Singapore Law Review
(2024) 41 Sing L Rev

TERRITORIAL AUTONOMY AND CONFLICT RESOLUTION: THREE CASE STUDIES FROM SOUTHEAST ASIA

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I. INTRODUCTION

This article looks at three Southeast Asian experiments in violent-conflict resolution by means of the creation of territorial autonomy: Aceh and Papua in Indonesia, and Bangsamoro in the Philippines. In these cases, there are historic and still ongoing attempts to find a compromise between, on the one hand, adherence of a minority community to the nation-state and, on the other hand, recognition of deep differences in ethnicity, culture, and religion between the minority and majority communities.

This article finds that success in achieving resolution, apart from reaching broad political agreement regarding the principle of autonomy, depends on addressing many issues of detail that throw into question the principles upon which the overall governance system of the nation-state is based, and even its capacity and willingness to achieve a balanced form of territorial autonomy. It also finds that these issues involve significant ongoing challenges, both from a governance and a development perspective, even after - sometimes long after - political agreement in outline has been achieved. The first part of this article provides the regional background. The second part discusses in detail the three case studies. The third provides analysis, and is followed by some general conclusions.

II. GEOGRAPHY, DIVERSITY, AND GOVERNANCE

Southeast Asian states, as a result of colonialism and the partially-related deep history of migration within and from outside the region, are complex in social composition and in human geography. This has posed, and continues to pose, many challenges of geopolitics and national integration.[1]

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[1] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).

Most Southeast Asian states (including Indonesia and the Philippines which are discussed here) were created within the lifetime of persons still living, but the communities they embrace find that their geographical location and social and political relations with other communities are deeply rooted in a history that by far predates the modern state. Very often, too, their law in the form of customary or religious law by far predates the positive law and the constitution of the nation state. This fact leads to legal pluralism, either in practice or by specific recognition and incorporation by the state. For example, John Bowen's[2] study of a family land dispute in the Gayo highlands of Aceh (a province that is the subject of one of my case studies) illustrates how resolution of the dispute involves a need to resort to *adat* (local custom), Islam, and state civil law, presenting three legal conceptions in a single matter relating to a single family. In Bowen's study, the assumption of *adat*'s fundamental authority, virtually spiritual in nature, is unquestioned by the villagers. Yet the Gayo are also an ethnic minority within a strongly Islamic part of Indonesia that has, since the time of that study, intensively and controversially implemented Islamic law.[3] In these modern Southeast Asian states, which are still struggling with issues of identity and belonging, the apparatus of government is nonetheless largely, and sometimes quite uncomfortably or even inappropriately, based on Western models and Western law.[4] For most of the region's history, territorial governance has been the main or only mode of governance, at least before the advent of colonialism. The region is largely made up of territories that used to be kingdoms in their own right, many of these eventually subdued by a metropolitan, centralizing power, whether based on colonial domination, as in the Philippines and Indonesia, or a predatory expanding kingdom, as in the case of Thailand.[5]

Despite centralized state-building in the last 200 years or so, Southeast Asian communities have always evinced a strong sense of localism, and sometimes a spiritual, custom-based connection to the land. Engel and Chua in their study of Southeast Asian law and society put it this way:[6]

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[2] John R. Bowen, *Islam, Law and Equality in Indonesia: An Anthropology of Public Reasoning* (Cambridge: Cambridge University Press, 2003) at 26-34.

[3] Simon Butt & Tim Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018) at 205ff [Butt & Lindsey, *Indonesian Law*].

[4] Wen-Chen Chang, Li-ann Thio, Kevin YL Tan, & Jiunn-rong Yeh, "Constitutional Cultures in Asia" in Wen-Chen Chang et al., eds, *Constitutionalism in Asia: Cases and Materials* (Oxford: Hart Publishing, 2014).

[5] Andrew J. Harding & Rawin Leelapatana, "Possibilities for Decentralisation in Thailand: A View from Chiang Mai" (2021) 1:1 Thai Leg Stud 76.

[6] David M. Engel & Lynette J. Chua, "State and Personhood in Southeast Asia: The Promise and Potential for Law and Society Research" (2015) 2 Asian JL & Soc 211 at 219.

> [C]oncepts of personhood [are] closely linked to physical and social places, or what we call 'locality' and 'social terrain', respectively. Together, they suggest that, in Southeast Asia, who one is depends on where one is. Localities help to constitute personhood through the cultures, communities, and sacred things situated there. They determine the social status and identity of persons, families, and groups, thus shaping personhood both individually and collectively. Similarly, the social terrain determines how people interact with one another, thereby constituting one's personhood in relation to other people.

This sense of locality, taken with legal pluralism, might lead us to question whether it presents not just a problem of nation-building but a possible way of dealing with issues of conflict in a diverse society. As a region of half a billion people, and of entrenched and extensive diversity, Southeast Asia may well offer an excellent laboratory for reflection on pluralism and territorial governance. As we shall see, legal pluralism is a necessary aspect of understanding all three case studies.

An approach to conflict resolution based on geography concedes, to one extent or another, the operation of different laws for different communities according to geographical as opposed to social fields.[7] This is a form of official legal pluralism, but one that is determined by geography more than subject-matter. Territorial autonomy defines an area – a province or parts thereof - as a minority "homeland", and powers are devolved to the territorial government asymmetrically so that the minority population may exercise a form of self-determination, at least in certain important areas of decision-making. As part of this self-determination, legal pluralism is often invoked in the sense of having different laws on the same question across different territorial units, especially in personal law matters, which tend to express the identity and social values of a minority group. In fact, it is difficult to see why asymmetrical autonomy would be needed, especially in Southeast Asia, if some form of legal pluralism is not to be invoked as part of the process.

