

## BERICHTE / REPORTS

## Special regional autonomy in a unitary system – preliminary observations on the case of the Bangsamoro homeland in the Philippines

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**Abstract:** *The region of Bangsamoro, situated within the island Mindanao, which in turn is part of the Philippines, has been experiencing one of the longest self-determination struggles in the world. Recently, with the enactment of the Basic Law (special law to set out autonomy for Bangsamoro), a system of asymmetrical self-government was introduced for Bangsamoro. This article places the Bangsamoro arrangement in context of international experiences with asymmetrical autonomy and makes recommendations about how certain aspects of the Basic Law can be improved. The article focuses particularly on conceptual clarity about some of the terms used in the Basic Law, demarcation of boundaries of Bangsamoro, intergovernmental relations between Manila and Bangsamoro, representation of Bangsamoro in national institutions, and amendments of the Basic Law.*

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## Introduction

Various countries experience centrifugal forces that undermine or threaten existing national boundaries. Since the fall of the Berlin Wall, the number of sovereign states has increased substantially (by 34) and it seems as if the process of state-creation is not yet at an end. A major motivating factor that often drives autonomy and self-determination movements is the desire of ethnic minorities to exert greater control over their own affairs. This is generally expressed as “self-government” or “self-determination” of some sort. Demands for self-government by ethnic minorities principally occur in three forms: Firstly in the form of

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demands for the creation of new, sovereign states under international law.<sup>1</sup> Secondly, in the form of demands for the creation of new autonomous regions within existing sovereign states by way of federalisation or decentralisation.<sup>2</sup> Thirdly, in the form of demands for the protection of ethnic minorities on a non-territorial basis since some groups do not live sufficiently concentrated for a form of territorial regional or local self-government.<sup>3</sup>

In some instances, such as Scotland, South Sudan, and Quebec, referenda have been held to determine whether a region could secede to create a new sovereign state. In other instances, such as Nigeria, Ethiopia, Ukraine, India, and the Russian Federation, there are demands for additional autonomous federal regions to be created within the boundaries of existing sovereign states. In other cases, such as Indonesia, Spain, Italy and Philippines, special, asymmetrical arrangements have been made to give expanded powers to “troublesome” regions in an effort to retain national unity, combat demands for secession, and protect territorial integrity.<sup>4</sup>

This article focuses on the creation of an autonomous region, Bangsamoro,<sup>5</sup> on the island of Mindanao within the Philippines to accommodate demands for self-determination by the (Muslim) Moro-community.<sup>6</sup> (In this article the terms Muslim and Moro are used interchangeably). The Moro community, which used to be the largest in Mindanao, was displaced through many years of social intervention by Manila to the effect that they became a

1 *Bertus De Villiers*, Secession – the last resort for minority protection, *Journal for African and Asian Studies* 48 (2012), pp. 81-96.

2 *Bertus De Villiers*, Creating federal regions – minority protection versus sustainability, *Heidelberg Journal of International Law* 72 (2012), pp. 310-351.

3 *Bertus De Villiers*, Protecting minorities on a non-territorial basis – recent international developments, *Beijing Law Review* 3 (2012), pp. 170-183.

4 *Ronald L. Watts*, Comparative perspectives on asymmetry in federations, *Asymmetry Series* 4(2005), Queen’s University.

5 Bangsamoro covers the islands of Mindanao, the Sulu Archipelago and Palawan.

6 The Muslim community is generally referred to collectively as “Moros”. It is not a derogatory term. The term Moros is believed to be arising from the Spanish occupation when the Muslim community reminded the Spanish of the Moors of North Africa and Spain. From this arose the references to “Moros”. (*William N. Holden and R. Daniel Jacobson*, Ecclesial opposition to mining on Mindanao: neoliberalism encounters the Church of the Poor in the Land of Promise, *Worldviews: Environment, Culture, Religion* 11 (2007), pp. 155-202). Montiel and others emphasise that it is only more recently that the Muslims refer to themselves as “Moros” and this is closely associated “in the context of their politico-military territorial struggle in Mindanao against the Christian-dominated Republic of the Philippines.” (*Christina Jayme Montiel, Judit M. De Guzman and Ma. Elisabeth J. Macapagal*, Fragmented Ethnopolitical Social Representation of a Territorial Peace Agreement: the Mindanao Peace Talks, *Journal of Pacific Rim Psychology* 6 (2012), p. 38). Christians constitute approximately 80% of the total Philippine population and Muslims 7%. The Moros (Bangsamoro) community (closely associated with Mindanao and specific provinces within Mindanao) comprise 13 Islamised linguistic groups who are united by the common bond of faith that originates from Muslim traders in the late fourteenth century. See *Benedict Andersen*, *Imagined communities, reflections on the origin and spread of nationalism*, London 1991 and *Jan Stark*, Muslims in the Philippines, *Journal of Muslim Minority Affairs* 23 (2003), p. 195.

minority in their own traditional lands. The Basic Law attempts to restore self-government to a part of Mindanao so as to fulfill the demands of the Moro-community for self-government.

A peace accord was entered into on 27 March 2014 with the aim of granting autonomous, asymmetrical powers to the homeland for Moros, Bangsamoro.<sup>7</sup> To give practical effect to the peace accord, a statutory instrument, the Basic Law,<sup>8</sup> sets out in detail the institutions of governance, the allocation of powers, and related matters.<sup>9</sup> The peace accord, which follows many decades of resistance, civil unrest, and violence,<sup>10</sup> potentially provides a platform for stability, whereby national unity is retained while regional diversity is recognised.<sup>11</sup> The accord and the Basic Law can, if implemented successfully, bring to a close arguably the longest running self-determination struggle in the world and provide a useful case study to other countries where regions within existing sovereign boundaries are demanding a form of special recognition and self-government. Stability on Mindanao is essential for long term economic development of the Philippines, with an estimated 30% of the country's food trade and 21 % of the country's total mining output originating from Mindanao. In addition to this, Mindanao has high potential for renewable energy resources.<sup>12</sup>

The challenge to address the demands of regions that seek special status is not limited to emerging democracies or to federations. Several member states of the European Union, for example Belgium, the United Kingdom and Spain, are being confronted by the opposing forces of national unity and the recognition of diversity.

Although international law has a bias towards maintaining existing sovereign state boundaries,<sup>13</sup> it has been shown in the recent past with the recognition of East Timor, South Sudan, Eritrea and Kosovo, that international law is also pragmatic and flexible.<sup>14</sup> While

7 For the full text refer to <http://www.cr.org/sites/default/files/2012%20Framework%20Agreement%20on%20the%20Bangsamoro.pdf>.

8 The "Basic Law" in which the autonomy arrangements of Bangsamoro are set out, should not be confused in this article with the Basic Law (Constitution) of the Federal Republic of Germany.

9 For useful information about the Basic Law, which is scheduled for enactment in early 2015, refer to <http://www.gmanetwork.com/news/story/378530/news/nation/faqs-about-the-bangsamoro-basic-law>.

10 It is estimated that the conflict has cost around 150,000 lives; hundreds of thousands of people having been displaced; massive destruction of property has occurred; and in the last decade since 2000 at least 3 million people have fled their homes.

11 The Moro community is concentrated in 5 of the provinces of Mindanao, namely Maguindanao, Lanao del Sur, Basilan, Sulu and Tawi-Tawi.

