

# Dealing with the Past or Moving Forward? Transitional Justice, the Bangsamoro Peace Agreement and Federalism in the Philippines

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## Abstract

In the Philippines, transitional justice is plagued by questions about whether and how to deal with the past as well as whether and what kind of justice is possible in the present. In 2014, the government ended its armed conflict with Muslim secessionists by enacting a peace deal with transitional justice provisions, but also proposed federalism as a more lasting solution to conflict. This article reads the agreement's 'dealing with the past' framework as reflecting a conventional approach. It then highlights continuing Muslim experiences of land dispossession and human rights abuses. It shows how transitional justice can come with uncertainty about what it means to "move forward," what "past" to overcome, and how the past is related to "justice." Furthermore, it argues that as the country increasingly veers towards authoritarian rule, conventional applications of transitional justice are further impeded. It explores how federalism receives more enthusiastic support than transitional justice.

## Keywords

Bangsamoro – federalism – Marawi – Moro Islamic Liberation Front – peace agreement – Philippines – transitional justice – time

## 1 Introduction

In 2014, the Philippine government formally ended long-running armed conflict with the Moro Islamic Liberation Front (MILF) by enacting a peace agreement.<sup>1</sup> The agreement contained provisions on transitional justice seeking to ensure that the ‘transition to peace’ will be just and enduring. Two years later, in 2016, the Philippines took a decidedly illiberal path by electing Rodrigo Duterte, a strongman espousing rhetoric and policies against human rights greatly at odds with the Philippines’ former democratising image. In 2018, Duterte signed the Bangsamoro Organic Law (BOL) implementing the peace agreement with the MILF and establishing the Bangsamoro, a new Muslim-majority autonomous region in the southern island group of Mindanao.<sup>2</sup> However, on top of these legal moves which had been crafted to be consistent with the 1987 Philippine Constitution, Duterte also proposed changes to the 1987 Constitution. In particular, he touted the proposal to change the political system to a federal structure as a more comprehensive solution for the Moros and the rest of the country’s neglected regions. This article critically explores transitional justice in the Bangsamoro and probes its prospects in view of the federalism proposal.

We argue that transitional justice in the Bangsamoro is plagued by an assumption that justice means to ‘move forward,’ competing strategic elite decisions about what ‘past’ to overcome, and questions regarding how the past is related to ‘justice’. That is to say, there is lack of clarity about whether and how to deal with the past and whether and what kind of justice is possible in the present situation. The article first probes the ‘dealing with the past’ framework endorsed by the Swiss-supported commission that incorporated transitional justice measures into the peace deal and the extent to which it reflects a conventional approach to transitional justice which presumes that progress is linear, moving forward from a violent past to a more democratic future. It then highlights recent experiences of land dispossession and human rights abuses in Marawi City, the northern Mindanao city which was the locus of fighting in 2017 between government forces and groups affiliated with the Islamic State of Iraq and Syria (ISIS). Marawi residents’ experiences show the limits and anachronism of mechanisms that reduce transitional justice to bureaucratic or political-institutional fixes to continuing violence and abuse. They support the necessity of further developing transitional justice discourse

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1 Official Gazette [Philippines], *The Framework Agreement on the Bangsamoro*, available online at [www.officialgazette.gov.ph/bangsamoro2/the-2012-framework-agreement-on-the-bangsamoro/#background](http://www.officialgazette.gov.ph/bangsamoro2/the-2012-framework-agreement-on-the-bangsamoro/#background) (accessed 24 September 2020).

2 Philippines Republic Act No. 11054 (Bangsamoro Organic Law), signed 26 July 2018.

in the Bangsamoro that potentially moves beyond the paradigmatic approach to address more concrete concerns such as political stability and economic development, decentralisation of power, and historical injustices brought about by colonialism.

