

JURNAL CITA HUKUM



- Dewan Perwakilan Rakyat Daerah (DPRD) Dalam Perundang-undangan Pemerintahan Daerah dan Lembaga Legislatif Daerah
Asmawi
- Pertanggungjawaban Penggunaan Hak Prerogatif Presiden Di Bidang Yudikatif Dalam Menjamin Kemerdekaan Kekuasaan Kehakiman
Bachtiar Baital
- Praktik Pengawasan Etika DPR-RI
Nur Habibi
- Fungsi Falsafah Negara Dalam Penerapan Konsep Negara Hukum
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- THE GPH–M.I.L.F. Agreement: Human Rights Provisions and Possible Overlaps
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- Kedaulatan Rakyat dan Pemilihan Kepala Daerah Dalam Konteks Undang-Undang Dasar Negara Republik Indonesia tahun 1945
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The GPH–M.I.L.F. Agreement: Human Rights Provisions and Possible Overlaps*

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Abstrak: *Perjanjian GPH-MILF: Ketentuan Hak Asasi Manusia dan Kemungkinan Terjadinya Tumpang tindih.* Salah satu tantangan dalam mengakhiri konflik non internasional adalah menyusun perjanjian damai yang memuaskan kedua belah pihak. Sebuah pendekatan baru dalam perjanjian damai adalah pendekatan Hak Asasi Manusia (HAM) yang mengamati dan berkomitmen memenuhi elemen-elemen HAM sebagai syarat dalam perjanjian damai. Proses perdamaian antara Pemerintah dan Moro Islamic Liberation Front yang masih berlangsung di Filipina saat ini memiliki kemajuan yang positif. Perjanjian-perjanjian yang sudah ditandatangani tampak jelas dilandasi oleh HAM. Akan tetapi tampak kemungkinan beberapa masalah implementasi serta kontradiksi antara ketentuan HAM dalam perjanjian damai dengan struktur yang telah ada, dan bahkan antar ketentuan HAM dalam perjanjian itu sendiri. Tulisan ini akan mengamati implementasi dan kontradiksi dalam perjanjian damai ini terutama terkait hak beragama dan hak wanita dan bagaimana permasalahan tersebut dapat diselesaikan.

Kata Kunci: Resolusi Konflik, Hak Asasi Manusia, Pembentukan Otonomi Bangsamoro, Hukum Islam

Abstract: *The GPH – M.I.L.F. Agreement: Human Rights Provisions and Possible Overlaps.* One of the challenges in ending non-international armed conflicts is to conclude a peace agreement that satisfies the need of both parties. A new approach to this is the human rights approach, which seeks to observe and promise to fulfil elements of human rights as terms of peace. The ongoing peace process in the Philippines between the Government and the Moro Islamic Liberation Front is seeing positive progress, with its peace agreement provisions highly based upon human rights. However, there are potential problems in implementing these provisions, as well as overlaps with the pre-existing structure or even between the human rights provisions themselves. This essay will observe the problems and overlaps particularly on provisions related to the rights of religion and women, and how they can be addressed.

Keywords: Conflict Resolution, Human Rights, Establishment of Bangsamoro Autonomy, Islamic Law

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Introduction

The conflict between the Mindanao regions and the central Philippine government, to some extent, roots on economic injustice.¹ This injustice just so happened to be between Christians and Muslims, including land and other economic related disputes.² These disputes were then added by the massacre of Muslim recruits by the Philippine Armed Forces (PAF), responded by the announcement of a Mindanao Independence Movement in Cotabato Province.³ Further hostilities between Muslims and Christians triggered the Martial Law declaration in 1972, starting the armed movement by the Moro National Liberation Front (MNLF).⁴

A peace agreement was signed in Tripoli in 1976, but this caused a further break in the insurgency by a group what was later called the Moro Islamic Liberation Front (MILF).⁵ The break up was due to *inter alia* persistence by MILF in demanding secession,⁶ a preference to a religion based movement rather than ethnic,⁷ and major problems in the wealth and resource sharing deals as well as developmental programs.⁸

Peace talks with MILF short lived, when President Joseph Estrada underwent an all-out war against MILF and other insurgents.⁹ Productive peace talks resumed at the regime of President Arroyo, when an agreement was signed with the MILF to continue peace talks.¹⁰ Another agreement was drafted and prepared to be signed in 2008, which MILF was happy with.¹¹ However in 2008, the Government decided not to sign the agreement, while the Supreme Court declared the document to be unconstitutional, and the hostilities resumed once more.¹²