12 See National Economic and Development Authority, *Mindanao: Strategic Development Framework 2010-2020*, Pasig City, 2010.

13 For a general discussion refer to Don H. Doyle (ed.), *Secession as an international phenomenon*, London 2009.

14 See for example *Milena Sterio*, On the right to external self-determinations: 'Selfistans,' Secession and the Great Powers' Rule, *Minnesota Journal of International Law* 12 (2010), p.138.

there is, in general, resistance against the creation of new states, there is also realism that existing sovereign country boundaries are not necessarily set in stone and that from time to time adjustments have to be made by creating more sovereign states. State creation is, however, generally seen as a measure of last resort.

One of the constitutional mechanisms that have been used to retain the territorial integrity of sovereign states while at the same time recognising the special needs of some regions for advanced forms of autonomy and self-government is *asymmetrical* autonomy. Asymmetrical autonomy refers to statutory arrangements whereby in decentralised, unitary, and federal systems special powers and functions are decentralised to a specific region as a result of the region's unique historic, ethnic, or geographical status.<sup>15</sup> The autonomy of such a recipient region includes additional powers and functions that would ordinarily not form part of the powers of other regions within the same country – hence the concept is called *asymmetrical*.

By using asymmetrical autonomy, countries attempt to retain national unity while at the same time giving as many powers and functions to a specific region as is practical and financially affordable. Examples of asymmetrical autonomy are found in unitary and federal arrangements, for example in the UK (eg Scotland), Canada (eg Quebec), Spain (eg Catalonia and Basque Country), and Indonesia (eg Aceh).<sup>16</sup> Watts observes after an assessment of asymmetrical arrangements that –

*“asymmetrical constitutional and political arrangements appear to have made possible the accommodation of deep diversity that could not otherwise be reconciled within a symmetrical organization.”*<sup>17</sup>

The Philippines are currently exploring ways to resolve by way of a form of asymmetrical regional autonomy that would benefit the Moro-community the ongoing civil unrest and violence that have plagued Mindanao for many decades. The envisaged special autonomy is limited to the part of the Mindanao Island and similar arrangements are not (yet) available to other regions of the Philippines.<sup>18</sup> The 2014 peace accord with the country's largest Muslim rebel group set in train a process to devolve special powers of autonomy to the Bangsamoro region, which falls within the greater Mindanao Island. The parties have expressed their optimism that the Accord will bring to an end the armed rebellion that has caused so

15 Charles D. Tarlton, Symmetry and asymmetry as elements of federalism, *Journal of Politics* 27 (1965), pp. 861-874.

16 When the process of decentralisation to the special region, Aceh, began in earnest, the motivation thereof was described as follows: “Indonesia’s government is hoping to end its armed conflict with separatists in Aceh by offering the people of the province more autonomy over their own affairs...”, International Crisis Group, Can autonomy stem the conflict? Brussels 2001, p. 1.

17 Watts, note 5, p. 6.

18 The region of Cordillera has already staked its claim for autonomy similar to that of Bangsamoro. <http://manilastandardtoday.com/2014/08/14/bangsomoro-fate-linked-to-cordillera-s/>.

much instability to Mindanao and to the country.<sup>19</sup> It is also hoped that the asymmetrical autonomy will remove secessionist demands for the creation of an independent, sovereign state and that as a result, the asymmetrical arrangement will retain the territorial integrity of the Philippines.<sup>20</sup>

The Peace Accord may set an example to other parts of Asia and beyond, where sovereign boundaries are under pressure as a result of demands by ethnic minorities for new states or autonomous regions to be created. The Accord in the Philippines was signed as a result of negotiations that commenced in the 1970s. Pursuant to the Accord, the Moro rebels agreed to end violence and to forego their demand for a separate state in exchange for broader, asymmetrical autonomy for the Bangsamoro region.<sup>21</sup>

The Accord is rich in promise but as has been shown in other countries with special autonomy arrangements, the proverbial devil is in the detail of the implementation of the Basic Law. This article seeks to reflect on autonomy arrangements that have been agreed to for Bangsamoro and to comment thereon. The following aspects of the autonomy arrangements will be the subject of this article's focus:

- Conceptual clarity about some of the terms used in the settlement
- Demarcation of boundaries of Bangsamoro
- Intergovernmental relations between Manila and Bangsamoro
- Representation of Bangsamoro in national institutions
- Amendment of the Basic Law

### Asymmetry – what is it about?

A widely used mechanism to grant a greater degree of autonomy of decision-making, freedom of institutional design, and/or administrative autonomy to ethnic minorities is through the asymmetrical allocation of powers and functions to sub-national institutions, be it to regions, local governments, or cultural councils.<sup>22</sup> As a result of such special powers, the recipient subnational authority has a wider range of powers, functions and discretions than

19 *Joseph Chinyong Liow*, *Muslim Resistance in Southern Thailand and Southern Philippines: Religion, Ideology and Politics*, Washington 2006. *Pushpa Iyer*, *Peace Zones of Mindanao*, Philippines, Manila 2004.

20 The Office of the Presidential Advisor on the Peace Process observed when the bill giving effect to the peace accord was presented to parliament, that the bill emphasised the asymmetrical arrangement between the government and Bangsamoro. "Peace in South at hand" 11 September 2014 *Newsinfo* at <http://newsinfo.inquirer.net/636958/peace-insouth-at-hand>.

21 Norwegian Refugee Council, *The new peace agreement in the Philippines is an opportunity to address internal displacement in Mindanao*, Manila, 2012. For background information refer to *G. Eugene Martin* and *Astrid S. Tuminez*, *Towards Peace in the Southern Philippines*, Washington (DC) 2008.

22 Tarlton, who played a leading role in developing the theory around asymmetry, described it as "varying degrees of autonomy and power." *Tarlton*, note 16, p. 867.

other similar subnational authorities of the same country.<sup>23</sup> In some respects, asymmetrical arrangements reek of division and separateness, while in other respects they represent flexibility and pragmatism.<sup>24</sup> Although asymmetry is often associated with federal forms of state, the concept also applies to decentralised unitary systems.

Asymmetry means that certain sub-national jurisdictions are awarded a greater degree of flexibility, discretion and autonomy than their counterparts in the range of matters over which it can make and implement decisions; greater freedom to design institutions that are applicable to the specific jurisdiction; special powers to develop and utilise economic resources; or special representation of the sub-national entity within national power-sharing institutions.<sup>25</sup>

The reasons for adopting asymmetrical arrangements may be varied. One of the most important reasons for applying asymmetry is the protection of ethnic minorities on a regional or local basis. Asymmetry in this respect reflects the pragmatism that underlies decentralisation and the organisation of powers of government on a sub-national level.