Finally, the article argues that implementation of transitional justice measures written into the Bangsamoro peace agreement is at best suspended as the Philippines enters a new phase of authoritarian rule and political will is missing for implementing the transitional justice provisions of the peace deal. In particular, the article discusses the government's move to propose a federal political structure for the Philippines. We show that the proposed federalism not only impedes implementation of transitional justice measures but is put forward as a more viable alternative in dealing with the injustices of the past. Thus, the federalism proposal displaces the clamour for accountability for past violations through transitional justice mechanisms in the name of 'moving forward' from the past. That is, with the promise of rapid economic development, stability and a sense of normalcy of the Bangsamoro region. Moreover, by presenting itself as the transcendence of a Manila-centred past, while deemphasising the need for the elaboration of measures for accountability, federalism further reveals dealing with the "past" is not straightforward since it is unclear when the injustices began, and furthermore, how "justice" itself is defined.

The paper presents findings derived from analysis of the Report of the Transitional Justice and Reconciliation Commission<sup>3</sup> as well as interviews with elite and community actors in the new Bangsamoro autonomous region. Mindanao-based respondents were interviewed between April and May 2019, immediately after the passage of the BOL. The interviews sought the respondents' views on transitional justice issues articulated in the MILF peace agreement and Duterte's federalism proposal and its potential impact. Respondents entertained conflicting views on the Duterte government, its federalism proposal, and its capacity to provide a long-term solution to the Moro conflict.

In the succeeding section, the paper introduces the Philippines as a case that problematises the conventional or paradigmatic approach to transitional justice by highlighting its assumptions about linear history that pinpoint the 'past' as when the violence occurs, and how the solution is, oftentimes, a vague promise for enhanced 'democratisation.' Thereafter, it presents the disparate imaginations of time and justice in, first, the transitional justice provisions

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3 Transitional Justice and Reconciliation Commission, *Report of the Transitional Justice and Reconciliation Commission (Transitional Justice and Reconciliation Commission 2016)*, available online at <https://asiapacific.unwomen.org/en/digital-library/publications/2016/10/transitional-justice-and-reconciliation-commission>.

of the MILF peace deal; second, a critical community view from Marawi; and third, elite and community views supportive of the proposed federalism structure. The paper concludes by emphasising the importance of a realistic sense of the possibilities of the present time for a non-fantastical justice.

## 2 Which Transition? What Justice? The Philippines and Transitional Justice

### 2.1 *Different Conceptions of Transition and Justice*

Paige Arthur explains that the field of transitional justice branched out of the human rights movement in Latin America as an activity distinct from human rights advocacy.<sup>4</sup> Human rights advocates have previously focused on the political strategy of naming and shaming military dictatorships in Latin America because obtaining accountability through those countries' legal systems had been impossible. After the fall of military rule, starting in Argentina in 1983, human rights advocates began working to ensure justice for past mass atrocities and prevent their recurrence. Advocates also recognised that the newly established governments reckoned with insubordination and threats from the military establishment and other practical political problems that endangered the survival of the new democratic governments. Given both these concerns, they converged on the endorsement of a limited number of legal and institutional reform measures to be carried out by the state, principally, prosecutions, lustration, commissions of inquiry (or truth commissions) and reparation. These measures, it was argued, provided justice to victims while consolidating democracy.<sup>5</sup> As transitional justice developed into a global professional project and field of expertise,<sup>6</sup> scholars questioned the prescription of the Latin American menu of justice measures to diverse societal contexts confronting political change, most notably in societies emerging from inter-ethnic conflicts.<sup>7</sup>

4 P. Arthur, 'How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice', 31(2) *Human Rights Q.* (2009) 321–367.

5 See, e.g., G. O'Donnell and P. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (John Hopkins University Press, Baltimore, MD, 1986).

6 S. Lefranc and F. Vairel, 'The Emergence of Transitional Justice as a Professional International Practice', in L. Israel and G. Mouralis (eds.), *Dealing with Wars and Dictatorships* (TMC Asser Press, The Hague, 2013); IJTJ, 'Editorial Note', 1(1) *Int. J. Transit. Justice* (2007) 1–5.

7 F. Ní Aoláin and C. Campbell, 'The Paradox of Transition in Conflicted Democracies' 27(1) *Human Rights Q.* (2005) 172–213.