Human geography is of enormous importance in finding and mediating the most useful mode conflict resolution, because a great deal depends on the distribution of the population. In some cases, it is possible to define an area or areas that are more or less exclusively inhabited by a minority community that seeks a homeland, and such area may form a basis for the granting of concessions.

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[7] Tove H. Malloy & Francesco Palermo, eds, *Minority Accommodation through Territorial and Non-territorial Autonomy* (Oxford: Oxford University Press, 2015).

These may be powers over religion or custom (the right to recognize or regulate religion or observance of custom); the ability to make special rules about language and education; or rights of access to public goods such as public service positions for an under-privileged minority. All of these aspects of self-determination are relevant to the case studies. Alternatively, they may simply be general powers over policy areas that have no specific relevance for a minority, but afford an opportunity to legislate or make policy choices in a culturally-specific or politically legitimate manner. If, however, a minority community is not identified with a specific territory, but is evenly spread geographically or compacted into small areas the size of a village, then clearly territorial solutions are not possible. This latter position is the case for most minorities in Southeast Asia, which perhaps explains why the territorial solution has not been adopted generally across the region, but only in specific and violently contested areas. Issues may of course arise where there are majority communities, or other minority communities, living in enclaves within the minority homeland, such as the Gayo in Aceh. This is a major policy consideration that is not easy to cater for, as is seen in the Bangsamoro case study below. The more compacted a minority community is, the easier it is to find territorial solutions; but this 'compacted-ness' needs to be found in a large enough area for autonomy to be meaningful. A minority may well of course be spread across the country in addition to being concentrated in a particular area or areas, as is the case with Filipino Muslims. It should be noted that, despite this article's focus on territorial autonomy, only a few million of Southeast Asia's half a billion people live under asymmetric territorial autonomy. Aceh has 5.4 million people, Papua 3.5 million, Bangsamoro 4.4 million, and there are not many other examples of territorial autonomy across the region. Diversity itself is of course much more prevalent than these population statistics would suggest, but it is apparent that minorities are not in general associated with a homeland the size of a province. There are some exceptions in Thailand and Myanmar.

What, then, precisely, are the advantages and disadvantages of territorial autonomy in the context of Southeast Asia? Territorial autonomy offers the legally guaranteed security of control over a minority's own traditional geography. But it also involves giving special asymmetric powers that are not given to other regions, possibly creating political tensions at all political levels.[8] It reduces the cogency of demands for secession; but at the same time, by definition, it also emphasizes difference, potentially dragging back the project of nation-building, or even raising new

[8] Yash Ghai & Sophia Woodman, eds, *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge: Cambridge University Press, 2013).

issues of identity. For example, Islamic jurisdiction did not feature strongly in secession/autonomy claims in Aceh until it became part of the 2006 settlement; it is now the main marker of difference in that province.[9] Asymmetry also points up difference in stark constitutional terms, which from one aspect is a significant guarantee, but from another is a provocation to units not granted such autonomy. Apart from these considerations, we will see that the detailed implementation of territorial autonomy raises many issues of detail that determine success or failure. Here we will see both successes and failures.

III. SOUTHEAST ASIAN PARTICULARITIES

In Southeast Asia, the distribution of populations owes relatively little to national or even provincial boundaries. Southeast Asian states, as we have seen, are mainly of very recent origin, or else have radically altered their boundaries to include minority areas. They have therefore experienced intractable problems of nation-building. National ideologies such as Indonesia's *pancasila* tend to stress unity, precisely because the existence or continuance of such unity is challenged.[10]

In the centralization of power during the 1960s-80s, Southeast Asian pluralism tended to be eclipsed in favour of an all-encompassing nationalism, expressed as nation-building and developmentalism.[11] This was often achieved at the expense of cultural autonomy for minority groups and often by violent suppression, as was seen in Burma/Myanmar's chronic border wars and also in the cases discussed here. Naturally there had to be a reaction against this loss of autonomy, and general decentralization, undertaken in the Philippines since 1987 and Indonesia since 1999, is one fruit of that reaction. In the Indonesian case, the end of the new-order period in 1998 ushered in a dangerous period of inter-ethnic violence and potential secessions. These were forestalled by decentralization to the lowest governmental levels – cities and regencies – as opposed

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[9] Edward Aspinall, "Special Autonomy, Predatory Peace and the Resolution of the Aceh Conflict" in Hal Hill, ed, *Regional Dynamics in a Decentralised Indonesia* (Singapore: Institute of Southeast Asian Studies, 2014) 460 at 470 [Aspinall, "Special Autonomy"].

[10] Rawin Leelapatana & Abdurrachman Satrio Pratomo, "The Relationship Between a Kelsenian Constitutional Court and an Entrenched National Ideology: Lessons from Thailand and Indonesia" (2020) 14:4 Vienna J Intl Const L 497.