‘Symmetry’ refers to the uniformity among regions in the powers and functions that can be exercised within a federal or decentralised unitary system. ‘Asymmetry’ in a federal or decentralised unitary system, on the other hand, occurs where there is a differentiation in the degree of autonomy, institutional design, power and/or representation among the constituent regions.<sup>26</sup>

Asymmetry can occur in a practical (*de facto*) context and in a legal (*de jure*) context. Practical asymmetry is probably found in every multitiered system since there can never be an exact equality as to size, economic resources, and economic activity between the respective regions. Legal asymmetry is found when specific legal arrangements, be it constitutional or statutory, are made to differentiate between the powers and functions of the respective regions, system of government in regions, fiscal and financial arrangements, representation of the regions at the national level, and the status and organisation of local government.<sup>27</sup>

23 For a useful overview of the theory and application of asymmetry refer to *Alixandra Funk*, *Asymmetrical federalism: a stabilizing or destabilizing factor in the multinational federation*, 2010, Master thesis at <http://www.ie-ei.eu/IE-EI/Ressources/file/memoires/2010/Funk.pdf>.

24 Burgess speaks about asymmetrical arrangements as “‘Janus faced’... being perceived by some as a positive instrument designed to buttress and sustain federal values and structures while simultaneously inducing fears and anxiety in others who construe it very much as a dangerous threat to the stability and integrity of the state.” *Michael Burgess*, *Comparative Federalism: Theory and Practice*, London 2006, p. 209.

25 See *Michael Burgess*, *Accommodating Diversity: Asymmetry in Federal States*, Baden-Baden 1990.

26 *Watts*, note 5.

27 *Tarlton*, note 16, pp. 861-874. Practical examples of asymmetry are: unequal representation of Länder within the Bundesrat of Germany; cantonal representation in the federal executive of Switzerland; group autonomy in Belgium; special arrangements for Quebec in Canada regarding its civil law as well as other areas of jurisdiction; special arrangements in Malaysia regarding Sabah and Sarawak; special autonomy for Basque and Catalan regions in Spain, and the special autonomy of Scotland in the United Kingdom.

Asymmetry may therefore be an olive branch offered to a region, a local government or a cultural community that might otherwise feel they suffer from neglect, from ignorance about their concerns, frustration that their traditions are not accommodated, or to placate their desire to secede. Asymmetry which aims at the protection of ethnic minorities can present itself in many ways, for example in the way that regions are demarcated, the powers and functions decentralised to a region, the development of regional institutions of governance, the organisation of local and traditional government within the region, regional representation in national institutions, and intergovernmental relations between the region at national institutions.

Asymmetry is sometimes viewed with suspicion or scepticism since, so it is alleged, it encourages unequal treatment of regions and asymmetry may, in a worse case, facilitate secession. The reality regarding asymmetry is, however, nuanced. Firstly, there can hardly be perfect symmetry in any multitiered arrangement. Multitiered systems are per definition based on practical asymmetry and often on legal asymmetry as well. Secondly, the absence of asymmetry and the insistence on symmetry may contribute to radicalism and the breaking up of a country since absolute symmetry demands a one size fits all approach. Multitiered systems such as Canada, Belgium, Ethiopia, India, Iraq, Malaysia, United Kingdom, Spain, Italy and South Africa might not have come into existence or may not exist in their current form had it not been for pragmatism and different degrees of asymmetry towards their respective regions. Thirdly, asymmetry can be used for temporary or transitional purposes. Legal asymmetry can therefore be used, as it has been done in Spain, to phase in a new constitutional arrangement whereby some regions would have more powers for a specific period of time but with the ultimate aim that all regions would have the same – symmetric – legal powers or as in the case of Quebec, the asymmetry may be a permanent feature of a constitutional dispensation.

Watts counters the suggestions that asymmetry may encourage secession. He observes that it is often the lack of asymmetry and flexibility that causes instability and violence by disgruntled minorities. In his assessment, efforts to impose hegemony amongst regions and the refusal to allow some asymmetry have often been the cause of instability and a breakdown of the national unity arrangements. He concludes as follows:

*“Thus, in spite of the increased complexity and risk of provoking counterpressures for symmetry, it appears that in a significant number of federations and unions, the recognition of constitutional and political asymmetry has in fact provided a way of accommodating major differences between constituent units that otherwise would not have been possible.” (emphasis added)<sup>28</sup>*

Although asymmetry in distribution of powers and functions is not confined to federations, it is, for various reasons, widely found and actively used in federations. Asymmetry also occurs in decentralised unitary systems – refer for example to the asymmetrical decentrali-

28 Watts, note 6, p. 7.

sation arrangements within the United Kingdom with Scotland, Wales and Northern Ireland as well as the quasi-federal arrangements in Spain and between the regions in Italy.

The Philippines are making promising progress towards asymmetry for the Bangsamoro region. If successful, this experience could hold promise for other parts of Asia and beyond, where existing country boundaries are in many instances being challenged by ethnic minorities.

### **Bangsamoro – an autonomous region in the making**

The region Bangsamoro is situated on Mindanao, the second largest of the islands of the Philippines. Mindanao is divided into 6 regions, which are in turn subdivided into 26 provinces. Mindanao's population numbers around 25 million with a rich diversity of which the Moro comprise about 20%. The Moro are made up of 13 ethno-linguistic groups and those comprise many other subgroupings, clans and communities. Although the Moro are united in the Islamic faith, the communities that share the faith are diverse and varied and their interests often collide.<sup>29</sup> To add to the complexity of the population composition of Mindanao, the indigenous Lumads, who comprise 20 linguistic groups, constitute around 5% of the Island's population.<sup>30</sup> The remainder of the population of Mindanao are Christian. In 1900, a United States Commission described the Philippines as being not a unified nation but rather a collection of different people.<sup>31</sup>

Mindanao has throughout its modern history been the subject of domination by three major external forces, namely the original Muslim traders (starting in 14<sup>th</sup> century),<sup>32</sup> the Spanish (1542 - 1889),<sup>33</sup> and the United States of America (1889 - 1946). The presence of

29 Liow refers to the concept of a united and integrated Moro resistance to colonisation as a "myth". Liow, note 20, p. 9.

30 The Lumads have suffered from all the occupiers of Mindanao and their traditional lands have been occupied or exploited. Their lot has been compared to the indigenous people of the Amazon basin. Jamail A. Kamlian, *Bangsamoro Society and Culture: A Book of Readings on Peace and Development in Southern Philippines*, Iligan City 1999.

31 United States Philippines Commission (Schurman Commission), Report of the Philippine Commission, Washington (DC) 1909, pp. 97-121. Mindanao comprises around 43% of landmass of the Philippines and 25% of the total population.

32 There is some evidence suggesting that Arab traders reached Mindanao in the 10<sup>th</sup> century on their way to China. Charles Frake, Abu Sayyaf: displays of violence and the proliferation of contested identities among Philippine Muslims, *American Anthropologist* 100 (1998), pp. 41-54.