This essay discusses agreements at the era of President Benigno Aquino (2010 onwards). The parties met for peace talks¹³ and MILF dropped secession demands.¹⁴ Further, in 2012, both parties agreed to a Decision Points of Principles (DPoP) as of April 2012, and later in October 2012a Framework Agreement on the Bangsamoro

¹ G. Brown. *The Long and Winding Road: The Peace Process in Mindanao*, Institute for British-Irish Studies, Discussion Paper No. 6 (found at http://www.ucd.ie/ibis/publications/discussionpapers/thepeaceprocessinmindanao/G_Brown.pdf accessed 13 April 2014 at 1.02am), p.8

² *ibid*

³ *Ibid*, p.9

⁴ *Ibid*

⁵ *Ibid*, p.11

⁶ Center for Strategy, Enterprise, and intelligence. *The Long Struggle to Silence the Guns. The CenSEI Report*, Vol. 2, No. 13, (2012), p.7

⁷ Note 1, p.11

⁸ *ibid*

⁹ Note 6

¹⁰ General Framework for the Resumption of Peace Talks and its Implementing Guidelines, signed on 24 March 2001, *ibid*

¹¹ Draft Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001, Note 1, p. 17

¹² *Ibid*

¹³ BBC News. *Philippines Muslim Rebels in Talks in Malaysia*, 10 February 2011 (found at <http://www.bbc.co.uk/news/world-asia-pacific-12402821>, accessed at 27 March 2014 at 2.54 pm)

¹⁴ Brunei Times. *MILF Drops Secession Plan on Malaysia's Advice*, 7 May 2011 (found at <http://www.bt.com.bn/news-asia/2011/05/07/milf-drops-secession-plan-malaysias-advice>, accessed at 27 March 2014 at 2.56 am)

(FAB) was concluded. From this FAB, many annexes and further agreements then emerged to regulate the details of provisions stipulated in the FAB, which until the writing of this essay has yet to be completed as many other negotiations are still ongoing.

This essay is aimed to answer a few points. First, the background of the conflict and peace agreements will be briefly explained. Second, there will be an overview of human rights provisions continued by some more thorough explanations on provisions related to rights of religion as well as rights of women. The reason to this is because, as will be shown, rights of religion are very central to the conflict. On the other hand, the application of it has potential to conflict with the existing structure as well as another right: rights of women.

Third, it will be seen how within the approach towards those rights, there are important issues that have not been dealt with so that therefore implementation difficulties can occur. It will be shown that the difficulties are mainly conflicts between the existing structure and what the agreement brings, or even a conflict between the fulfilling of two different rights. Some possibilities to resolve the matters will also be outlined. Finally, this essay will conclude on how important human rights are, especially in context of these two rights, in the peace talks.

Human Rights Provisions

Unlike the provisions in the previous peace related agreements surrounding the hostilities in Mindanao, these new agreements from 2012 onwards have highly referred to human rights. There were no explicit reference to international human rights conventions, but the provisions in the agreements were very detailed, even in the first agreement between the government of the Philippines in the Aquino era and the MILF, which is the DPoP.

Point 10 of the DPoP listed twelve rights that the new political entity (that will emerge over the Bangsamoro) is bound to respect and guarantee, which includes *inter alia* rights to life and dignity, rights of freedom and expression of religion and beliefs, rights to privacy, equal opportunity, *etc.* The FAB in Article VI(1) cited the same rights mentioned in DPoP, but added a provision on vested property rights under Article VI(2) and indigenous people's rights under VI(3).

A small note must be taken that before enumerating a list of rights, both the DPoP and the FAB starts the provisions with "*In addition to basic rights already enjoyed, the following rights...*".¹⁵ It is still unclear to the writer what is meant by these 'basic rights'.

Another thing to note is how there are multiple mention of the same rights on different angles in separate provisions. An example to this would be: Rights to freedom and expression of religion and beliefs (Article VI[1][b] of the FAB), then Right to establish cultural and religious associations (Article VI[1][j] of the FAB), and Right to freedom from religious, ethnic, and sectarian harassment (Article VI[1][k] of the FAB), which may suggest comprehensiveness and extra emphasis to approach the particular right.

¹⁵ Emphasis added

Further, there are provisions that are made in the annexes to implement the rights that have been guaranteed. For example, VI[1][e] of the FAB guarantees rights to express political opinion and aspiration, and the Annex of Power Sharing (2013) Part Two Section 1-2 establishes a Bangsamoro Assembly which contains representatives of all elements (including ethnic minorities). Another example is rights related to customary land tenure and land ownership (VI[2] of the FAB), which the Annex of Power Sharing gives exclusive power to the Bangsamoro Government to manage housings and settlement (Article III.III.50) and ancestral domains (Article III.III.29).