As Arthur has underscored, early advocates of transitional justice thought of a 'transition to democracy' as a relatively brief period in which democracy could be consolidated and engineered by elites undertaking reforms at the institutional-legal level of politics.<sup>8</sup> This concept of transition was a repudiation of Marxists who thought of transitions from one mode of production to another and of democracy, in particular, as an open-ended transitional phase towards socialism, i.e., a 'transition to socialism'.<sup>9</sup> In contrast to conventional transitional justice measures, reforms endorsed by Marxists were structural in nature and implied deeper transformations in the economic base of society. Different imaginations of transitions and measures for transcending the past were not lost on early critiques of transitional justice. For example, Mahmood Mamdani had articulated that colonialism left important legacies which were economic and collective in nature,<sup>10</sup> and emphasised postcolonial thought which sought the rectification of these legacies through socialist measures like expropriation and nationalisation of foreign corporations.<sup>11</sup> In post-apartheid South Africa, scholars also argued that justice for the crimes of apartheid requires a redistribution of wealth that was unjustly accumulated through the economic system.<sup>12</sup> Without reforms of land ownership, critics claimed further, transitional justice may not mean very much to states with a large land-owning class such as the Philippines.<sup>13</sup>

In recent years, a critical literature arose questioning the conventional practice of transitional justice based on the 'four pillars' of criminal prosecutions, truth commissions, reparations and institutional reform.<sup>14</sup> Critics revived arguments that transitional justice suffered from a narrow legalist focus on individual civil and political rights and failed to challenge violence that was

8 See, e.g., Justice and Society Program of the Aspen Institute, *State Crimes: Punishment or Pardon?* (Wye Center, Queenstown, MD, 1989); N.J. Kirtz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume I: General Considerations* (United States Institute of Peace, Washington, DC, 1995).

9 Arthur, *supra* note 3, pp. 338 ff. For example, the Maoist concept of 'national democracy with a socialist perspective' of which the mainstream Philippine left is an exponent of democracy as such a transition stage and package of reforms towards socialism. M. Zedong, *On New Democracy* (Foreign Languages Press, Beijing, 1954); J.M. Sison, *Struggle for National Democracy*, Luis Teodoro (ed) (Progressive Pub, Quezon City, 1967).

10 M. Mamdani, 'Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism', 43(4) *Comp. Stud. Soc. Hist.* (2001) 651–664.

11 S. Metz, 'In Lieu of Orthodoxy: The Socialist Theories of Nkrumah and Nyerere', 20(3) *J. Mod. Afr. Stud.* (1982) 377–392.

12 Arthur, *supra* note 3, p. 359.

13 *Ibid.*

14 United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*. DPA/UNSG/2010-00904, paras B1–B4.

structural, economic, cultural and gender-based in nature.<sup>15</sup> More recent scholarship sought to incorporate different imaginations of justice into the practice of transitional justice.<sup>16</sup> Notably, new movements campaigned around calls for ‘transformative’ reparations to remedy structural socio-economic legacies of the historical Transatlantic slave trade. These reparations movements sought not only financial restitution, but also land redistribution, political self-determination, culturally relevant education programmes, language recuperation, and the right to return or repatriation.<sup>17</sup> As will be seen in the next section, these reparations that go beyond the conventional ‘four pillars’ of transitional justice are more in line with the ‘justice’ those in Mindanao seek.

## 2.2 *Problems with Conventional Transitional Justice as Applied to the Philippines*

The Philippines exemplifies some of the problems with the application of transitional justice that critics have emphasised. Importantly, the adoption of conventional transitional justice measures assumes that some functioning legal or democratic mechanisms survived in the transition that allowed justice to be rendered for past abuses. The 1986 People Power uprising in the Philippines, for example, overthrew the authoritarian regime of Ferdinand Marcos and established a formal constitutional democracy. The succeeding government of Corazon Aquino furthermore espoused commitment to human rights. But the military and judicial establishments that survived in the transition were deeply shaped by Marcos’ authoritarianism and proved a hindrance to prosecution of human rights violators. Thus, justice for the victims of Marcos-era human rights abuses was placed on the back burner, as the Corazon Aquino government sought survival and stability from coups by appeasing violators within the Armed Forces of the Philippines. In fact, hardly anyone was charged and convicted in Philippine courts for past human rights violations under her term. Corazon Aquino initially pursued a policy of prosecuting select violators,

15 D. Sharp, ‘Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice’ 26 *Harvard Human Rights J.* (2013) 149–178; D. Sharp, ‘What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice’ 13(3) *Int. J. Transit. Justice* (2019) 570–589.