33 Concerning the colonisation of the Philippines by Spain, the following was said in 1566 about the Moros in an instruction from Philip II to Miguel Lopez de Legazpi: "We give you permission to make such Moros slaves and seize their property." Nicolas Zafra, *Philippine History through Selected Sources*, Quezon City 1967, p. 51. The Spanish rule did away with communal land ownership, which in turn impacted the way in which natural resources, grazing, and access to water and forests were managed and controlled. Alpasla Özerdem, Suhanya Podder and Eddie L. Quitarano, *Identity, Ideology and Child Soldering: Community and Youth Participation in Civil Conflict – A Study on the Moro Islamic Liberation Front in Mindanao, Philippines*, Civil Wars 12 (2010), p. 308.



these forces not only had major socio-economic, religious and cultural impacts on Mindanao, the forces also represented different faiths. The Muslim faith established its roots in Mindanao at least 500 years ago. With the Spanish colonisation of the Philippines in the sixteenth century, ongoing efforts were made to spread Christianity to all parts of the Philippines, including Mindanao. These efforts involved not only the sending of missionaries to Mindanao, but also large-scale population resettlement programmes aimed at “diluting” the numbers and influence of the local Muslims. The Spanish never succeeded in bringing the entirety of Mindanao under central control. It was the American administration that extended the influence of Manila over the entirety of Mindanao. The “Christianisation” of Mindanao, especially under American occupation, was accompanied by large scale population movement, displacement of people and massive land dispossession.<sup>34</sup>

Early in the 20<sup>th</sup> century, attempts were made to separate Mindanao from the Philippines. These independence movements were fiercely opposed by the Christian Pilipino elite and the colonial American government.<sup>35</sup> The Muslim proponents of separation were unable at the time to present a united voice as a result of numerous regional and linguistic subgroups, and consequently the status of Mindanao as an integral part of the Philippines and being governed from Manila, remained unchanged.<sup>36</sup> There remain some differences within the Muslim community about the answer to the question whether Mindanao should remain part of the Philippines or become a sovereign state. For now, at least, it seems as if the prevailing opinion is for special autonomy for Mindanao within the Philippine state.<sup>37</sup>

Large-scale settlement of Christians into Mindanao started around 1911 and as a result of actions by subsequent governments, the demographic makeup and landownership of Mindanao have been radically altered. Population resettlement was actively pursued under the American administration and this, inevitably, contributed to large-scale land deprivation on the part of the Moros.<sup>38</sup> Consequently, whereas Muslims formed around 98% of the pop-

34 The system of land distribution under the Islamist tribes prior to Spanish colonial settlement was based on ancestral association and communal sharing. It is particularly under the United States Administration that the system of land ownership radically changed with Christian Filipinos being the main beneficiaries. The “massive Christian migration” meant that by 1960, Christians were the majority in Mindanao. *Christina J. Montiel, Marshaley Baquiano and Charlie M. Inzon, Conflicting Group Meanings of Territorial Rights in Central Mindanao: Muslim-Christian Social Representations of Land Entitlement, Journal of Pacific Rim Psychology 7 (2013), pp.1-11.*

35 *Nobutaka Suzuki, Upholding Philipino Nationhood: the Debate over Mindanao in the Philippine Legislature, 1907-1913, Journal of Southeast Asian Studies 44 (2013), p. 284.*

36 *Suzuki, note 36, p. 290.*

37 Note however the opposition by BIFF (Bangsamoro Islamic Freedom Fighters) to the peace accord and the campaign of violence resulting from it. “3 killed, 22 wounded in bombing in Philippines” *News24*, 25 November 2014. The situation remains fluid with much depending on the way in which the Peace Accord and Basic Law are implemented and the ability of the regional government to address socio-economic issues.

38 It was estimated that in 2000, 27% of the total Philippine population was living in poverty, but in areas dominated by the Moros the number of those living in poverty was as high as 52%. National Statistical Coordination Board, *Estimation of local poverty in the Philippines, Makati City 2005.*

ulation of Mindanao in 1913, by 1999 they only formed around 19% of the population.<sup>39</sup> It has been observed that the “inflow of settlers was so severe that by 1948, where once the indigenous population predominated they now had become numerical minorities.”<sup>40</sup> As a result, the Muslims “lost their lands to the settlers through the operation of law.”<sup>41</sup> This explains why immediately before the independence of the Philippines in 1946, Moro leaders (again) petitioned the government of the United States, seeking to be excluded from the independence of the Philippines.

Since the early 1970s, Muslim separatists in Mindanao have asserted their right to self-government, even to secession.<sup>42</sup> In the unrest and conflict that accompanied the demands for self-government, more than 120,000 people have been killed – and millions more wounded and displaced – during the past decades.<sup>43</sup> It has been proposed that the source of the conflict between Mindanao and the central government in Manila was fourfold, namely the reduction of the influence of traditional leaders, competing and conflicting religious beliefs,<sup>44</sup> government policies in regard to land, social services and education,<sup>45</sup> and local rivalries between communities and within communities.<sup>46</sup> It is generally admitted that the Muslim anti-Manilla movement, through the years, may have had undertones of religious conflict, but it was also motivated by an anti-colonialism and anti-centralisation attitude mixed with intra-community disputes.<sup>47</sup> The anti-Manilla sentiment is exacerbated by intense poverty in Mindanao, particularly amongst the Moros and the Lumads. Özerdem summarises the nature of the conflict as follows:

39 Özerdem, note 34, p. 399.

40 Daniel Joseph Ringuet, *The Continuation of Civil Unrest and Poverty in Mindanao*, Contemporary Southeast Asia 24 (2002), p. 36.

41 Rey Crystal, *Overview of Land Settlement Schemes in the Philippines*, in: Garvin W. Jones and Hazel Varvara Richter, *Population Resettlement Program in South East Asia*, Canberra 1982, p. 101.

42 It must be emphasised that although there is a combined efforts by the broader Muslim community to obtain a form of self-government for Mindanao, the Moro community comprises different tribes and clans and therefore remain “ethnopolitically fragmented”. Montiel *et al.*, note 7, p. 39.

43 Ringuet, note 41, p. 48. In addition to the number of deaths, those who were wounded are “countless”, with displacement of more than 2 million people, emergence of massive “Muslim ghettos” in and around various cities, exodus of Muslims to neighbouring countries, increased poverty, and increase of lawlessness. Salvatore Schaivo-Campo and Mary Judd, *The Mindanao Conflict in the Philippines: Roots, Costs and Potential Peace Dividend*, Washington (DC) 2015, p. 6.

44 The casual observer is cautioned against drawing a conclusion that the Mindanao conflict is primarily a conflict between Christians and Muslims. Iyer says such an approach is “simplistic” and “wrong.” Pushpa Iyer, *Peace Zones of Mindanao: Philippines: civil society efforts to end violence*, Cambridge 2004, p. 4.

45 Martin and Tuminez, note 22, p. 8.

46 Samuel K. Tan, *The Filipino Armed Struggle 1900-1972*, Manila 1977, p. 19.

47 The Mindanao conflict is said to be the second oldest internal conflict on earth, with the oldest suggested to be the (now resolved) conflict in Sudan between north and south.

*“The conflict in Mindanao is often labelled as an ethno-religious struggle of the Bangsamoro against the majority Christians, but the problem is much more deep-rooted than this... The armed conflict was not only between the MNLF and a predominantly Christian AFP, but it also saw the involvement of private armies of logging companies and politicians, and a wide range of other paramilitary groups.”<sup>48</sup>*

As a result of ongoing conflict and violence, the relationship between the Moros and Manila deteriorated to the extent that martial law was declared in 1972.<sup>49</sup> Since then, various efforts have been made to accommodate the self-government demands of the Moros. Until recently those efforts came to naught or were not implemented in full<sup>50</sup> but, in historical perspective, the efforts over the past four decades had set a process in motion that gave rise to the 2014 Peace Accord.

