

## THE BANGSAMORO BILL NEEDS THE APPROVAL OF THE FILIPINO PEOPLE \*

*Justice Vicente V. Mendoza\*\**

House Bill No. 4994<sup>1</sup> (“Bill”), which proposes the Bangsamoro Basic Law, has been filed in accordance with the Comprehensive Agreement on the Bangsamoro (CAB), which was signed on March 27, 2014, between the Government of the Republic of the Philippines peace panel and the counterpart panel of the Moro Islamic Liberation Front (MILF). The CAB is the second attempt to end the armed conflicts that for so long have dominated the relationship of the Government with Muslim Mindanao. The first one, the Memorandum of Agreement on Ancestral Domain (MOA-AD) made in 2008, was declared void by the Supreme Court for being beyond the power of the Government to make under the Constitution.<sup>2</sup>

Comparing the two agreements, I find much that has been done in the proposed Bangsamoro Basic Law to make it conform to the Constitution, although much remains to be done toward this end. Certain concepts and provisions of the Bill, when pieced together, reveal secessionist inclinations, notwithstanding the claim in the Preamble of the Bill that it is “consistent with the Constitution” and in its definition of the “Bangsamoro Territory” that the territory “shall remain a part of the Philippines.”<sup>3</sup> The recognition in the Bill of the “right [of the Bangsamoro people] to self-determination – beginning with the struggle for freedom of their forefathers in generations past and extending to the present – to chart their political

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\* Cite as Justice Vicente V. Mendoza, *The Bangsamoro Bill Needs the Approval of the Filipino People*, 89 PHIL. L. J. 1, (page cited) (2015).

This article is the expanded version of the statement of Justice Vicente V. Mendoza before the House of Representatives Ad Hoc Committee on the Bangsamoro Basic Law at the hearing on House Bill No. 4994 on Oct. 28, 2014.

\*\* LL.B., University of the Philippines College of Law; LL.M., Yale Law School; Associate Justice (Ret.), Supreme Court of the Philippines; Former Presiding Justice, Court of Appeals; Former Chairman, Court of Appeals, Second Division; Former Assistant Solicitor General, Office of the Solicitor General.

<sup>1</sup> H. No. 4994, 16<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (2014). Bangsamoro Basic Law [hereinafter “Bill”].

<sup>2</sup> Province of North Cotabato v. Gov’t of the Republic of the Philippines Peace Panel on Ancestral Domain, G.R. No. 183591, 568 SCRA 402, Oct. 14, 2008 [hereinafter “MOA-AD”].

<sup>3</sup> Bill, art. III, § 1.

future”<sup>4</sup> reinforces the impression that Bangsamoro is a political entity that is only a little different from the “associated state” called Bangsamoro Juridical Entity (BJE) in the MOA-AD which was invalidated by the Supreme Court in 2008.

Let me briefly discuss the concepts and provisions of the Bill which raise special concerns.

### THE BANGSAMORO TERRITORY

The reference in the Bill to the autonomous region in Muslim Mindanao as a “territory” of the Bangsamoro people is contrary to the Constitution under which the autonomous region is a part of the Philippine archipelago.<sup>5</sup> The term “territory,” as defined in Black’s Law Dictionary, means “[a] part of a country separated from the rest and subject to a particular jurisdiction and a geographical area under the jurisdiction of another country or sovereign power.” Such, for example, was the Philippines, as an “unincorporated territory” of the United States, before it was granted independence on July 4, 1946, or the trust territories under the Charter of the United Nations, which are former colonies under administration by other countries under commission by the United Nations, pending the eventual grant of independence to them, like the Marshall Islands and Mariana Islands in the Pacific, and the French Cameroons and the British Cameroons in West Africa.

Certainly, this is not the status of the autonomous region in Muslim Mindanao under the Constitution. To call the region the “Bangsamoro Territory”<sup>6</sup> is to imply that it is a separate part of the Philippines waiting to become independent.

It is said that self-determination is a principle recognized in the Charter of the United Nations. It is, but self-determination in that context refers to the rights of former colonies which, as already stated, were placed under the international trusteeship system of the United Nations following World War II, in order to prepare them for self-government and eventual

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<sup>4</sup> Bill, preamble, art. I, § 3, art. IV, § 1 & art. VI, §§ 1, 3.