In order to analyse further how provisions of human rights were applied but may have blind spots, two particular rights will be analysed: rights to religion and women's rights.

Rights to Religion

As previously mentioned, religion has an important role in the conflict, as it was an identity the MILF and MNLF associated itself with and demanded accordingly. These matters of identity (including religious) have been seen as one of the major causes of civil wars with demands of secession or self-administration¹⁶ (This is of course apart from the wealth sharing matters that also became a big issue).

In accommodating this, every single text of agreement produced from the Tripoli Agreement in 1976, until the most recent annexes, all start with the words "*In the Name of God, the Beneficent, the Merciful*" to bring about the identity of the Muslims. This is close to an English translation¹⁷ of the Arabic sentence:¹⁸

To Muslims, this sentence means a great deal, among its virtues is to start any action so that they are blessed with such act,¹⁹ where practicing Muslims would say it before any deed and write it before any text.

To accommodate the rights for Muslims to practice their religion means to also provide various relevant sets of laws and institutions. Therefore, one can see these provisions from an angle of rights to religion as well as power sharing at the same time.

Prior to the FAB, there are existing Islamic structures within the society to fulfil the necessity of various social interactions, where the Bangsamoro people live according to Islamic laws. President Ferdinand Marcos recognized this reality by issuing Presidential Decree No. 1083 the Code of Muslim Personal Laws of the Philippines (MPC) in 1977, which regulates issues of islamic family laws as well as

¹⁶ Helga Malmin Binningsbo. *Power-Sharing and Postconflict Peace Periods* (found at http://kms1.isn.ethz.ch/serviceengine/Files/ISN/38262/ipublicationdocument_singledocument/9faf96a6-3107-4a2b-9548-6f90652dfcda/en/2006_Power-Sharing+and+Postconflict+Peace+Periods.pdf accessed on 30 March 2014 at 10.04pm), p.9

¹⁷ MarmadukePickthall (Translator). 1930.*The Meaning of the Glorious Qur'an*.New York: The New American Library, p.1

¹⁸ Ministry for Islamic Affairs, *Awqaf, Propagation, and Guidance* (Collection Authorizer).1430 H. *Al Qur'aanul Kareem*.Madinah: Majma Al Malik Fahd for Holy Qur'an Printing, (hereinafter The Holy Quran), the beginning of every Chapter except Chapter 9

¹⁹ See Safiur-Rahman Al-Mubarakpuri (Editor and Abridger). 2000. *Tafsir of IbnKathir (Abridged): Vol: 1*. Riyadh: Darussalaam, pp. 59-69

establishing Shari'a Courts. Other examples of Islamic related laws would be Presidential Decree No. 264 establishing the Philippines Al-Amanah Islamic Bank, to fulfil the needs of Muslims for a bank that is in accordance with Islamic laws.

The peace agreements have guaranteed the freedom to practice religion in VI[1][b] of the FAB. To guarantee this right, in addition to the pre-existing structures, the FAB and the annexes have provided many provisions to strengthen this institutionalization of Islamic laws in Bangsamoro. The FAB, for instance, provides that the Shari'ah courts need to be strengthened and that their jurisdiction should be expanded (Article III.3.) and to be included in the Bangsamoro Basic Law (Article III.5.), and *Halal*²⁰ certifying bodies (Article III.4.). Further in the Annex on Power Sharing (2013), there are provisions to cooperate in adjusting laws of international trade to include regulating the entry of *haram*²¹ goods to Bangsamoro (Article II.10.), Bangsamoro enjoying exclusive powers to regulate: financial and banking systems to adhere to Islamic banking systems (Article III.13), management of *Hajj* and *Umrah*²² pilgrimages (Article III.26.), *awqaf*²³ (Article III.47), etc.

These provisions that incorporate seem to do their best attempt to support the freedom of the Bangsamoro Muslims in practicing their religion.

The Shari'ah law and courts that will be enacted pursuant to this agreement is yet to be known, as such provisions will be regulated in the Bangsamoro Basic Law²⁴ which has yet to be made to this date. However, Shari'ah law is based on the *Qur'an*²⁵ and *Hadith*²⁶ (where there has never been any change) as binding sources of law, with addition to interpretations by the four *Fiqh Madhabs* (schools of Islamic jurisprudence).²⁷ This is what the MPC refers to, and there is reasonable basis that the Shari'ah law that will be enacted in the Basic Law may not be too different to what has already been there before. This may be except provisions on the Shari'ah court's jurisdiction, as the FAB Article III.3. and III.5 suggests to be expanded.