A major step that anticipated some form of autonomy for Mindanao was the so-called Tripoli Agreement in 1975 between the Marcos government and the MNLF (Moro National Liberation Front).<sup>51</sup> In 1977, President Marcos issued Proclamation 1628 giving rise to the Autonomous Region of Muslim Mindanao (ARMM).<sup>52</sup> Pursuant to the Tripoli Agreement limited autonomy was proposed for some of the Muslim dominated provinces of Mindanao.<sup>53</sup> The agreement sought to set the framework for autonomy by way of four pillars, namely the recognition of autonomy for Mindanao, the identification of the 13

48 *Alpasla Özerdem*, The Contribution of the Organisation of the Islamic Conference to the Peace Process in Mindanao, *Civil Wars* 14 (2012), pp. 399-400. The Norwegian Refugee Council cautioned in 2014 that regardless of the peace accord that had been reached in 2014, the extensive poverty, poor governance, culture of retribution, and clan disputes in Mindanao make the road to lasting peace a long one. Norwegian Refugee Council, The new peace agreement in the Philippines is an opportunity to address internal displacement in Mindanao, 2014.

49 *Macapado Muslim* and *Rufa Cagoco-Guiam*, Mindanao, Land of Promise, *MSU-GSC Research Journal* 3 (1990), p. 16.

50 Mindanao has been described as a classical example of a “failed state” and potentially the “next Afghanistan.” United States Charge d’Affaires Josep Mussomeli, *Philippine Star*, 11 April 2005, p. 4.

51 The MNLF was established with the objective to obtain self-government for Mindanao. [http://mnlf.net.com/The\\_Tripoli.htm](http://mnlf.net.com/The_Tripoli.htm). The Tripoli Agreement was signed on 23 December 1976 between Manila and the MNLF under the facilitation of the Quadripartite Commission of the Islamic Conference (OIC), which comprised the foreign ministers of Saudi-Arabia, Libya, Senegal, and Somalia. The OIC comprises 57 member states, principally from the Middle East and North Africa. It was founded on 25 September 1969. For a very useful overview of the role of the Islamic Conference refer to *Özerdem*, note 49, pp. 393-413.

52 The ARMM forms the core of the Bangsamoro region.

53 *Viberto Selochan*, *The Military, the State and Development in Asia and the Pacific* Boulder, 1991, pp. 11-112. The Tripoli Agreement was not a treaty but rather a record of intention between Manila and the MNLF to establish “regional autonomy” in Mindanao within the “framework of territorial integrity” of the Philippines. *Datu Michael O. Mastura*, *Muslim Filipino Experience: A Collection of Essays*, Philippine Islam Series no. 3, Manila 1984, p. 274.

provinces and cities<sup>54</sup> that would be included into the autonomy arrangement, the principle of autonomy and a cease-fire, and the procedures to implement autonomy.<sup>55</sup> It was foreshadowed that Sharia laws would be applied in the courts of the ARMM, that Muslims would be appointed in key government positions, and that the ARMM regional government would create an autonomous economic and political system for the region. Although the Tripoli Agreement failed to be implemented successfully,<sup>56</sup> it nevertheless set a “benchmark” for future negotiations and it constituted an important watershed whereby the autonomy needs of the Moros were acknowledged and legitimised.<sup>57</sup> Of particular importance in the Tripoli Agreement was the underlying agreement that Mindanao would remain part of the sovereign territory of the Philippines. This concession addressed concerns of other Asian countries such as Malaysia and Indonesia that any special treatment for secession might have ramifications to their countries.

The MILF (Moro Islamic Liberation Front) was established in 1984 with the aim to pursue an independent Mindanao rather than a region with autonomous powers within the Philippines. The establishment of MILF and its purported connections to radical Islamist forces<sup>58</sup> gave rise to an increase in hostilities within Mindanao and the rest of the Philippines. The conflict between the Moro and Manila was (and remains) multidimensional. The separatist movement is strongly influenced by the poverty of Muslim-dominated areas within Mindanao, frustration at land resettlement policies of previous generations that saw Christians take over large tracks of land that used to belong to Muslims, ongoing conflicts between the Muslims/Christians on the one hand and the indigenous people the Lumads of Mindanao on the other hand, and regular infighting within the respective Moro communi-

54 The provinces were Basilan, Sulu, Tawi-Tawi, Zamboanga del Sur; Zamboanga del Norte; North Cotabato; Mguindanao; Sultan Kudarat; Lanao del Norte; Lanao del Sur; South Cotabato and Palawan.

55 Özerdem, note 32, p. 402.

56 For a useful overview refer to *Carmen A. Abubakar*, Review of the Mindanao Peace Process, *Inter-Asia Cultural Studies* 5 (2004), pp. 451-453.

57 There are many reasons why the implementation of the Tripoli Agreement failed, such as the ongoing civil war, the lack of participation of provinces in the referendum about autonomy, and the rejection of the proposed autonomy by a majority of those that voted. See *Elena Clariza*, The Mindanao Peace Process: Is Autonomy a Viable Option for Mindanao?, 2005, paper available at <http://www.angelfire.com/amiga2/clariza/PDFonline-mindanaopp.pdf>.

58 By inserting the word “Islamic” in its name, the group felt it would clearly set them apart from the MNLF and establish their credentials. *K Collier*, Terrorism: Evolving Regional Alliances and the State Failure in Mindanao, in: Daljit Singh and Lorraine C. Salazar, *Southeast Asian Affairs 2006*, Singapore 2006, pp. 22-28. Collier observes that although the Philippines is not a failed state, it contained “enclaves within which transnational terrorists continue to find sanctuary...”, Id. at p. 34. Özerdem cautions that although the MILF receives support and sympathy from Middle Eastern sources, “any discussion if jihad is primarily used as a mobilising tool for the local ethnic campaign” rather than for violent resistance. Özerdem, note 32, p. 309. It has often be stressed that the nature of the conflict in Mindanao is political rather than religious and that radical Islamist doctrine has (so far) not fallen on fertile soil.

ties and tribes. While there is some level of conflict *between* the respective Mindanao communities, there is also conflict *within* the communities and yet all the communities share a common destiny as residents of Mindanao.<sup>59</sup>

A further milestone in the self-government process was an agreement on a peace accord, the Final Peace Agreement,<sup>60</sup> that was entered into on 2 September 1996 between the Philippine Government and MNLF<sup>61</sup> by which the poorest cities and provinces of Mindanao were to form part of the Special Zone of Peace and Development (SZOPAD). SZOPAD covered all the provinces that were the subject of the Tripoli Agreement. It was envisaged that after three years another plebiscite would be called to determine whether those provinces that had not previously joined the autonomous region, would want to opt in. The aim of the agreement was to facilitate and stimulate economic growth of the region as part of the process of affording special recognition to the Moro community. The implementation of the peace agreement failed for various reasons, including lack of public support,<sup>62</sup> lack of buy-in by MNLF, concerns by the Christian community of Mindanao that their interests were not adequately protected,<sup>63</sup> administration complexity due to the provinces forming part of the area of self-government not all being contiguous, and ongoing conflict, which in turn reflected the lack of socio-economic progress of the Muslim community.<sup>64</sup>

The success or failure of the implementation of 2014 Accord will be measured in the tangible improvement of socio-economic conditions – the so-called ‘peace dividend’<sup>65</sup> – of the Muslims of Bangsamoro and the ability of all parties to effectively implement any peace and autonomy agreement. The peace accord would have to overcome a problem that

59 Refer to the discussion of *Liow*, note 20, pp. 12-18 about the impact of Islam on the leadership of MILF and how it interacted with nationalism and self-determination for Bangsamoro. He emphasises that MILF leaders have departed from the notion of an “Islamic State” and that they support a secular convention albeit that the teaching of Islam need to be respected.