<sup>5</sup> CONST. art. I, § 1 (“The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction”). The phrase “other territories” refers to the Philippine claim to Sabah.

<sup>6</sup> Bill, art. III, § 1.

statehood.<sup>7</sup> The principle cannot be applied to ethnic groups like the Bangsamoro, which is not a colony but a part of the Philippines, to which the Constitution grants regional autonomy.

Indeed, as the Supreme Court noted in its decision in the MOA-AD, the international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain statements supportive of the conclusion that the exercise of such right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.<sup>8</sup> Self-government, as used in international legal discourse pertaining to indigenous peoples, has been understood to be equivalent to "internal self-determination."<sup>9</sup>

The dismemberment of the national territory can result from such provisions of the Bill. As has been pointed out by a professor of international law, "[g]roups do not seek to secede merely because they are ethnically distinct, and if they did, they would probably not get much support[.] When a group seeks to secede, it is claiming a right to a particular piece of land."<sup>10</sup> This will be the result of considering the area occupied by the Bangsamoro people a "territory" and their "ancestral land." However, as the Court has said, "[t]he Constitution [...] does not contemplate any state in this jurisdiction other than the Philippine State, much less does it

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<sup>7</sup> U.N. Charter, art. 1, ¶ 2, art. 55, art. 77, ¶ 1(b). *See also* G.A. Res. 1514 (XV) (Dec. 14, 1960) (declaring that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation" and "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

Article 1, paragraph 2 of the U.N. Charter is reiterated in the U.N. International Covenant on Civil and Political Rights. *Compare* International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 U.N.T.S. 171 ("All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.") *with* U.N. Charter, art. 1, ¶ 2 ("The Purposes of the United Nations are: [...] to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace").

<sup>8</sup> *MOA-AD*, 568 SCRA at 490-91, *citing* Reference Re Secession of Quebec, 2 S.C.R. 217 (1998).

<sup>9</sup> *MOA-AD*, 568 SCRA at 494.

<sup>10</sup> Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177, 201 (1991).

provide for a transitory status that aims to prepare any part of Philippine territory for independence.”<sup>11</sup>

### THE BANGSAMORO PEOPLE

By defining who are to be considered Bangsamoros,<sup>12</sup> the Bill, in effect, gives the Parliament the power to pass a law, such as the Electoral Code, which it is authorized to enact,<sup>13</sup> limiting suffrage and membership in the Bangsamoro Government to the Bangsamoro people, thus denying others the rights and privileges of national citizenship guaranteed in the Constitution.<sup>14</sup> Non-Bangsamoros, although Filipino citizens and residents of the region for the requisite period, can be disqualified from elective positions in the provinces, cities, municipalities, barangays, and geographical areas in Bangsamoro or from appointment in the Bangsamoro Government. This is because the definition in the Bill of who are considered Bangsamoros performs the same function that the definition of who are considered citizens of a nation or state does in a national constitution, namely, screen out outsiders from certain privileges of national life.

### THE FORM OF GOVERNMENT

The Bill provides a parliamentary system of government.<sup>15</sup> It vests the powers of government in the Parliament. The Chief Minister, who is the head of the Cabinet, is elected by the majority vote of the Parliament from among its members, while the Deputy Minister and a majority of the Cabinet are appointed by the Chief Minister from the members of Parliament.<sup>16</sup> The Cabinet performs executive functions.

The Constitution provides, however, that the government of autonomous regions should consist of “the executive department and

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<sup>11</sup> *MOA-AD*, 568 SCRA at 481.

<sup>12</sup> Bill, art. II, § 1 (“Those 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 a right to identify themselves as Bangsamoro by ascription or self-ascription. Spouses and their descendants are classified as Bangsamoro.”).

<sup>13</sup> Bill, art. VII, § 9.

<sup>14</sup> CONST. art. V, § 1.

<sup>15</sup> Bill, art. IV, § 2.

<sup>16</sup> Bill, art. VII, §§ 1-3.

legislative assembly, both of which shall be elective and representative of the constituent political units.”<sup>17</sup> While the Chief Minister and at least half of the members of the Cabinet are to be chosen from the members of the Parliament, the fact is that the Constitution contemplates direct election by the people. It does not provide for any other kind of election other than that done directly by the people.