[11] Meredith Woo-Cumings, ed, *The Developmental State* (New York: Cornell University Press, 1999).

to provinces, where increased powers might simply fuel secession.[12] Decentralization in the Philippines finds its origin in the 1987 Constitution, which defined democratic governance in the post-Marcos era. The entrenchment of local decentralization in the Constitution at Article X (compare Indonesia's Article 18) is the most definitive and structured of any in the region, and was fulfilled in the impressive Local Government Code 1991.[13]

The theme of decentralization was taken up concertedly by the international community after the end of the Cold War; but it was already a happening event across much of Southeast Asia. Thus decentralization predated, but also in some ways facilitated and was synchronized with, all three of the examples of granting of territorial autonomy discussed below.[14] In the following subsections, I set out the three major instances of territorial autonomy in the region, what created their necessity, and how they attempt to resolve violent conflict.

A. Special Autonomy in Aceh

For a very long time the province of Aceh has asserted its unique identity as having a more Islamic culture compared to the rest of Indonesia[15], with intermittent warfare breaking out during several periods over the last 300 years in attempts to sever the province from central rule, both of the Dutch colonial government and the Indonesian republic. Separatists have argued that Aceh never really agreed to be part of the Indonesian republic in 1945, and despite the implementation of asymmetric territorial autonomy since 1999 and especially since 2006, there are still those who advocate secession. They have also argued that Aceh is disadvantaged in terms of development and exploitation of natural resources. A rebel group, Gerakan Aceh Merdeka (GAM), has been the main advocate of the position in recent decades, both in mounting a damaging insurgency against Indonesian forces between 1989 and 1999, resulting in extensive violence on both sides, and in

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[12] Simon Butt & Tim Lindsey, *The Constitution of Indonesia: A Contextual Analysis* (Oxford: Hart Publishing, 2012); Donald L. Horowitz, *Constitutional Change and Democracy in Indonesia* (Cambridge: Cambridge University Press, 2013) [Horowitz, *Constitutional Change and Democracy*].

[13] Mendiola Teng-Calleja, et al, "Transformation in Philippine Local Government" (2017) 43:1 Local Government Stud 64.

[14] Andrew J. Harding, "The Constitutional Dimensions of Decentralisation and Local Government in Asia" in Adriaan W. Bedner & Barbara M. Oomen, eds, *Real Legal Certainty and its Relevance: Essays in Honour of Jan-Michiel Otto* (Leiden: Leiden University Press, 2018) [Harding, "The Constitutional Dimensions of Decentralisation"].

[15] This is specifically recognised in the Preamble to the Law on Governing Aceh 2006, for which, see below.

forming the leading political party, Parti Aceh, implementing territorial autonomy since it was realised from 2006.[16]

The process dealing with the Aceh insurgency was Indonesia's first item on the decentralization agenda, which began in 1999, and is properly seen, as we shall see, in that context.[17] Moves towards establishing peace resulted in laws on Aceh autonomy being passed in 1999 (Law No. 44/1999) and 2001 (Law No. 18/2001), even as large protests demanded a referendum on independence. The two attempts in 1999 and 2001 failed to resolve the conflict, as they did not go far enough in achieving autonomy to satisfy GAM demands, and continuing disturbance in the province made implementation virtually impossible. Indeed, the autonomy laws did little more than embrace the decentralization that was taking place across all of Indonesia during that period, and embodied imposed concessions rather than concerted, negotiated outcomes. Nonetheless, lessons were learned from these laws, and much of territorial autonomy as we now see it is based on these two precedents, for example the granting of *shari'a* jurisdiction and economic concessions.[18]

The GAM leadership continued to demand independence, while central government forces occupied the province during 2003 and vowed to end the insurgency by military victory. What eventually broke the impasse was not so much new concessions by the Indonesian government as the devastating tsunami that hit Aceh in December 2004, which killed more than 120,000 people in the province's coastal areas. Focusing minds on the terrible plight of the people, this disaster resulted in talks between GAM and the Indonesian government beginning in Helsinki from early 2005. These talks resulted in permanent peace accords later in that year, which were given effect in the Law on the Government of Aceh 2006 (Law 11/2006) (LGA).[19] A sudden switch by GAM from demanding independence to demanding autonomy opened a path to agreement. The LGA involved the granting of asymmetric powers to the province over a number of subjects, especially religion, customary law, education, and natural resources.[20] It is a comprehensive piece of legislation that acts as a special constitution for Aceh embracing both provincial government and central-local

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[16] Edward Aspinall, *Separatist Rebellion in Aceh, Indonesia* (Stanford: Stanford University Press, 2009) [Aspinall, *Separatist Rebellion in Aceh*].

[17] Horowitz, *Constitutional Change and Democracy*, *supra* note 12.

[18] Aspinall, "Special Autonomy", *supra* note 9.

[19] Aspinall, *Separatist Rebellion in Aceh*, *supra* note 16.

[20] Hans-Joachim Heintze, "The Autonomy of Aceh" in Jens Woelk & Roberto Toniatti, eds, *Regional Autonomy, Cultural Diversity and Differentiated Territorial Government: The Case of Tibet – Chinese and Comparative Perspective* (Abingdon: Routledge, 2017).

relations. However, it has been criticized for not going very far beyond the general decentralization on which it is primarily based, and its implementation has been dogged by excessive delay in negotiating and enacting necessary central government regulations – a perennial problem in Indonesia. The eventual extent and shape of autonomy remains somewhat obscure and contested even 15 years after the LGA was enacted.