Potential Problems in Religious Rights Application Post Agreement

There are however some potential problems in these provisions when they meet the pre-existing structures. These potential problems mainly revolves around Muslim and non-Muslim relations –which may be a blind spot that the FAB may not have foreseen. The FAB stresses that the Shari'ah justice system only will apply to Muslims.²⁸ What will then happen in case of Muslim and Non-Muslim legal relations? There can be some problems here.

²⁰ Literally means "lawful" or "permitted". *Halal certification* is usually for consumed products, e.g. food will be certified *halal* only if it fulfils certain requirements under Islamic Laws

²¹ Literally means "unlawful" or "prohibited". A product being *haram* means that it is not *halal*.

²² Respectively major and minor pilgrimage, to the city of Makkah and Madinah in Saudi Arabia

²³ Some kind of endowment for public or worship purposes

²⁴ See article III.5. of the FAB

²⁵ Muslims believe the Arabic text of the Holy Quran to be the verbatim of God's revelation

²⁶ The life and teachings of Muhammad ibn Abdullah (who Muslims believe is the final Messenger of God), that has gone through extensive examination and classification and grading based on authenticity

²⁷ See Article 7(h), MPC; also Wael B. Hallaq. 2005. *A History of Islamic Legal Theories: an Introduction to Sunni usul al-fiqh*. New York: Cambridge University Press, p.1

²⁸ Article III.3 of the FAB

The first very specific case would be in marital law. In case where there is marriage between a Muslim and Non-Muslim, it is clear in Article 13 (1) of the MPC that Muslim law applies to marriages between Muslims or between Muslim male and non-Muslim female. In another situation, when a Muslim female marries a non-Muslim male, it would be regulated under the Philippine Civil code, as per Article 13 (2) of the MPC.

With the enactment of the FAB, which says that Islamic law is only to be applied to Muslims, then a conclusion can be made that Muslim men may no longer exercise marriage under Islamic law to a Non-Muslim women, while this is something that Islamic law normally provides.²⁹

Another case would be in Islamic banking. While Islamic banking operates under Islamic laws, the Al Amanah Islamic Bank is also open for non-Muslims.³⁰In neighbouring countries, such as Indonesia, the religious court is open for Non-Muslims so long as the subject matter is governed under Islamic law which includes Islamic Banking.³¹This practice stems from primary sources of Islamic law which can apply to Non-Muslims as well who wish to undergo transactions governed by Islamic laws (or wish to be judged by it, whatever the dispute is about).³²However, similar to the problem of laws of marriage, if the FAB applies then the Shari'ah courts cannot judge disputes in Islamic Banking.

One may submit that the disputing parties can turn to arbitration, since the Al Amanah Bank Regulations does provide rules for that.³³ However, the said rule only regulates disputes between shareholders, and therefore not for other parties who may have legal relations with these banks (loaners, customers *etc.*). Further, for these disputes not between shareholders to be subject to a separate arbitration, it will require consent from both parties to establish the arbitration tribunal.³⁴

The only possible solution for this, if one were to fulfil the rights of Muslims to practice religion, is to clarify for certain in the new Bangsamoro Basic Law that the Shari'ah Courts does not close the doors to the possibility for Non-Muslims to settle their disputes if the matter still falls under the material jurisdiction of the Court. The provisions should be constructed in a way that, if a Non-Muslim consented to any legal relations governed by Shari'ah law (e.g. Islamic banking or certain interfaith marriage), it could be considered as an acceptance to the compulsory jurisdiction of the Shari'ah Court. However, there can be certain exceptions when the object of the legal relations is incompatible with Islamic laws as well (e.g. if the marriage is in between a Muslim woman and a Non-Muslim man, where the Philippine Civil Code would apply instead as per Article 13[2] of the MPC).

²⁹ The Holy Quran, Chapter 5 verse 5

³⁰ Al Amanah Islamic Bank Official Website. *The New Amanah Bank* (found at <http://www.al-amanahbank.com/aboutthebank.html> , accessed at 28 March 2014 at 6.59pm)

³¹ Article 49, Law No 3 of 2006 on the Religious Court, Republic of Indonesia

³² The Holy Quran, Chapter 5 verses 42-43; see also: Safiur-Rahman Al-Mubarakpuri (Editor and Abridger). 2000. *Tafsir of IbnKathir (Abridged): Vol: 3*. Riyadh: Darussalaam, pp.184-189

³³ Section 10, the Implementing Rules and Regulations of Republic Act No. 6848 (The Islamic Bank Charter)

³⁴Frasser P. Davidson. 2000. *Arbitration*. Edinburgh: W. Green & Son, pp.99-100

Women Rights

Regulating comprehensive implementation of women's rights is essential to peace processes. This is because women experience in the conflict will be different than that of men (which will highly affect their post-conflict determination and need), that peace processes must be built on the widest base of experience, and other reasons as well, so that the peace process can achieve more sustainable results.³⁵ This is why the UN Security Council saw it necessary to issue Resolution 1325 (2000) to urge the participation of women in peace processes.