Indeed, a parliamentary system in an otherwise presidential system of government is an oddity and an anomaly. Even in Malaysia, the structure of the governments of the thirteen states is similar to that of the federal government which is parliamentary except for minor native judiciary powers in Sabah and Sarawak, and the state legislatures consist of a single chamber. The Constitution recognizes differences in “historical and cultural heritage, economic and social structures” of the two regions of Muslim Mindanao and Cordilleras, but it does not recognize differences in their political structures. It grants to these regions autonomy “within the framework of the Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.”<sup>18</sup>

### THE POWERS OF GOVERNMENT

Under the Bill, the Bangsamoro Government will enjoy extensive “exclusive powers,” including the power to trade with ASEAN countries;<sup>19</sup> to contract foreign loans, credits, and other forms of indebtedness;<sup>20</sup> and to receive foreign grants and donations.<sup>21</sup> It will likewise have “concurrent powers” over matters enumerated therein.<sup>22</sup>

In contrast, the powers of the Central Government will be limited to those enumerated therein<sup>23</sup> and to those which it shares with the Bangsamoro Government. These powers, denominated in the Bill as “reserved powers,” refer to the following:

1. Defense and external security;
2. Foreign policy;

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<sup>17</sup> CONST. art. X, § 18.

<sup>18</sup> CONST. art. X, § 15.

<sup>19</sup> Bill, art. V, § 3 (7).

<sup>20</sup> Bill, art. V, § 3 (3) & art. XII, § 22.

<sup>21</sup> Bill, art. V, § 3 (17) & art. XII, § 24.

<sup>22</sup> Bill, art. V, § 2 (1-14).

<sup>23</sup> Bill, art. V, § 1.

3. Coinage and monetary policy;
4. Postal service;
5. Citizenship and naturalization;
6. Immigration;
7. Customs and tariff, as qualified by Section 2 (10), Article V of the Bill;
8. Common market and global trade, provided, however, that the power to enter into economic agreements given to the ARMM under Rep. Act No. 9054 shall be transferred to the Bangsamoro Government; and
9. Intellectual property rights

and to “concurrent powers” over the following matters:<sup>24</sup>

1. Social security and pensions;
2. Quarantine;
3. Land registration;
4. Pollution control;
5. Human rights and humanitarian protection and promotion;
6. Penology and penitentiary;
7. Auditing;
8. Civil service;
9. Coastguard;
10. Customs and tariff;
11. Administration of justice;
12. Funding for the maintenance of national roads, bridges, and irrigation systems;
13. Disaster risk reduction and management; and
14. Public order and safety

Thus, under the Bill, the Central Government would function like the Federal Government of the United States – a government of enumerated powers with the balance of powers retained by the governments of the several states. The Philippine Government, however, is a unitary government. Under the Constitution, it has all the powers of sovereignty, except only those which are given by the Constitution or which may be given by law to the autonomous regions regarding the following matters:

1. Administrative organization;
2. Creation of sources of revenues;

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<sup>24</sup> Bill, art. V, § 2.

3. Ancestral domain and natural resources;
4. Personal, family, and property relations;
5. Regional urban and rural planning development;
6. Economic, social, and tourism development;
7. Educational policies;
8. Preservation and development of the cultural heritage; and
9. Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region<sup>25</sup>

The lopsided allocation of powers to the national government and the Bangsamoro Government is due in part to the fact that some powers granted by the Bill to the Parliament of the Bangsamoro Government are not legislative, but constituent in nature, whereas the Constitution clearly stipulates that what can be delegated to the government of the regions are those which are “legislative” in character and that the exercise of such legislative power shall be “subject to the provisions of [the] Constitution and national laws.”<sup>26</sup> Constituent powers cannot be granted; otherwise, the Constitution may be amended in a manner other than that prescribed in the Amendment Clause.<sup>27</sup>

Consider, for example, the following provisions of the Bill on mining. Article XIII provides:

Sec. 13. *Mines and Mineral Resources.* – The Bangsamoro Government shall have authority and jurisdiction over the exploration, development, and utilization of mines and minerals in its territory. Permits and licenses and the granting of contracts for this purpose shall be within the powers of the Bangsamoro Government.

Sec. 14. *Financial and Technical Assistance Agreements.* – The applications for financial and technical assistance agreements (FTAAs) covering mineral resources within the Bangsamoro shall be commenced at and recommended by the Bangsamoro Government to the President.

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<sup>25</sup> CONST. art. X, §§ 17 & 20.

<sup>26</sup> CONST. art. X, § 20.