One critical issue in Aceh autonomy is the right to veto central laws as applied to Aceh. GAM succeeded in inserting into the Helsinki agreement a provision that laws, executive orders, and regulations affecting the province would have to be "taken in consultation with and with the consent of the legislature of Aceh" or "implemented in consultation with and with the consent of the head of the Aceh administration".[21] Accordingly, Aceh would have had a veto over national laws and regulations affecting the province. In fact, the LGA waters-down this agreement, requiring merely the "consultation and advice" of the Aceh legislature in respect of laws, and the Governor of the province in respect of administrative measures; as in many other areas, details regarding such consultations are to be established by presidential regulations.[22] The central government can also cancel any *qanun* (local regulation) simply on the ground that it contravenes the public interest, other qanun, or higher laws.[23]

Aceh autonomy is to some extent a matter of symbolism, but it does go further than general decentralization in some important respects. Of Indonesia's provinces, only Aceh has powers over religion. Although Islamic jurisdiction was not a major claim made by GAM in the peace process, it was offered by the Indonesian government in an attempt to undercut GAM's appeal. This offer is, however, being embraced now with enthusiasm by the former GAM leaders who govern Aceh.

This key outcome of autonomy requires further explanation in terms of the legal pluralism it implicates. The province has power to implement Islamic law via *qanun*, distinguishing the province from the whole of the rest of Indonesia.[24] Aceh's *shari'a* court jurisdiction itself goes beyond the rest of Indonesia and other parts of Southeast Asia, in embracing both criminal and commercial

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[21] Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement (15 August 2005), Article 1.1.2.

[22] Law on the Government of Aceh 2006, Article 8; Aspinall, *Separatist Rebellion in Aceh*, *supra* note 16 at 470 ff.

[23] Law on the Government of Aceh 2006, Article 235(2).

[24] Law on the Government of Aceh 2006, Articles 13 and 16.

law as well as the more obvious subjects of family law and succession that tend to define *shari'a* jurisdiction elsewhere. Islamic jurisdiction has notably been exercised through *qanun* outlawing, for example, gambling, consumption of alcohol, and sexual immorality. Most significant is the *qanun jinayat* or Islamic criminal code (Qanun Aceh No. 6/2014), which has been controversial.[25] This law involves severe *hudud* and *ta'zir* punishments, and applies to Muslims in Aceh as well as non-Muslims who commit offences with Muslims or who violate the *qanun* in terms of offences not provided in the Criminal Code, which is of course of general application. For Muslims, the *qanun jinayat* takes precedence, according to its own terms.[26] There are many objections to this *qanun*, and its validity has been challenged, albeit unsuccessfully, in the Supreme Court, on the grounds that it violates the hierarchy of laws and the Law on Law-making.[27] The Supreme Court has power, not yet exercised, to rule on the validity of *qanun*.[28]

There is of course a cost to such arrangements. The *qanun jinayat* is a legal irritant in a number of respects.[29] Such law may well not be in conformity with human rights as expressed in the Indonesian Constitution, in terms of being oppressive to women or minorities, or involving cruel or unusual punishments; and their applicability to non-Muslims is unprecedented in the region. The tension with national criminal law is also an aspect of the legal irritant. However, as Butt and Lindsey have stated, "[t]he result is the most ambitious attempt to formally apply Islamic law in modern Southeast Asia".[30]

Another area of legal irritation and controversy is the internal organization of the political process in Aceh. Three examples of such irritation can be advanced. First, a ban imposed by the LGA on independent candidates in elections was struck down by the Constitutional Court.[31] Secondly, Article 82 of the LGA, on regulation of local political parties, includes a provision

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[25] Butt & Lindsey, *Indonesian Law*, *supra* note 3 at 205.

[26] Qanun Aceh No. 6/2014, Article 72.

[27] Supreme Court Decision 60/P/HUM/2015.

[28] Law on the Government of Aceh 2006, Article 235; It is the Supreme Court, and not the Constitutional Court, who has the power to exercise judicial review of subsidiary legislation such as qanun.

[29] Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies" (1998) 61 MLR 15.

[30] Butt & Lindsey, *Indonesian Law*, *supra* note 3 at 183.

[31] Simon Butt, "Indonesia's Constitutional Court and Indonesia's Electoral Systems" in Andrew J. Harding and Albert H. Y. Chen., eds, *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge: Cambridge University Press, 2018) 214 at 231-232) [Butt, "Indonesia's Constitutional Court"]; Constitutional Court Decision 005/PUU-V/2007.

prohibiting local parties from endangering the integrity of the (unitary) Republic of Indonesia. Thirdly, a government regulation (No. 20/2007) on local parties gives the provincial office of the (central) Ministry of Law and Human Rights, but not the provincial government, the power to approve their registration. This impacted on GAM itself, which had to change its name to Parti Aceh to satisfy the Ministry's requirements.[32]

A real fear that GAM had during the process of negotiation was that autonomy could be undermined over the long term by slow-slicing or manipulation. This was realistic, because many guarantees under the LGA are made subject to the enactment of law and regulations; and quite apart from this many important matters required to be implemented by regulations.[33]

Crucial to the entrenchment of autonomy in practice has been the positioning of former GAM leaders in the provincial polity. Parti Aceh has proved to be a dominant party in gubernatorial, provincial and local elections. The new economic dispensation, which is partly due to increased local shares of natural resource exploitation, and partly due to additional funding from the centre as such revenues have declined, has enabled the provincial and local governments as well as individual leaders to become prosperous and opportunities exist for corrupt practices, patronage, and rent-seeking. This factor has been seen as crucial in adhering these leaders to the new autonomy system. As Aspinall puts it, "most former rebels are too busy pursuing their political and economic advancement to seriously consider a return to armed conflict".[34]

The settlement based on territorial autonomy remains somewhat fragile, the danger being that of increased control from Jakarta, making use of ambiguous provisions in the LGA. On the plus side, Aceh autonomy has ensured peace in the province since 2004, something rarely experienced in the last 300 years; and Aceh remains part of the republic, which few had predicted during 1999-2003.