60 [http://mnlfn.net/The\\_Final.htm](http://mnlfn.net/The_Final.htm). Refer to the following site for access to the major agreements and accords of relevance to this research: [http://peacemaker.un.org/document-search?keys=&field\\_padate\\_value%5Bvalue%5D%5Bdate%5D=&field\\_pacountry\\_tid=Philippines&field\\_paconflict\\_tid%5B%5D=1](http://peacemaker.un.org/document-search?keys=&field_padate_value%5Bvalue%5D%5Bdate%5D=&field_pacountry_tid=Philippines&field_paconflict_tid%5B%5D=1).

61 The MILF continued to fight an insurgency, while MNLF assumed control of the ARMM government.

62 Only one additional province and city voted to join the autonomous region.

63 The majority of the provinces identified for inclusion in the autonomous region had a majority of Christian inhabitants and those communities were often concerned that their interests at the regional level may not be adequately safeguarded.

64 Report of the Secretary-General on the Question of Muslims in the Southern Philippines, 33<sup>rd</sup> Session of the Organisation of Islamic Conference, Baku, Azerbaijan, 19-21 June 2006.

65 The following criteria were recommended in 2005 for sustainable development and a resultant peace dividend: adopt an inclusive approach to address the concerns of Moro, traditional and other communities in Mindanao, break the vicious cycle of weak low-capacity autonomy through genuine capacity building to sustain decentralised powers, and attention to environmental and social risks.

has been observed by Abubakar in 2004, namely that “after each agreement was signed, the implementation itself had always run into trouble.”<sup>66</sup> Podder has commented that regardless of the seemingly uniting factor that Islam provided to the Bangsamoro, underlying the unity were ethno-linguistic differences, ideological disagreements and factional interests.<sup>67</sup> In addition to these potential hurdles, sight should not be lost of the deep differences in religious beliefs and cultural values of the communities that reside on Mindanao. According to Horner, the reference to “nation-building” is often seen by Muslims as “Christianisation and the eradication of ethnic diversity.”<sup>68</sup> To this must be added the internal conflict and disputation between families and clans, which have for their part contributed to loss of life, evacuation, and curtailment of development.<sup>69</sup>

The Framework Agreement on the Bangsamoro (Basic Law)<sup>70</sup> which arose from the peace accord is seen as the way to bring “just and lasting peace” to Mindanao. Some of the key elements of the Basic Law are

- An asymmetrical relationship between Manila and Bangsamoro is established<sup>71</sup> with typical federal-type characteristics, whereby both levels of government have enumerated powers that can only be amended through a complex process of safeguards and popular referendum.
- The territory of Bangsamoro includes the ARMM areas but additional areas are added and there is a mechanism for popular will to be tested about the expansion of Bangsamoro into other local governments and cities.<sup>72</sup>
- A parliamentary system of government is established whereby members of parliament are elected on a mix of proportional representation, single member wards, and served seats. The Chief Minister is elected by parliament and members of cabinet are appointed by the Chief Minister.<sup>73</sup> A titular head of government (*Wali*) is appointed.<sup>74</sup>

66 Abubakar, note 57, p. 461.

67 Sukanya Podder, Legitimacy, Loyalty and Civilian Support for the Moro Islamic Liberation Front: Changing Dynamics in Mindanao, Philippines, Politics, Region and Ideology 13 (2012), p. 501.

68 Lindsey K. Horner, Networking resources, owning productivity: a post-development alternative in Mindanao?, Globalisation, Societies and Education 11 (2013), p. 553.

69 Anne-Marie Hilsdon, Invisible Bodies: Gender, Conflict and Peace in Mindanao, Asian Studies Review 33 (2009), p. 352.

70 <http://www.gov.ph/2014/03/27/document-cab/> (last accessed: 27 March 2014).

71 Preamble Basic Law. Note the concern expressed that the Basic Law is unconstitutional because it creates, in effect, a separate state: <http://www.mb.com.ph/bbl-unconstitutional-miriam/> 14 February 2015 and <http://www.gmanetwork.com/news/story/447093/news/nation/miriam-to-govt-milf-scrap-bangsamoro-law-renegotiate-peace-deal> 5 March 2015.

72 Article III Basic Law.

73 Article VII Basic Law.

74 Article VIII Basic Law.

- A typical federal-type allocation of powers is done whereby national and regional exclusive and concurrent powers are defined on the basis of “principles of devolution and subsidiarity”.<sup>75</sup>
- Provision is made for intergovernmental structures to facilitate cooperation and consultation between Manila and Bangsamoro.<sup>76</sup>
- Basic rights of citizens are enumerated in addition to any rights they may have pursuant to the national Constitution.<sup>77</sup>
- Sharia law is applied to Muslim citizens.<sup>78</sup>
- Bangsamoro has “fiscal autonomy” with its own tax resources, shared resources with the national government, and block grants and ability to access loans.<sup>79</sup>
- The Basic Law only takes effect after ratification by way of popular referendum and any amendments must be approved by popular referendum.<sup>80</sup>

### Observations about key elements of the Basic Law

It is not within the scope of this article to comment exhaustively on all aspects of the Basic Law. The areas of particular interest to the author are set out below since those matters often present challenges to democracies that decentralise powers after many years of centralisation. The process of decentralisation is complex (often more complex than anticipated), implementing decentralisation can be drawn-out (often taking longer than was anticipated) and close cooperation between regional and national authorities remains essential (often closer cooperation than anticipated is required). The areas of focus for purposes of this article are

- Conceptual clarity within the Basic Law
- Demarcation of boundaries of Bangsamoro
- Intergovernmental relations between Manila and Bangsamoro
- Representation of Bangsamoro in national institutions
- Amendment of Basic Law

### *Conceptual clarity*

The Basic Law uses concepts that require further clarification; otherwise the implementation and administration of the Basic Law could be curtailed by a lack of agreement, litigation or confusion. Some aspects of the Basic Law resemble a political manifesto rather than

<sup>75</sup> Article V Basic Law.

<sup>76</sup> Article VI Basic Law.

<sup>77</sup> Article IX Basic Law.

<sup>78</sup> Article X Basic Law.

<sup>79</sup> Article XII Basic Law.

<sup>80</sup> Article XV Basic Law.



a legal document. As a result of the programmatic nature of some of the provisions, confusion could arise when undefined provisions must be implemented.

These problems shall be illustrated by the following examples:

The relationship between Bangsamoro and Manila as described in the Basic Law is “founded on the principles of subsidiarity and parity of esteem”.<sup>81</sup> The Basic Law goes on to proclaim that “the Central Government and the Bangsamoro Government accept the concept of devolution as inspired by the principle of subsidiarity.”<sup>82</sup> There is no definition in the Basic Law about what is meant by these concepts.