<sup>27</sup> CONST. art. XVII.

The manner by which the Bangsamoro Government shall make the recommendation shall be in accordance with the mining policy that shall be adopted by the Bangsamoro Parliament.

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Sec. 17. – *Bangsamoro Mining Policy*. – Policies on mining and other extractive industries shall be drawn up by the Bangsamoro Parliament in accordance with its Comprehensive Sustainable Development Plan, as well as its over-all medium-term and long-term Bangsamoro Development Plan.

Section 13 of the Bill, as quoted above, is contrary to Article XII, Section 2 of the Constitution, which provides that the exploration, development, and utilization of the natural resources shall be under the “full control and supervision” of the National Government which may either undertake these activities itself or enter into co-production, joint venture, or production-sharing agreements with Filipino citizens or corporations 60 percent of the capital of which is owned by Filipino citizens. Furthermore, in violation of the constitutional provision that the grant of legislative powers to regional governments “shall be subject to the provisions of [...] national laws,”<sup>28</sup> the Bill gives the Bangsamoro Government the power to amend the Philippine Mining Act of 1995 (Rep. Act No. 7942), among other national laws.<sup>29</sup>

Nor can Congress give the Bangsamoro Government the power to “adopt” or “draw up” a policy regarding mining. The mining policy is set forth in the Constitution and, as such, cannot be changed except by constitutional amendment. The Constitution provides that the natural resources belong to the State; that with the exception of agricultural lands, natural resources cannot be alienated; that the exploration, development, and utilization of the natural resources shall be under the full control and supervision of the State; that although the State may make agreements for others to undertake these activities, the party it contracts with must be Filipino citizens or corporations or associations 60 percent of the capital of which is owned by Filipino citizens; that although the President of the Philippines may make agreements with foreign-owned corporations for technical or financial assistance for the large-scale exploration and utilization of minerals, petroleum, and other mineral oils, the agreements to be made must be “based on real contributions to the economic growth and general

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<sup>28</sup> CONST. art. X, § 20.

<sup>29</sup> Bill, art. XIII, § 8.



welfare of the country [and] the State shall promote the development and use of local scientific and technical resources.” This constitutional policy applies to mining in the entire country.<sup>30</sup>

The Bangsamoro Government cannot be given the power to determine the mining policy in the region without first giving it the power to amend the Constitution. Obviously, this cannot be done.

Another provision of the Bill which is of doubtful constitutionality is Article VII, Sections 9–11, which create a Bangsamoro Electoral Office. The Electoral Office shall be composed of three members who shall be appointed by the President of the Philippines upon the recommendation of the Bangsamoro Parliament. It will form part of the Commission on Elections (COMELEC) and perform the functions of the COMELEC in the Bangsamoro.

To be sure, the office will be created not by the Bangsamoro Government but by Congress in the event that the Bill is passed. The question that remains, however, is whether Congress can create such office, considering that the organization, composition, and functions of the COMELEC are provided in the Constitution.<sup>31</sup>

So here again is the basic flaw in the Bill, *i.e.*, the failure to distinguish constituent matters from legislative matters.

### **GENERAL SUPERVISION OF THE BANGSAMORO GOVERNMENT**

Under the Constitution, the President has general supervision of autonomous regions “to ensure that laws are faithfully executed.”<sup>32</sup> This power cannot be diminished, modified, or qualified. The Bill provides, however, that the President shall exercise general supervision over the Bangsamoro Government “consistent with the principle of autonomy and the asymmetric relation of the Central Government and the Bangsamoro Government.”<sup>33</sup>

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<sup>30</sup> CONST. art. XII, § 2.

<sup>31</sup> CONST. art. IX, C, §§ 1-11.

<sup>32</sup> CONST. art. X, § 16.

<sup>33</sup> Bill, art. VI, § 3.

Already reduced to “general supervision,” or mere oversight as distinguished from control, the Bill further emasculates the President’s power by providing that its exercise should be “consistent with the principle of autonomy and the asymmetric relation of the Central Government and the Bangsamoro Government.”<sup>34</sup>

This can make the strict enforcement of national laws within the Bangsamoro territory difficult to secure as law enforcement may have to take into account the local customs of the people. That can make a mockery of the laws of the Republic as the “asymmetric relation” of the two governments can always be waived to overrule any constitutional objection.