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[32] Aspinall, "Special Autonomy", *supra* note 9 at 468. Aspinall counted that there are 49 such provisions that are made subject to the enactment of law and regulations, and 99 other important matters that are required to be implemented by regulations.

[33] *Ibid*, at 467, 470.

[34] *Ibid*, at 479.

B. Special Autonomy in Papua

The Indonesian province now known as Papua forms most of the Western part of the island of New Guinea, divided between Indonesia and Papua New Guinea, and its population is mainly Indigenous Melanesian. It contains some of Indonesia's remotest areas. A secessionist group, Organisasi Papua Merdeka (OPM), has the agenda of complete independence from Indonesia and claims that Papua, not part of the republic in 1945, was coerced into joining it without its assent in 1969, following a controversial UN-sponsored referendum. OPM has staged low-level resistance to Indonesian rule since the 1960s. There are several groups variously pursuing armed resistance, international diplomacy, and territorial autonomy as means to achieving "*merdeka*" (independence).[35] As with Aceh, there are issues of local culture and exploitation of natural resources, allied with the province's under-development. Papuan autonomy was part of the decentralization plan, and is provided by the Law on Special Autonomy for Papua Province 2001 (Law No. 21/2001) (LSAPP). The idea was to undercut the OPM with devolution of powers, but several mistakes followed.

What had been a single province in 1999 was divided into three, then into two provinces. This confusing and damaging process has been accompanied by an almost bewildering and persistent form of administrative fragmentation - an aspect of implementation of autonomy that is not present in the other case studies. In this process referred to as *pemekaran* (blossoming), large numbers of regencies and districts have been created, which allows the province to be flooded with new government funding. There seems to be little in the way of real strategy or thought devoted to why or how this process should be undertaken, but the effect has been to reinforce the political importance of *suku* or clans and sub-clans. Corruption has increased, violence has occurred around elections in some new areas where existing social fault lines were exacerbated, and poor governance conditions have become distressingly prevalent. An official central-government administrative performance review in 2011 showed Papua to be the worst-performing province and to contain the worst-performing districts. Three out of four Indonesian districts threatened with "cancellation" in 2013 were in Papua.[36]

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[35] Camellia Webb-Gannon, "Merdeka in West Papua: peace, Justice and Political Independence" (2014) 56:2 Anthropologica 353 at 362.

[36] Cillian Nolan, et al, "The Political Impact of Carving Up Papua" in Hal Hill, ed, *Regional Dynamics in a Decentralised Indonesia* (Singapore: Institute of Southeast Asian Studies, 2014) 409 [Nolan, "The Political Impact of Carving up Papua"].

The most significant features of the LSAPP are, first, its provision for return of 70% of oil and gas revenues to the province for 25 years[37]; and second, the creation of a Papuan People's Assembly (the Majelis Rakyat Papua (MRP)). The MRP's main purpose is to advise the Papuan government on the protection of the rights of the Indigenous people. Under the LSAPP, the MRP is to comprise equal numbers of representatives of traditional *adat* communities, women, and religious figures, selected by their respective constituencies.[38] The provincial government is under a duty, further, to protect customary law and Indigenous land rights.[39]

The main problem with the LSAPP is its provision for MRP membership, which involves appointment of 25% of its members. This provision has been challenged in the Constitutional Court on grounds of lack of equality of access to opportunity and benefit (under the Constitution, Article 28H(2)), and breach of provincial powers to regulate and administer matters of government (under the Constitution, Article 18(2)). The decision recognizes the legitimacy of making appointments to the MRP as part of affirmative action to enable *adat*-community representatives to participate in decision-making and protect the environment and Papuan customs.[40] In another decision, the Constitutional Court allowed a cultural exception to ordinary voting rules in a case involving the customary *noken* system, which is used in parts of Papua.[41] Under this system the village chief determines the distribution of votes by implicit consent of the villagers, described by the Court as "community agreement" or "acclamation". This was justified by reference to the obligation under Article 18B(2) of the Indonesian Constitution to respect *adat* communities and their traditional rights, and the need to maintain harmony in traditional communities with their own norms concerning elections.[42] It has, however, been criticised for treating Papuan rights as less important than those of Indonesians generally.[43]

Developmentally, Papua presents the paradox that, while it is one of the wealthiest parts of Indonesia in toto, this wealth, natural-resource-derived, is confined to one enclave and sits statistically with the province being one of Indonesia's poorest, with five out of the country's ten

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[37] The proportion of the return of oil and gas revenues to the province then reduces to 50%.

[38] Law on Special Autonomy for Papua Province 2001, Article 19(1).

[39] Law on Special Autonomy for Papua Province 2001, Article 11.

[40] Constitutional Court Decision 4/PHPU.D-XI/2013

[41] Constitutional Court Decision 47/PHPU.A-VII/2009.

[42] Butt, "Indonesia's Constitutional Court", *supra* note 35 at 236-238.

