3 is one of the most contentious provisions in the BBL.²⁰⁷ It provides for exclusive powers within the authority and jurisdiction of the Bangsamoro government. The word “exclusive” implies that the exercise of such powers is to the exclusion of the national government. Considering the range of powers granted to the Bangsamoro, some have claimed that this encroaches upon the plenary powers of the Congress to legislate on matters concerning the affairs of the entire Republic.

Some of the more problematic provisions of Article V, Section 3 involve the overlapping of the Bangsamoro’s authority with other government agencies. These provisions include the exclusive power to establish government-owned and/or controlled corporations (GOCCs)²⁰⁸ and the

203. PHIL. CONST. art. IX-D, § 2 (2) (emphasis supplied).

204. H.B. No. 4994, art. V, § 2 (8).

205. *Id.*

206. *Id.*

207. *Id.* art. V, § 3.

208. The BBL provides that

[t]he Bangsamoro Government shall legislate and implement the creation of its own [government-owned and/or controlled corporations (GOCCs)] in the pursuit of the common good, and subject to economic viability. The GOCCs shall be registered with the

power to create LGUs within its territory.²⁰⁹ The Constitution mandates that only Congress has the power and authority to create GOCCs through special charters.²¹⁰ Thus, Section 3 (14) contravenes the Constitution by allowing “[t]he Bangsamoro Government to legislate and implement the creation of its own GOCCs[.]”²¹¹

Section 3 (57) provides that the “Bangsamoro Parliament may create, divide, merge, abolish[,], or substantially alter boundaries of provinces, cities, municipalities[,], or barangays[.]”²¹² This provision along with Section 8, Article VII²¹³ may open the possibilities for gerrymandering. It must also be

Securities and Exchange Commission or shall be established under legislative charter by the Bangsamoro Government.

Id. art. V, § 3 (14).

209. The BBL states that

the Bangsamoro Government shall have authority to regulate power generation, transmission, and distribution operating exclusively in the Bangsamoro and not connected to the national transmission grid. It shall promote investments, domestic and international, in the power sector industry in the Bangsamoro. Power plants and distribution networks in the Bangsamoro shall be able to interconnect and sell power over the national transmission grid to electric consumers. The Bangsamoro Government may assist electric cooperatives in accessing funds and technology, to ensure their financial and operational viability. When power generation, transmission, and distribution facilities are connected to the national transmission grid, the Central Government and the Bangsamoro Government shall cooperate and coordinate through the intergovernmental relations mechanism.

Id. art. V, § 3 (57).

210. PHIL. CONST. art. XII, § 16.

211. H.B. No. 4994, art. V, § 3 (14).

212. *Id.* art. V, § 3 (57).

213. This provides —

The Parliament shall have the power to reconstitute, by law, the parliamentary districts apportioned among the provinces, cities, municipalities, and geographic areas of the Bangsamoro to ensure equitable representation in the Parliament. The redistricting, merging[,], or creation, of parliamentary districts shall be based on the number of inhabitants and additional provinces, cities, municipalities, and geographic areas, which shall become part of the territories of the Bangsamoro Government.

noted that an autonomous region cannot create a new province. As held in *Sema v. Commission on Elections*,²¹⁴ where the Supreme Court invalidated the creation of the Province of Shariff Kabunsuan,²¹⁵ only the Congress has the power to create provinces and cities because its creation necessarily includes the creation of legislative districts — a power only the Congress can exercise under Section 5, Article VI of the Constitution.²¹⁶

G. Article VI: Intergovernmental Relations

1. Asymmetrical Relationship

The proposed BBL describes the relationship between the national government and the Bangsamoro government as “asymmetric.”²¹⁷ The term asymmetric as used in the proposed BBL has been criticized as vague and it somewhat shows a relationship similar to what the MOA-AD described as associative which has been declared unconstitutional in *Province of North Cotabato*.²¹⁸ As mentioned earlier though, asymmetrical relationship described in jurisprudence pertains to when a territorial unit within a political system (the Bangsamoro in this case) is granted more powers and less intervention from the national government than other territorial and political subdivisions.

2. Bangsamoro Participation in Central Government

Article VI, Section 9 of the proposed BBL provides the following —

It shall be the policy of the Central Government to appoint competent and qualified inhabitants of the Bangsamoro in the following offices in the Central Government: at least one (1) Cabinet Secretary; at least one (1) in each of the other departments, offices[,] and bureaus, holding executive,

For the purpose of redistricting, parliamentary districts shall be apportioned based on population and geographical area; Provided that each district shall comprise, as far as practicable, contiguous, compact, and adjacent territory[,] and should have at least a population of one hundred thousand (100,000).

Id. art. VII, § 8.

214. *Sema v. Commission on Elections*, 558 SCRA 700 (2008).

215. *Id.* at 744.

216. *Id.* at 730. See PHIL. CONST. art. VI, § 5 (3).