The FAB is very rich in mentioning 'women-friendly' provisions. The FAB, reciting the DPoP, includes two women related rights, namely: right of women to meaningful political participation, and protection from all forms of violence (Article VI[1][g], which in itself includes two rights in one point), as well as right to equal opportunity and non-discrimination in social and economic activity and the public service (Article VI[1][j]).

Further in the annexes, there are even more provisions to further enumerate these rights. The Annex on Power Sharing (2013) ensures that there are representatives of women in the: assembly of the Bangsamoro Basic Law (Article II.2.) and the Council of Leaders (Article II.7).

There have been sources mentioning that women are excluded from the Bangsamoro peace talks.³⁶ However, there are attempts in which women are participating to some extent, which include in (but not limited to) the following activities:³⁷ Participating in the actual peace talks between conflicting parties, Engagement with religious leaders, Mediation in settling family and clan disputes, Supporting violence victims, Study groups on Islam to seek strength and guidance from the Qur'an, Peacekeeping, etc.

More recently, the Bangsamoro Transition Commission (BTC) signed a Memorandum of Understanding (MoU) in 2013. The MoU lists two important programs that both involve women. The first one is entrenching Women's Participation in the Basic Law (involving four women NGO, i.e. UNYPHIL-Women, Bangsamoro Women in Action for Development Initiative [BWADI], Teduray Lambangian Women's Organization [TLMO], and Nisa Ul Haqq Fi Bangsamoro [Nisa]), and the second is the Building Peace in Mindanao Through Public Participation in Governance, which includes two women organizations (i.e. Teduray Lambangian Women's Organization and Nisa UlHaqq Fi Bangsamoro).

Other than women participation in politics, there has also been stipulated numerous provisions related to welfare of women both in social development as well

³⁵ Christine Chinkin. 2003. *Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women*, Expert Group Meeting, United Nations Division for the Advancement of Women (found at <http://www.un.org/womenwatch/daw/egm/peace2003/reports/BPChinkin.PDF> accessed 13 April 2014 at 1.40am), pp. 9-13

³⁶Toohy Aileen. Social Capital, Civil Society and Peace: *Reflections on Conflict Transformation in the Philippines* (found at <http://www.engagingcommunities2005.org/abstracts/Toohey-Aileen-final.pdf> accessed 29 March 2014 at 10.57pm), at p.11

³⁷ Conciliation Resources. *Muslim Women in Peace Processes: Reflections for Dialogue in Mindanao*, Discussion Paper, July 2011 (found at [http://www.c-r.org/sites/c-r.org/files/Muslim%20women%20\(1\).pdf](http://www.c-r.org/sites/c-r.org/files/Muslim%20women%20(1).pdf) accessed 29 March 2014 at 11.38pm)

as health sector. While generally women in the world have higher life expectancy than men, the women in Mindanao generally have lesser life expectancy than men.³⁸ Further, the maternal mortality rate is quite high (132/100.000 live births, according to 2006 statistics)³⁹ and highly linked to poverty and access to proper health services.⁴⁰

Responding to these issues, the Terms of Reference for SajahatraBangsamoro (ToRSajahatra) was signed in 2013, with a main aim to fulfil rights to health, education, and good living conditions (Article 2.2.3). Uplifting the health service in general (as this ToRSajahatra aims to achieve e.g. through health insurances, community based health services, *etc*, as per Article 3), the project will be guided by the principles of inclusiveness and gender balanced (Article 5.2.3.) it is expected to help to tackle the root of the problem of women health issue which is the health service in general.

Other than health matters, there are provisions to enhance the capacity of women as well to uplift their state of welfare. The Annex on Revenue Generation and Wealth Sharing (2013) mentions that 5% of developmental funds should be allocated by the Bangsamoro Government for support programs and activities for women (Article XII). Along this aim, the ToRSajahatra also provides scholarships; community based vocational trainings, and others (Article 3).