[43] Nolan, "The Political Impact of Carving up Papua", *supra* note 36 at 424.

poorest districts in 2011 being Papuan.[44] Papua also has one of the slowest rates of increase in standards of living. The developmental challenge, which has hardly begun to be met, is to reduce poverty and uneven development across the province as a whole. "There can be no doubt", concludes one careful analysis, "that this region is Indonesia's most serious development challenge"; and it attains very low scores as regards human development.[45]

Governance indicators remain generally poor, although the 'Papuanisation' of local government has been one positive outcome of administrative changes. Little progress has been made over the last two decades in devolving powers much beyond those granted generally in Indonesian decentralisation. It is too early to say whether territorial autonomy in Papua will bring with it the dividend of a cessation of violence. UN experts estimate that as 60,000-100,000 Papuans have been displaced due to violence since 2018.[46] It is also reported that the province remains at risk of further violence.[47]

C. Bangsamoro Autonomous Region, Muslim Mindanao (BARMM)

The Philippines also presents a very diverse society, with more than 175 ethnic groups, 120 languages, and 7600 islands. Similarly to Indonesia, general decentralization is constitutionally mandated under the 1987 Constitution, Article X, which is amply fulfilled in the Local Government Code 1991. Sections 15-21 of that Article require the enactment of special autonomy laws in Muslim Mindanao and the Cordilleras.[48] This requirement is based on areas sharing what section 15 calls "common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics". As with Indonesia, decentralization is designed both to build the nation by recognising diversity and provide a bulwark against a centralizing dictatorship.

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[44] Hal Hill & Yogi Vidyattama, "Hares and Tortoises: Regional Development Dynamics in Indonesia" in Hal Hill, ed, *Regional Dynamics in a Decentralised Indonesia* (Singapore: Institute of Southeast Asian Studies, 2014) 68 at 75.

[45] *Ibid*, at 79.

[46] United Nations Human Rights Council, "Indonesia: UN Experts Sound Alarm on Serious Papua Abuses, Call for Urgent Aid" (1 March 2022), online: *ReliefWeb*, <https://reliefweb.int/report/indonesia/indonesia-un-experts-sound-alarm-serious-papua-abuses-call-urgent-aid>.

[47] Sebastian Strangio, "Indonesia's Papua Region at Risk of Mass Violence, Report Claims" (27 July 2022), online: *The Diplomat*, <https://thediplomat.com/2022/07/indonesias-papua-region-at-risk-of-mass-violence-report-claims>.

[48] The purport of this section has been clarified by the Supreme Court of the Philippines in *Province of North Cotabato v Government of the Republic of the Philippines*, G.R. No. 183591 (2008).

Attempts have been made since 1987 to find a similar solution to those in Aceh and Papua for the region formerly known as Muslim Mindanao, but now known as Bangsamoro.[49] The grievances of the Bangsamoro movement include economic discrimination and lack of economic opportunity.

As with Aceh, there is a long history behind the claim for autonomy, based on the Muslim identity of the region. Muslim Filipino identity has been a basis for claims for recognition of separate identity since at least 1921, when the first claim was made against the United States' administration. The claim became backed by violence after the Jabidah massacre of 1968, which involved the slaughter of Muslim members of the armed forces in disputed circumstances.[50] The development of Bangsamoro identity is a complex story, as this identity has been represented by many different groups over the years, which have often split over fundamental, existential issues. Currently there are ten political parties operating under the Bangsamoro Organic Law of 2018 (BOL). Two are national parties, three are local ethnic parties, and five are Muslim parties, although these too have ethnic demographics.[51] Splits have occurred regularly within the Bangsamoro movement, represented mainly by the Moro National Liberation Front (MNLF) and the Moro Islamic Liberation Front (MILF), over three issues. The first issue concerns dealing with the central government with a view to special autonomy versus insisting on secession under an independent state; second, Muslim versus ethnic Bangsamoro identity[52]; and thirdly, the territorial extent of the claim for recognition. The last of these represents a debate between embracing six provinces of Mindanao as a core homeland (favoured by MILF), or embracing autonomy for 13 Mindanao provinces having a Muslim majority (favoured by MNLF).[53] This is a good example of the complexity attending claims for autonomy.

Regional autonomy, extensive in its potential breadth, is as we have seen entrenched in the constitution. Pursuant to this provision the Organic Act for the Autonomous Region in Muslim Mindanao (Republic Act No. 6734) was passed in 1989. However, successive attempts to make

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[49] "Bangsamoro" is made up of "bangsa" (nation) and "Moro" (Moors or Muslims, as designated in Spanish).

[50] Rizal Buendia, *The Politics of the Bangsamoro Basic Law* (Manilla: Yuchengco Centre, D La Salle University Manilla, 2015) at 4 [Buendia, *The Politics of the Bangsamoro Basic Law*].

[51] Hansley Juliano, "Opportunities and Pitfalls for Political Communication for the 2022 BARMM Polls", online: *Access Bangsamoro* <https://www.access-bangsamoro.ph/posts/think-pieces/opportunities-and-pitfalls-for-political-communication-for-the-2022-barmm-polls>.

[52] There are 13 distinct ethno-linguistic groups amongst Filipino Muslims, as well as non-Muslim, people with Bangsamoro identity.

[53] Buendia, *The Politics of the Bangsamoro Basic Law*, *supra* note 61.

autonomy work proved unsuccessful, being rejected by some groups as creating too little autonomy for the region.