217. H.B. No. 4994, art. VI, § 1.

218. See *Province of North Cotabato*, 568 SCRA at 485.

primarily confidential, highly technical, policy-determining positions; and one (1) Commissioner in each of the constitutional bodies.²¹⁹

By requiring a competent and qualified Bangsamoro inhabitant to be appointed as a Cabinet Secretary, a member of the department, office, or bureau, and a Constitutional Body Commissioner, this provision limits the President's wide discretion to appoint. It also constitutes as an additional qualification for Chairs and members of each Constitutional Commission. Pursuant to the doctrine laid down in *Social Justice Society (SJS) v. Dangerous Drugs Board*,²²⁰ "Congress cannot validly amend or otherwise modify these qualification standards, as it cannot disregard, evade, or weaken the force of a constitutional mandate, or alter or enlarge the Constitution."²²¹ Thus, the BBL may not require the President or the national government to appoint at least one Commission from "competent and qualified inhabitants of the Bangsamoro," because this requirement constitutes an additional qualification, consequently violating the Constitution. The provision may also give rise to issues on equal protection of the law because a position is automatically to be given to a Bangsamoro inhabitant, hence depriving other citizens who are equally qualified from applying.²²²

H. Article VIII: Wali

Article VIII, a unique provision of the BBL, describes a *Wali* as "the titular head of the Bangsamoro. As titular head, the *Wali* shall take on only ceremonial functions. ... [A]s part of the Bangsamoro Government, [the *Wali*] shall be under the general supervision of the President."²²³ The *Wali*'s role as a titular head must be defined by law. One of the issues raised with regard to this provision is whether the *Wali* is a religious role. If the *Wali* is a religious role, then issues may arise with regard to the constitutional provision on the separation of church and State,²²⁴ and the probable violation of Section 29 (2), Article VI of the Constitution.²²⁵

219. H.B. No. 4994, art. VI, § 9.

220. *Social Justice Society (SJS) v. Dangerous Drugs Board*, 570 SCRA 410 (2010).

221. *Id.* at 422.

222. Jimeno, *supra* note 145.

223. H.B. No. 4994, art. VIII.

224. PHIL. CONST. art. II, § 6.

225. PHIL. CONST. art. VI, § 29 (2).

I. Article X: Bangsamoro Justice System

The proposed BBL establishes the Bangsamoro Justice System.²²⁶ Section 2, Article X of the BBL provides that the Shari’ah Justice System shall have jurisdiction over cases involving “persons and family relations, and other civil matters, commercial law, and criminal law.”²²⁷ It has been argued that this provision conflicts with Section 18, Article X of the Constitution which provides that “[t]he organic acts shall likewise provide for special courts with personal, family, and property law jurisdiction consistent with the provisions of this Constitution and national laws.”²²⁸ However, it must be noted that Section 5 of the ARMM Organic Act already allows Shari’ah Courts to have jurisdiction over criminal and commercial cases involving Muslims.²²⁹

Section 7 of Article X is also alleged to undermine the Judiciary and contravenes Article VIII of the Constitution because of the following sentence — “The decisions of the Shari’ah High Court shall be final and executory.”²³⁰ This Section supposedly undermines the Supreme Court of its jurisdiction to “[r]eview, revise, modify, or affirm on appeal or *certiorari* ... final judgments and orders of lower courts[.]”²³¹ The Section though does not necessarily deprive the Supreme Court of its inherent power to

226. The BBL provides —

The justice system in the Bangsamoro shall consist of Shari’ah law which shall have supremacy and application over Muslims only; the traditional or tribal justice system, for the indigenous peoples in the Bangsamoro; the local courts; and alternative dispute resolution systems.

For Muslims, the justice system in the Bangsamoro shall give primary consideration to Shari’ah, and customary rights and traditions of the indigenous peoples in the Bangsamoro.

Nothing herein shall be construed to operate to the prejudice of non-Muslims and non-indigenous peoples.

H.B. No. 4994, art. X, § 1.

227. *Id.*

228. PHIL. CONST. art. X, § 18.

229. Section 5, Article III of Republic Act No. 9054 provides that “the Shari’ah courts shall have jurisdiction over cases involving personal, family[,] and property relations, and commercial transactions, in addition to their jurisdiction over criminal cases involving Muslims.” R.A. No. 9054, art. III, § 5.

230. H.B. No. 4994, art. X, § 7.

231. PHIL. CONST. art. VIII, § 5 (2).

review.²³² However, it is recommended that the Section be clarified by including expressly that the Supreme Court is the final arbiter of any justiciable controversy in the Philippine judicial system.

The creation of the Shari'ah Judicial and Bar Council²³³ may also be problematic because only the Judicial Bar and Council created under Section 8, Article VIII of the Constitution has the sole power of recommending appointees to the Judiciary, including the judges of the Shari'ah courts.²³⁴

Another problematic provision is Section 27 of the Article X which provides that "[i]t shall be the policy of the Central Government that at least one justice in the Supreme Court and two justices in the Court of Appeals at any one time shall be qualified individuals of the Bangsamoro territory."²³⁵ Pursuant to Section 7 (1), Article VIII of the Constitution and the *Social Justice Society (SJS)* doctrine, the qualifications of the members of the Supreme Court are exclusive. Thus, no additional requirements under the BBL may be provided without violating the Constitution.

V. CONCLUSION

The legislative process that the proposed BBL is going through is vulnerable to the onslaught of passionate advocacies grounded in deep-rooted socio-cultural and political underpinnings, particularly within Muslim Mindanao. An incident, like Mamasapano, can reopen old wounds, bring to the surface historical prejudices, and intensify opposition to the BBL. Without undermining the moral imperative to address the effective delivery of justice for the victims of this unfortunate incident, it is crucial to remain constructively focused on a robust national debate, sensitive to the legitimate concerns of various shareholders. It has not helped the process to abbreviate legislative debate through Executive pressure on Congress.

On the part of the leadership of the MILF, it has become clearer for them that engaging the GRP is a painstaking process within a democratic setting, which a revolutionary movement must begin to cope with by exemplifying greater patience and understanding. The BBL must ripen into consensus points in order to serve as an instrument of unity towards a just and lasting peace in our country.

232. PHIL. CONST. art. VIII, § 1.

233. H.B. No. 4994, art. X, § 10.

234. PHIL. CONST. art. VIII, § 8.

235. H.B. No. 4994, art. X, § 27.