Further, in making the Bangsamoro Basic Law, the women organizations have issued a comprehensive recommendation so that the new law would comprehensively deal with women related issues. Among the recommendations are on the topic of women's political participation, which includes *inter alia*: women occupying fifty percent of positions at the management level within the Bangsamoro new political entity, and the creation of a Department of Women Affairs.⁴¹ There is also a comprehensive recommendation to include provisions on education and livelihood, which include *inter alia*: funds for livelihood of widows and women who are victims of the conflict.⁴²

The actual manifestations of these provisions and recommendations are yet to be seen, as the negotiations are still in progress and the Bangsamoro Basic Law has yet to be completed.

Potential Problems in the Application of Women's Rights

It has been mentioned how there is a positive enthusiasm in women's participation in so many fronts in the peace processes. However, there are some

³⁸ Report to the Delegation of the European Commission in the Philippines. *A Review of Poverty in the Conflict Affected Areas of Mindanao* (found at <http://www.doh.gov.ph/sites/default/files/A%20Review%20of%20Poverty%20in%20the%20Conflict%20Affected%20Areas%20of%20Mindanao.pdf>, accessed 30 March 2014, at 00.53am), p.36

³⁹*Ibid*, p.47

⁴⁰*Ibid*, p.42

⁴¹Point VI.a, Womens Recommendation. *A Better Bangsamoro for all: Women's Contributions to the Bangsamoro Basic Law* (found at http://unyphilwomen.files.wordpress.com/2014/03/a-better-bangsamoro-for-all_womens-contribution-to-the-bangsamoro-basic-law.pdf, accessed 30 March 2014 at 3.08am), hereinafter WBR

⁴² Point VIII.f, WBR

structural matters that could be seen as a potential problem. There are certain rules in Islamic laws, which are instituted due to the fulfilment of the rights to religion, which seem to contradict women's rights. This is the main reason why this essay uses women's rights as a second case study. Other than the importance of women's rights, it is also integral in the display of potential problems in the previous case study of rights to religion. The current FAB and its Annexes do not yet provide any solutions to this.

The Women BBL Recommendations, in Section III regarding the Shari'ah Justice System, particularly point III.a. mentions "*Take into account the perspectives of women on the scope of expanded Shari'ah (e.g. the conflict of the CMPL⁴³ provision on allowing Muslim men marrying non-Muslim women)*". It is unclear what is meant by 'conflict' in that particular provision. It could either mean the conflict with the 'Shari'ah only applies to Muslims' as explained earlier in this essay (with possible solution already mentioned), or seen under the language of gender equality it could mean possible unfairness since Muslim men have more options than Muslim women. If it is the latter, it will not make much sense as it is still possible for a Muslim woman to marry a Non-Muslim man under the Philippine Civil Code,⁴⁴ therefore balancing the satisfaction of the purity of Islamic law application and equal opportunities between genders as well.

However, that instance of interfaith marriage was simply cited as an example. Nisa, one of the women NGOs participating in the WBR, has advocated a few points on May 2013 that may serve as a better understanding in the matter. Relevant to point III.a. of the WBR, Nisasees the current MPC to have the following flaws:⁴⁵ Discrimination in spousal rights and responsibilities, Discrimination in inheritance rights.

On the first point on spousal rights and responsibilities, there are matters where the wife has to seek permission to the husband while the husband needs not to do the same. An example to this would be how the wife needs consent to acquire property by gratuitous title and to exercise profession.⁴⁶ As for the second point on inheritance rights, Muslim men would generally inherit more than woman. An example to this is how a wife inherits one-fourth of the estate shall the husband die, while a husband inherits one-half of the estate shall the wife die (if no legitimate child. If the marriage produced legitimate children, these portions are halved).⁴⁷

A simple reading could point out that articles in the Convention on the Elimination of Discriminations Against Woman (CEDAW) are possibly breached, *inter alia* Article 1 in understanding 'discrimination' as "*distinction.. restriction made on the basis of sex... impairing.. women..*", 15(3) on restricting the legal capacity of women, *etc.* However, another way of reading would refer to the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UNDHR), Article 18 of both instruments mentioning rights to adopt and practice

⁴³ Code of Muslim Personal Laws, or in the language of this essay, the MPC

⁴⁴ Article 13(2) of the MPC

⁴⁵ UNFPA. *Revision of Muslim Code Gains More Support*, 31 May 2013 (found at accessed on 30 March 2014, 3.47am)

⁴⁶ Article 36(2) and 36(3) respectively of the MPC

⁴⁷ Article 111 and 112 of the MPC

religious beliefs. Seen together with the Preamble of the CEDAW (in its entirety), all these instruments suggest that 'discrimination' is something done externally as opposed to internally by the individual her/himself. This is unless the faith itself is imposed upon the individuals which is against international law as well as Islamic laws.⁴⁸