“Subsidiarity” is closely linked with European political and constitutional thought<sup>83</sup> and the question of whether such a concept should be elevated to the level of a constitutional principle in the Philippines arises. It would be preferable for the Basic Law to contain an objective to the effect that the devolution of powers is aimed to decentralise decision-making to the lowest practical level, rather than to rely on a generic concept such as “subsidiarity”, which lacks philosophical roots and legal clarity in the Philippines.

The same criticism can be expressed about the use of the “principles of asymmetry”.<sup>84</sup> While in political science and constitutional law “asymmetry” is a common subject of scholarly discourse, it is novel for a constitutional text to formally describe a relationship between two different levels of government as an “asymmetrical political relationship”. Added to this concern is what appears to be a misconception of the Basic Law about what “asymmetry” means. The Basic Law describes the relationship between Manila and Bangsamoro as “asymmetrical”<sup>85</sup> without any reference to the powers and functions of other regions. This creates the (incorrect) impression that the relationship between the national and regional governments is asymmetrical.

Another area where conceptual clarity is required is the allocation of powers and functions to the respective levels of government, particularly in regard to “concurrent powers”. “Concurrent powers” are those powers that are “shared” between the central government and Bangsamoro, but with inadequate guidance in the Basic Law of what would happen when laws enacted by the two levels are inconsistent.<sup>86</sup> The Basic Law ought to give guidance about how inconsistencies should be resolved.

The Basic Law would benefit from clarification of key concepts so as to prevent confusion or conflict in the implementation process. Without any guidance in the Basic Law

81 Preamble Basic Law.

82 Article VI(6) Basic Law.

83 According to the Oxford Dictionary the term in general means “the principle that the central authority should have a subsidiary function, performing only those tasks which cannot be performed at a more local level”, whereas in the context of the Treaty of Maastricht it refers to the right of member states to the European Union to have their sovereignty protected on the basis of subsidiarity. <http://www.oxforddictionaries.com/definition/english/subsidiarity>.

84 Preamble Basic Law; Article VI(1) Basic Law.

85 Article VI Basic Law.

86 Article 5 (2) Basic Law.



about which laws prevail in the event of an inconsistency, a constitutional issue may easily turn into a political issue, which in turn could erode the trust that has been developed between Manila and Bangsamoro.

#### *Demarcation of Bangsamoro boundaries*

A particularly challenging issue for young multitiered systems is to settle the boundaries of newly created regions. In contrast to federal arrangements such as those in the USA, Australia, Switzerland, Germany and Canada where existing autonomous or sovereign states came together to form a federation, the Philippines finds itself in the category of countries such as India, South Africa and Nigeria where new regions had to be created through a process of consultation and demarcation. The boundaries of such newly created regions may not have the same historic roots and stability as in the older federations, and this applies even more to the case of Bangsamoro where only a part of the island of Mindanao will be included in the Basic Law. There should therefore be time and opportunity to allow for regional boundaries to be revisited and adjusted if necessary.

The Basic Law provides that Bangsamoro remains part of the territory of the Philippines.<sup>87</sup> The confirmation that Bangsamoro remains an integral part of the Philippines is, given the background of secessionist struggles, and important constitutional principle.

The geographical area of Bangsamoro is defined as a “core” area as well as areas that may be added to the autonomous region.<sup>88</sup> The core area comprises the ARMM, the municipalities that voted for inclusion into the ARMM in the 2001 plebiscite, the cities of Cotabato and Isabela, and other contiguous areas where there is a request by a local government to be included into Bangsamoro or where a petition of at least 10% of registered voters requests inclusion. These requests for inclusion will be voted upon as part of the ratification process of the Basic Law by way of popular referendum. Provision is also made that any other contiguous area that is adjacent to Bangsamoro may, even after the enactment of the Basic Law, request to be included in the autonomy arrangement. Such a request shall be dealt with by way of a popular referendum within the area that requested inclusion in Bangsamoro.<sup>89</sup>

87 Article III (1).

88 See Article III(2)-(6).

89 See Article XV Basic Law for arrangements about a plebiscite to give effect to Bangsamoro. In essence the Basic Law shall be put to a public referendum in the ARMM, the municipalities of Baloi, Munai, Nunungan, Pamtar, Tagoloan and Tangkal, 39 other local areas that voted for inclusion into the ARMM in 2001, the cities of Cotabato and Isabela, and those local government areas that are contiguous with Bangsamoro which requests a referendum to be held.

The following observations can be made about the definition of the territory of Bangsomoro:

There is no provision for a local government area, once amalgamated with Bangsomoro, to withdraw from the arrangement. The Basic Law may, for a limited time, establish a basis for opt-in and opt-out before the boundaries of Bangsomoro are settled.

It remains to be seen if and how the Bangsomoro arrangement influences demands by other regions of the Philippines for similar autonomy. Although the Basic Law cannot address the status of other regions (since the Basic Law is only directed at Bangsomoro), provision may have to be made at the national level for a commission on demarcation to investigate and consult on regional boundaries and investigate the creation of additional autonomous regions.

#### *Intergovernmental relations*

Multitiered systems require various degrees of cooperation and consultation between the different levels of government to ensure efficiency, reduce overlaps, prevent and resolve conflict, utilise resources efficiently, and promote good governance. This cooperation and consultation is generally referred to in literature and practice as “intergovernmental relations”.<sup>90</sup> In some multitiered systems the “spirit” or “comity” that guides intergovernmental relations is formally recognised by the courts, most notably so in Germany where *Bundestreue* is a guiding principle that provides the foundation of intergovernmental relations.<sup>91</sup>

The Basic Law contains several references to the concept of “intergovernmental relations”.<sup>92</sup> Although the Basic Law does not define what is meant by intergovernmental relations, it speaks about the relationship between Bangsomoro and the central government as being “asymmetric”; furthermore, the interaction between Bangsomoro and Manila shall be guided by the principles of “parity of esteem” and “respect” and that the President shall exercise “general supervision” over Bangsomoro to ensure laws are “faithfully executed”.

The Basic Law stops short of following the example of the South African Constitution’s Chapter 3 which contains arguably the most detailed guidelines for the conduct of intergovernmental relations. Although the Basic Law refers to general principles, such as asymmetry, respect and parity of esteem, such a young decentralised system may have benefited from a more detailed exposition of what the required standards of the two levels of government are, for example respecting the powers and functions of each other, refraining

90 Intergovernmental relations are not limited to federations. Jong S. Jun and Deil S. Wright (eds.), *Globalization and Decentralization*, Washington (DC) 1996; *Martin Laffin*, *Comparative British Central-local Relations, Public Policy and Administration* 22 (2012), pp. 74-91; Peter Meekison (ed.), *Intergovernmental Relations in Federal Countries*, Ottawa 2007.

91 *Bertus De Villiers*, *Intergovernmental Relations: Bundestreue and the Duty to Co-operate from a German Perspective*, SA Public Law 9 (1994), pp. 430-437.

92 Article V(2) in regard to roads, bridges and irrigation; Article V(3) makes reference to “the intergovernmental relations mechanism” and most notably Article VI of the Basic Law.

from litigation against each other, being committed to serve the common good for the people of Bangsamoro, coordinating and consulting with one another, informing each other of matters of common interest, fostering friendly relations and positive attitude to each other, and assisting and supporting each other. Such standards of governance may give “flesh” to the very bare-bones approach taken in the Basic Law.