Peace talks continued over several years between the national government and groups advocating autonomy, but these were punctuated by episodes of violence. A comprehensive agreement had been reached in 2014, but the region was destabilized by Islamic extremism, notable examples of which are the Mamasapano incident in 2015, and the seizure of the regional capital Marawi by the Islamic fundamentalist group Abu Sayyaf in 2017, which led to extensive military action, a siege, and widespread destruction of the city.[54]

As a result of further talks, the Bangsamoro Organic Law (BOL) was passed in 2018 (Republic Act No. 11054). The peace process led to a double referendum in early 2019 and the consequential creation under the BOL of the new BARMM, and a Bangsamoro Transitional Authority (inaugurated in March 2019) to oversee the implementation of regional autonomy. The referenda established the acceptability of the principle of autonomy and then established which of the municipalities and *barangay* (villages) would join the new region; 63 *barangay* in Cotabato province did so. As a result of the referenda, the BARMM region is geographically odd.[55] It comprises three major cities, 116 municipalities and 2.488 *barangay*.[56]

Under the BOL, the BARMM is currently in transition to full autonomy with the projected election of a local parliament in 2025.[57] As with the special autonomy laws for Aceh and Papua, the BOL acts as a constitution for the new region, covering all aspects including central-local relations, and containing economic measures.

The implementation of asymmetrical autonomy, the ultimate outcome of which still remains to be seen, is not without problems as a solution to the ongoing conflict. The organic law provides for a Westminster-type parliamentary system of government with a Chief Minister and a regional

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[54] Imelda Deinla & Georgi Engelbrecht, "A New Dawn for Bangsamoro Democracy? Political Autonomy and Inclusive Participation in Post-conflict Mindanao" (2019) L'Observatoire de l'Asie du Sud-Est.

[55] For example, Isabela City is not part of the BARMM region, but the rest of the province of which Isabela City is part of is included.

[56] Imelda Deinla & Veronica Taylor, "Towards Peace: Rethinking Justice and Legal Pluralism in the Bangsamoro" (2015) Regulatory Institutions Network Research Paper No. 63 at 81.

[57] Ruth Abbey Gita-Carlos, "Duterte Resets BARMM Elections to 2025" (29 October 2021), online: *Philippine News Agency* <https://www.pna.gov.ph/articles/1158190>.

head of state, that sits uneasily as another legal irritant within the Philippines' presidential system, and is considered by some to be, unconstitutional. For this reason, there is much emphasis during the current preparatory period on political parties – how they are formed, how they can operate, and how they can work with each other. The last of these is especially important in a fragmented and parliamentary system; and especially difficult when parties are organised mainly along ethnic lines and operate within social structures that are patriarchal and clan-based.[58]

Partly because of the extent of autonomy granted under the BOL, the BARMM has spawned a debate around the creation of a federal system and wider constitutional reform, for which the BARMM may be seen as a pilot scheme. Even though it does not appear that federalism proposals are likely to yield fruit in terms of actual reform[59], regional autonomy has become a general problem for the Philippines. The current debates concerning federalism proposals owe much to the fact that other regions resent the special concessions to the BARMM, and federalism would offer those regions a similar degree of autonomy. Already in 2018, a new demand emerged for recognition of autonomy for Bangsa Sug, a region comprising other Mindanao provinces that distinguish themselves from Bangsamoro.[60]

The issue of legal pluralism lies of course at the root of the problem and as with Aceh a central issue is the justice system under which *shari'a* courts exist at lower and appeal levels, applying Islamic law, while Indigenous people are dealt with separately under their own adat, providing yet another layer of legal pluralism.[61]

With regard to the critical issue of inter-governmental relations the BOL establishes the National Government-Bangsamoro Government Intergovernmental Relations Body (IGRB). The role of this body moving forward will be critical for effective implementation and policy development, given post-conflict tensions and the extent of mutual distrust and the historic lack

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[58] Maria Cecilia Macabuac-Ferolin & Norma Constantino, "Localising Transformation: Addressing Clan Feuds in Mindanao Through PCIA" (2014) 9:1 Journal of Peacebuilding and Development 10.

[59] Eimor P. Santos & Chad de Guzman, "Proposed Charter for Federal PH Weakens Senate, Eyes Prime Minister" (9 January 2018), online: *CNN Philippines* <http://cnnphilippines.com/news/2018/01/09/draft-proposal-federalism-PDP-Laban-senate-prime-minister.html>.

[60] Al Jacinto, "Isabela City, Sulu Reject Bangsamoro Organic Law" (23 January 2019), online: *The Manilla Times* <https://www.manilatimes.net/2019/01/23/second-headline/isabela-city-sulu-reject-bangasmoro-organic-law/500921>.

[61] Imelda Deinla, "Legal Hybridity, Trust, and the Legitimacy of the Shari'ah in the Bangsamoro" (2019) 41 Law & Policy 198.

of coordination and cooperation. Improvements in education, security, and social welfare will be needed as well as development and natural-resource-conservation policies. BARMM is less developed and less urbanised than its adjoining regions.

Regional autonomy needs expression not just externally but internally. The Bangsamoro Parliament, by virtue of the BOL, Article VII, Section 6, will be comprised of 80 members. Under Section 7, there is classification of MPs, as follows:

> (a) Party representatives (40 seats), elected by proportional representation.
> (b) Parliamentary district seats (not more than 40%, or 32 seats), elected by a plurality of votes in the district.
> (c) Reserved seats and sectoral representatives (at least 10% or eight seats), two each for non-Moro Indigenous peoples and settler communities, and one each for women, youth, traditional leaders, and *Ulamas* (learned religious scholars).

An Electoral Code was enacted in March 2023 (Bangsamoro Autonomy Law No. 35/2023).