Another reading from the perspective of Islamic laws, would suggest in many passages in the Qur'an that men and women are equal.⁴⁹ However, Islam understands that equality of men and women is not understood as exact similarity but instead complementarily (of different roles).⁵⁰ An example to this is how the inheritance portion of women may be less, but men are given more financial burdens, namely to sustain their household during the marriage and for a period of time after divorce,⁵¹ as well as other relatives who cannot sustain themselves⁵² (the latter obligation is not codified in the Muslim Personal Law, but in the *hadith* which is a source of law in Article 7[h] of the Muslim Personal Law).

The above explanations show how different readings of these particular rules can cause very different conclusions, one may see it as discrimination while another would see it as equality. There are a few ways to get around this problem, to settle the different readings:

First, To codify in the Bangsamoro Basic Law provisions on prenuptial agreements, where husbands can waive anything that is initially 'subject to the husband's consent' under Islamic contract law.⁵³ Secondly, to codify rules financial sustenance more comprehensively (as per n.48) and To keep options open for those who wish to marry under the Philippine Civil Code shall they do not wish to follow Islamic Laws on marriage. Whether or not the Bangsamoro Basic Law will satisfy the demands of the Bangsamoro people in general, whichever the way they read the concept of gender equality, it is yet to be seen until the law's completion.

Conclusion

There is no question that human rights considerations are essential in peace agreements. The abuse or deprivation of human rights can be major parts or causes of the conflict, and the fulfilling of it is a key to achieve and sustain peace.⁵⁴ The peace agreements between the Government of the Philippines and MILF has put human rights at its heart, and has carried out further provisions to ensure these rights. Some of these rights have already been given implementing provisions (this essay has

⁴⁸ The Holy Quran, Chapter 2 verse 256

⁴⁹ The Holy Quran, Chapter 2 verse 187; Chapter 49 verse 13; Chapter 9 verses 71-72; etc

⁵⁰ The Holy Quran, Chapter 2 verse 228

⁵¹ Articles 35, 65, 66, 68, of the MPC

⁵² Authentic Hadith in Sahih Muslim, found in Abdul Hamid Siddiqi (Translator). *Sahih Muslim: Vol V (English)*. Lahore: Al-Ashraf Press, , Hadith No. 2183; Authentic Hadith in Sunan An-Nasa'i, found in Nasiruddin al-Khattab (Translator). 2007. *English Translation of Sunan An-Nasa'i (Volume 3)*. Riyadh: Maktaba Darussalam, Hadith No. 2533

⁵³ The Holy Quran, Chapter 2 verse 177

⁵⁴ Christine Bell. 2006. *Negotiating Justice? Human Rights and Peace Agreements* (http://www.ichrp.org/files/reports/22/128_report_en.pdf), pp.107-108

mentioned rights to aspiration and political participation, land ownership and customary land tenure, rights to religion, and women's rights).

As the negotiations are still underway, there are important instruments that have yet to be seen. An example to this would be the right to redress of grievances and due process of law (VI[1][I] of the FAB), which the Annex on Normalization mentions to regulate further in a separate terms of reference which has yet to be agreed upon (Articles J and H). The completion of the Bangsamoro Basic Law is something to look forward to as well, as it will be this instrument that will overarch the new Bangsamoro laws in implementing the peace agreements.

However, as has been shown in the case study of both rights of religion and women's rights, more caution must be taken in order to avoid collision between the new provisions introduced and the pre-existing structures, as well as collision between the implementation of two different rights (like what happened in the *Sejdic Case*).⁵⁵ Negotiators must first pay extra attention to pick up these potential problems, and find ways to deal with them.

References

International, National, and Local Instruments

Annex of Power Sharing (2013)

Annex on Revenue Generation and Wealth Sharing (2013)

Civil Code of the Philippines (1949)

Convention on the Elimination of Discriminations Against Woman (1979)

Decision Points of Principles (2012)

Draft Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli (2001)

Framework Agreement on the Bangsamoro (2012)

General Framework for the Resumption of Peace Talks and its Implementing Guidelines (2001)

Implementing Rules and Regulations of Republic Act No. 6848 (2006)

Indonesian Law No 3 of 2006 on the Religious Court

International Covenant on Civil and Political Rights (1966)

Presidential Decree No. 264 on the Establishment of the Philippines Al-Amanah Islamic Bank (1973)

Presidential Decree No. 1083 on the Code of Muslim Personal Laws of the Philippines (1977)