In sum, the Bill embodies a concept that is incompatible with the nature of our Constitution as a social compact. It considers the autonomous region to be a separate territory with its own territorial waters and recognizes this territory to be the “ancestral homeland” of a distinct group of people called Bangsamoros, who have the right to self-determination to chart their political future, whose government is parliamentary in form, possessing almost all the powers immanent from an internal and an external sovereignty. The support shown by foreign governments to the proposed Bangsamoro can easily translate into a support and recognition to make the Bangsamoro claim to self-determination, self-government, and eventual statehood legitimate.<sup>35</sup> What the Court said in the MOA-AD case also applies to the Bill:

[The] BJE is a state in all but name as it meets the criteria of a state laid down in the Montevideo Convention, namely, a permanent population, a defined territory, a government, and a capacity to enter into relations with other states.

Even assuming *arguendo* that the MOA-AD would not necessarily sever any portion of Philippine territory, the spirit animating it – which has betrayed itself by its use of the concept

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<sup>34</sup> Bill, art. VI, § 3.

<sup>35</sup> Compare with Milena Sterio, *On the Right to External Self-Determination: “Selfistans,” Secession, and the Great Powers’ Rule*, 19 MINN. J. INT’L L. 137, 176 (2010) (“It is the Great Powers that control the outcome of most self-determination struggles in today’s world, through their military, political, financial, and economic dominance, exercised in international organizations and directly through concepts such as humanitarian intervention and involuntary sovereignty waiver.”).

of *association* – runs counter to the national sovereignty and territorial integrity of the Republic.<sup>36</sup>

### THE “ASYMMETRIC POLITICAL RELATIONSHIP” OF THE CENTRAL AND BANGSAMORO GOVERNMENTS

Finally, the Bill cannot be justified on the ground that the relation of the Central Government and the Bangsamoro Government is “asymmetric,” meaning to say their relationship is “distinct from [the inter-governmental relationship in] other regions and other local governments.”<sup>37</sup> The question is precisely whether such relationship can be had if it is contrary to the Constitution. Such relationship cannot justify the recognition of the right of the Bangsamoro people to self-determination “to chart their political future.” The Constitution clearly states: (1) that the autonomous regions in Muslim Mindanao and in the Cordilleras must be created “within the framework of [the] Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines,”<sup>38</sup> and (2) that the laws of the regional governments must be “subject to the provisions of [the] Constitution and national laws.”<sup>39</sup> This was emphasized by the Court in its decision invalidating the MOA-AD of 2008,<sup>40</sup> and it is also by this standard that the constitutionality of the Bill must be judged.

### CONCLUSION

If the Bangsamoro is to be created as the price for peace in Mindanao, it must be by the will of the Filipino people as a whole, not solely by the will of the Bangsamoro people living in the Bangsamoro Territory; and it must be by constitutional amendment, and not by an act of Congress. It is noteworthy that in the Framework Agreement between the peace panel of the Philippine Government and that of the MILF, a Transition Commission was provided for, the task of which was to draft the Bangsamoro Basic Law and “to work on proposals to amend the Philippine Constitution for the purpose of accommodating and entrenching in the

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<sup>36</sup> *MOA-AD*, 568 SCRA at 482. (Emphasis supplied.) See also Vicente V. Mendoza, *The Legal Significance of the MOA on the Bangsamoro Ancestral Domain*, 83 PHIL. L.J. 489, 493-495 (2008).

<sup>37</sup> Bill, art. VI, § 1.

<sup>38</sup> CONST. art. X, § 15.

<sup>39</sup> CONST. art. X, § 20.

<sup>40</sup> *MOA-AD*, 568 SCRA at 483.

[C]onstitution the agreements of the Parties whenever necessary without derogating from any prior peace agreement.”<sup>41</sup> Only the Draft Bill on the Bangsamoro Basic Law was submitted by the Transition Commission. Why no proposals for constitutional amendments were also prepared has not been explained. But implicit in the second task of the Transition Commission is an acknowledgment by the parties to the various agreements forming integral parts of the CAB that the essential provisions of the agreements, which were to be embodied in the Basic Law, were incompatible with the provisions of the Constitution. Hence the need for constitutional amendments.

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<sup>41</sup> Framework Agreement on the Bansamoro, VII, 4(b) (Oct. 15, 2012); Annex on Transitional Arrangements and Modalities, I, C-D (Feb. 27, 2013).