The reasoning behind the adoption of a parliamentary system is two-fold. It is considered in the BARMM that parliamentarism offers more executive accountability than presidentialism, and that it is also more reflective of Islamic governance in requiring consultation and cooperation. However, there is no experience of operating a democratic parliamentary system that depends very much on an understanding of constitutional conventions correcting governance.[62]

Over several decades the state has failed to address the grievances in the BARMM, based on the linked phenomena of discrimination and underdevelopment. As one Filipino commentator puts it[63], the causes of the conflict are:

> [I]nsubstantial political autonomy; socio-economic grievances and deprivation; and perceived injustice, discrimination, and alienation of the people from the mainstream of Philippine political and economic development. The issue boils down to political and

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[62] Frank Kayitare & Nyla Grace Prieto, "Strategic Planning on Forming Political Parties in Bangsamoro" (31 October 2019), online: *International Institute for Democracy and Electoral Assistance* <https://www.idea.int/news/strategic-planning-forming-political-parties-bangsamoro>.

[63] Buendia, *The Politics of the Bangsamoro Basic Law*, *supra* note 61 at 25.

economic equity and social justice, the crux of the state's responsibility and kernel of nation's spirit.

As with Aceh and Papua, the process of negotiating territorial autonomy has at least dampened a desire to proceed by violent means, and discontent focuses on the process of implementing autonomy rather than the question whether it should proceed at all.

IV. COMPARATIVE INSIGHTS

Despite the differences between the three cases, they reveal a common pattern in several respects and raise some common issues. First, issues of ethno-religious identity and history lie at the root of the demand for autonomy, but these are accentuated by underdevelopment, unequal development, and disproportionality in natural resources exploitation. Grievances of various kinds often accumulate under a flag once it is raised. Thus, development has to be addressed as well as issues of self-determination. Of course, development issues are not confined to ethnic peripheries, but reflect uneven development as a larger, systemic problem. Second, the struggles for agreement on autonomy have featured, and continue to be punctuated by, violence led by a separatist or autonomy-seeking militarized group or party, with fear of national fragmentation or secession driving opposition from the centre. Third, the solution in terms of autonomy is expressed in a special regional autonomy law which is plenary in scope, and is even constitutionally mandated in the case of BARMM. This law provides to one extent or another for legal pluralism in terms of local courts administering local or religious law, or doing so to a greater extent than in other regions. Fourth, regional autonomy leads to various irritants that endanger the process. These involve constitutional issues such as intergovernmental relations, unconstitutional laws affecting fundamental rights, especially equality and civil and political rights, and internal political organisation and representation within the territory. These in turn also raise questions about the equal treatment of other regions within the nation state.

To a large extent, these issues still remain to be resolved by a process of implementation or by a process of mutual adaptation of contradictory laws and principles. This can only occur by a process that moves from major to relatively minor but still potentially deal-breaking issues. The issues listed mainly implicate the entire nation state, not simply the region directly affected.

One obvious overall conclusion we can draw from this survey is that regional autonomy is revealed not as an ideal but as a least damaging solution for instances of continuing violence and/or potential separatism. It has proved very difficult to negotiate these to a state of finality. Typically, across these three cases, as we have seen, the process has been punctuated by violence, which is not necessarily at an end, and has also been uncertain in its implementation and even its end-point. Even though it might seem to have had some success, in the limited sense of avoiding secession and offering a significant hope of gradual adaptation and integration, it would be an exaggeration to say that regional autonomy has become entrenched, accepted, and certain in its parameters. It remains for the most part stuck at the level of experimentation and controversy. Regional autonomy, on this evidence, appears to address the issue of bare adherence to the nation state, but fails to address the issue of what we may term real-time nation-building.

One issue that stands out in these Southeast Asian cases, possibly in contrast to other regions of the world, is the issue of legal pluralism, which arises in the sense that autonomous regions can, as we have seen in all three instances, have their own court and legal system that may differ significantly from the rest of the nation state, especially, but not only, in personal law matters.

This prompts us to consider, by way of comparison, general decentralization as a solution to issues of localism and identity.[64] Decentralization can to some extent cater for issues of local identity. There are, for example, numerous ways other than through enforcement of personal law that ethnic culture and religion may be expressed: educational medium and curriculum; social care; building, planning and heritage preservation; markets and food regulation; religious buildings and festivals, and public art and symbolism, for example, spring to mind. Even the classic equal-citizen acts of voting and representing communities in the legislature can be culturally inflected or provided for, as we have seen in the case of Papua. However, general decentralization has one very important limitation in that it cannot cater for legal pluralism. Local governments cannot run special legal systems, and do not have, nor should they have, powers in respect of personal law. One simply cannot have 1000 different legal systems as opposed to a regional one that diverges from the national system.

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[64] Harding, "The Constitutional Dimensions of Decentralisation", *supra* note 14.

V. CONCLUSION

Addressing the issue of ethno-religious or ethno-cultural diversity is never easy. Judging different approaches is also difficult. In this chapter, I have focused on territorial autonomy in Southeast Asia, a region where generalised solutions are not likely to travel especially well. However, a study of regional autonomy, in Southeast Asia as elsewhere, seems to show that its applicability is narrow in scope, confined to areas where the compactness of ethnic populations tells of a clear and unique local culture, found in a region corresponding at least roughly to a plausible homeland. This is by no means the usual situation in the region, but where it is the case territorial autonomy has appeared to be the least damaging solution, designed to bring an end to violence. Whether it can go further in enhancing multiculturalism or nation-building remains to be seen.