Terms of Reference for SajahatraBangsamoro (2013)

Universal Declaration of Human Rights (1948)

UN Security Council Resolution No. 1325 (2000)

Books, Journals, Articles, And Reports

Aileen, Toohey. Social Capital, Civil Society and Peace: *Reflections on Conflict Transformation in the Philippines* (found at <http://www.engagingcommunities2005.org/abstracts/Toohey-Aileen-final.pdf> accessed 29 March 2014 at 10.57pm)

⁵⁵ See Christopher McCrudden and Brendan O'Leary. Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements. *European Journal of International Law*, Vol. 24 No. 2, (2013), pp.477-501, at p.478, 481-482

- Bell, Christine. 2006. *Negotiating Justice? Human Rights and Peace Agreements* (http://www.ichrp.org/files/reports/22/128_report_en.pdf)
- Binningsbo, Helga Malmin. *Power-Sharing and Postconflict Peace Periods* (found at http://kms1.isn.ethz.ch/serviceengine/Files/ISN/38262/ipublicationdocument_singledocument/9faf96a6-3107-4a2b-9548-6f90652dfcda_/en/2006_Power-Sharing+and+Postconflict+Peace+Periods.pdf accessed on 30 March 2014 at 10.04pm)
- Brown, G. *The Long and Winding Road: The Peace Process in Mindanao*, Institute for British-Irish Studies, Discussion Paper No. 6 (found at http://www.ucd.ie/ibis/publications/discussionpapers/thepeaceprocessinmindanao/G_Brown.pdf accessed 13 April 2014 at 1.02am)
- Center for Strategy, Enterprise, and intelligence. *The Long Struggle to Silence the Guns. The CenSEI Report*, Vol. 2, No. 13, (2012)
- Chinkin, Christine. 2003. *Peace Agreements as a Means for Promoting Gender Equality and Ensuring Participation of Women*, Expert Group Meeting, United Nations Division for the Advancement of Women (found at <http://www.un.org/womenwatch/daw/egm/peace2003/reports/BPChinkin.PDF> accessed 13 April 2014 at 1.40am)
- Conciliation Resources. *Muslim Women in Peace Processes: Reflections for Dialogue in Mindanao*, Discussion Paper, July 2011 (found at [http://www.c-r.org/sites/c-r.org/files/Muslim%20women%20\(1\).pdf](http://www.c-r.org/sites/c-r.org/files/Muslim%20women%20(1).pdf) accessed 29 March 2014 at 11.38pm)
- Davidson, Fraser P.. 2000. *Arbitration*. Edinburgh: W. Green & Son
- Hallaq, Wael B. 2005. *A History of Islamic Legal Theories: an Introduction to Sunni Usul al-Fiqh*. New York: Cambridge University Press
- al-Khattab, Nasiruddin (Translator). 2007. *English Translation of Sunan An-Nasa'i (Volume 3)*. Riyadh: Maktaba Darussalam
- McCrudden, Christopher and Brendan O'Leary. Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements. *European Journal of International Law*, Vol. 24 No. 2, (2013), pp.477-501
- Ministry for Islamic Affairs, *Awqaaf*, Propagation, and Guidance (Collection Authorizer). 1430 H. *Al Qur'aanul Kareem*. Madinah: Majma Al Malik Fahd for Holy Qur'an Printing
- Pickthall, M. Marmaduke (Translator). 1930. *The Meaning of the Glorious Qur'an*. New York: The New American Library
- Siddiqi, Abdul Hamid (Translator). *Sahih Muslim: Vol V (English)*. Lahore: Al-Ashraf Press

Online Articles, Media, and Official Websites

- Womens Recommendation. *A Better Bangsamoro for all: Women's Contributions to the Bangsamoro Basic Law* (found at <http://unphilwomen.files.wordpress.com/2014/03/a-better-bangsamoro-for-all-womens-contribution-to-the-bangsamoro-basic-law.pdf> , accessed 30 March 2014 at 3.08am)
- Al Amanah Islamic Bank Official Website. *The New Amanah Bank* (found at <http://www.al-amanahbank.com/aboutthebank.html> , accessed at 28 March 2014 at 6.59pm)
- BBC News. *Philippines Muslim Rebels in Talks in Malaysia*, 10 February 2011 (found at <http://www.bbc.co.uk/news/world-asia-pacific-12402821> , accessed at 27 March 2014 at 2.54 pm)
- UNFPA. *Revision of Muslim Code Gains More Support*, 31 May 2013 (found at accessed on 30 March 2014, 3.47am)

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