The powers of the President to “ensure that laws are faithfully executed” may, given the background of distrust within Bangsamoro towards the central government, lead to abuse or suspicion. It is not clear how those seemingly wide powers of the President are limited by principles of cooperative intergovernmental relations. Most importantly, it is not clear if the exercise of the powers of the President is subject to judicial review and oversight.

The Basic Law provides that an Intergovernmental Relations Mechanism between the central government and Bangsamoro be established at the “highest level” to “coordinate and harmonize relationships”.<sup>93</sup> It is envisaged that this mechanism shall resolve intergovernmental disputes through regular consultation, negotiation, and in a non-adversarial manner. If a dispute remains unresolved, it shall be referred to the President. Provision is also made for a parliamentary forum in which the legislative initiatives of the two governments will be coordinated.<sup>94</sup>

It seems as if the primary forum for the conduct of intergovernmental relations is the leaders’ forum. Other forums for the conduct of intergovernmental relations may also develop over time, but those would be non-statutory and informal. Given the history of distrust and antagonism between Bangsamoro and Manila and in light of the poor experiences with self-government in Bangsamoro, the Basic Law could have given more guidance about the type of forums that would be primarily responsible for the conduct of intergovernmental relations and the accountability of those forums, for example leaders’ forum, ministers’ forum, senior officials’ forum, and speakers’ forum. Consideration could also have been given to the option of enacting a statute on the conduct of intergovernmental relations, in which general principles are identified and specific institutions are established.<sup>95</sup>

The reference in the Basic Law to “intergovernmental relations” is important, especially in light of the background of the Manila-Bangsamoro relationship. The Basic Law can possibly play a greater role to set out the ground rules according to which intergovernmental relations are to be conducted or in the alternative an act may be enacted to set out those rules and forums. With the Basic Law in place, the government of Bangsamoro will become responsible and accountable for service delivery and to be effective, the closest possible intergovernmental relations between all three levels will be required.

93 Article VI(4) Basic Law.

94 Article VI(8) Basic Law.

95 Article 41(2) of the South African Constitution requires that an Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

*Representation of Bangsamoro in national institutions*

Although much attention has been given through the years to demands for autonomy and self-determination of Bangsamoro, the possible involvement of Bangsamoro in matters of national importance has, in some respect at least, remained under the radar. The negotiations leading to the peace accord and Basic Law focused almost exclusively on terms for decentralisation and autonomy. In many multitiered arrangements, provision is made for some form of regional representation in national legislative and executive institutions in addition to the autonomy of the regions.

The question that arises is whether in the case of Bangsamoro, the Basic Law contains or ought to contain provisions for some form of involvement in national policy processes by the regional government.

One of the common features of multitiered systems is the representation of the regions, in some form or another, within decision-making structures of the national government.<sup>96</sup> The second house of Parliament is usually *the* institution in which it is assumed that regions are formally represented, while representation of regions in the executive and judiciary are usually rather informal and based on convention, political arrangements and informal coalitions rather on legal prescription. Bicameral legislatures are not limited for federations.<sup>97</sup>

There is no provision for a second house of the national parliament in which Bangsamoro is represented. This is not surprising in light of the fact that the Philippines are only starting with a process of decentralisation, of which the arrangements for Bangsamoro are by far the most advanced compared to any other region. The Basic Law nevertheless provides for Bangsamoro to be represented in the national cabinet on the following basis: at least one person from Bangsamoro as Cabinet Secretary, at least one person from Bangsamoro in the executive of other government departments, and one Commissioner of Bangsamoro in each of the constitutional bodies.<sup>98</sup> Those persons appointed within central government positions are appointed at the discretion of the national government and the Basic Law does not contain any prescription as to how such persons are nominated or appointed.

The representation of Bangsamoro in national government institutions is novel. On the one hand there is no specific provision for Bangsamoro to receive separate representation in parliament, but account must be taken that a substantial number of members of parliament are elected from the Bangsamoro area, which means those voices are heard in the national legislative process. On the other hand, provision is made for representatives from Bangso-

96 Samuel Patterson and Anthony Mughan, *Senates and the Theory of Bicameralism*, in: Samuel Patterson and Anthony Mughan (eds.), *Senates: Bicameralism in the Contemporary World*, Columbus 1999, pp. 1-6 and Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries*, New Haven 1999, pp. 200-215.

97 More than 70 countries in the world have bicameral national parliamentary arrangements. Patrice Gélard, *Report on Second Chambers in Europe: "Parliamentary complexity or democratic necessity?"* Strasbourg 2006, p. 2.

98 Article VI(9) Basic Law.

moro to be appointed in executive institutions, but the Basic Law does not determine how the central government is to exercise its discretion when appointments are made. In practice, one would expect a convention to develop whereby appointments would be made in consultation with the government of Bangsamoro.

#### *Amendment of the Basic Law*

The powers and functions of regions within multitiered systems are usually contained in a national instrument, be it the national constitution or national legislation. In federal systems, as a general rule, the constitution sets out the powers and functions of the national and regional governments and that allocation can only be altered by way of a constitutional amendment.

The arrangements contained in the Basic Law for amending the powers and functions of Bangsamoro are unique and contain elements of a typical federal constitution albeit that the Philippines are not a federation and the powers of Bangsamoro are set out in a statute and not in the Constitution.

The Basic Law envisages a three step process before it can be amended, namely:

- The intergovernmental forum of the national and Bangsamoro legislatures, called the Philippine Congress-Bangsamoro Parliament Forum, must “discuss and endorse” any proposed amendment before it can be submitted to the national parliament.
- If the national parliament approves the amendment, the proposal is put to a plebiscite in Bangsamoro where a majority vote in favour of the amendment is required.<sup>99</sup>

These requirements of amendments to the Basic Law reminds of typical federal-type constitutions where regional powers are entrenched in the national constitution. The benchmark for amendments to the Basic Law may, however, are unrealistically high. The reasons for forming this view are that (a) the Basic Law is a very young constitutional instrument and lack of flexibility may cause it to be too rigid for growth and adaptation, (b) even minor amendments to the Basic Law would have to be submitted to a referendum which could be unnecessarily time consuming, costly and divisive, and (c) it may be more prudent to identify the core aspects of the Basic Law for which a plebiscite is required, with all other amendments only requiring the recommendation of the Intergovernmental Parliament Forum and approval by the national parliament. This would allow flexibility while at the same time ensure certainty.

#### **Summary**

The enactment of the Basic Law, in which autonomy for Bangsamoro is entrenched, is a major breakthrough in the constitutional and political developments of the Philippines. After decades of conflict an asymmetrical arrangement has been negotiated, which may pro-

<sup>99</sup> Article XVII Basic Law.

vide the basis for Bangsamoro to remain part of the Philippines, while its unique identity is respected and protected. The special autonomy of Bangsamoro may have ripple effects to other regions of the Philippines and may also contribute to constitutional developments in other Asian countries where regionally concentrated ethnic minorities are demanding some form of recognition and decentralisation. If international experiences of young decentralised nations are anything to go by, there will be many challenges for Bangsamoro and Manila to implement the Basic Law. Regardless of those challenges, the Philippines have potentially established a basis whereby national unity and regional diversity can be harmonised. That is an important lesson in a world where centrifugal forces are threatening the existence of several states.