16 P. Gready and S. Robins, ‘From Transitional to Transformative Justice: A New Agenda for Practice’ 8(3) *Int. J. Transit. Justice* (2014) 339–361; Sharp, *supra* note 15, ‘What Would Satisfy Us?’

17 P. Cullors, ‘Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability’ 132(2) *Harvard Law Rev.* (2019) 1684–1694; L. Moffett and K. Schwarz, ‘Reparations for the Transatlantic Slave Trade and Historical Enslavement: Linking Past Atrocities with Contemporary Victim Populations’ 36(4) *Neth. Q. Human Rights* (2018) 247–269.

forming the Presidential Committee on Human Rights (PCHR) for this purpose, but quickly reversed this policy.<sup>18</sup> Meanwhile, victims of human rights violations during Marcos' Martial Law regime sought accountability from the Marcos family before the United States courts under the Alien Tort Claims Statute, believing Philippine courts to be too corrupt and beholden to the old regime.<sup>19</sup>

Nevertheless, the Corazon Aquino government took pioneering efforts in recovering ill-gotten wealth from the Marcos family and their cronies through the Presidential Commission on Good Government (PCGG).<sup>20</sup> PCGG supported the implementation of the government's agrarian reform programme, and hence contributed towards social justice, as by law, PCGG recoveries were automatically allocated to the agrarian reform budget.<sup>21</sup> Moreover, under the Benigno Aquino II administration, Marcos' Martial Law victims were recognised as being entitled to compensation from part of these recovered assets.<sup>22</sup>

The recovery of ill-gotten wealth and its allocation for social ends, scholars emphasise, are innovative measures that gave redress for economic crimes, which aren't usually addressed by transitional justice measures.<sup>23</sup> Moreover, compensation of victims was inventively linked to remedies against economic crimes and human rights violations.<sup>24</sup> But, like prosecutions for human rights violations, PCGG recoveries have also been marred with long delays and reversals. Recovery efforts met with substantial difficulties in the enforcement of foreign court decisions.<sup>25</sup> Governments succeeding Corazon Aquino—notably Joseph Estrada's—acted to reverse the PCGG's successes.<sup>26</sup> As a result, much

18 R. Carranza, 'Transitional Justice in Mindanao and the Philippines: Interview with Ruben Carranza', in V. Betita, M. Domes, D. Jaeger, L. Kirch and J. Simons (eds.), *Moving Beyond: Towards Transitional Justice in the Bangsamoro Peace Process* (forumZFD (Forum Civil Peace Service), Cologne, 2014), pp. 25–28; Philippines Executive Order No. 8, signed 18 March 1986.

19 N.R. Davidson, 'Alien Tort Statute Litigation and Transitional Justice: Bringing the Marcos Case Back to the Philippines' 11(2) *Int. J. Transit. Justice* (2017) 257–275.

20 Philippines Executive Order No. 1, signed 28 February 1986.

21 Philippines Republic Act No. 8532, signed 23 February 1998.

22 Philippines Republic Act No. 10368, signed 25 February 2013.

23 R. Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' 2(3) *Int. J. Transit. Justice* (2008) 310–330; Davidson, *supra* note 6. R. Abou-El-Fadl, 'Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will' 6(2) *Int. J. Transit. Justice* (2012) 318–330; Z. Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' 2(3) *Int. J. Transit. Justice* (2008) 266–291; D. Sharp, 'Addressing Economic Violence in Times of Transition: Toward a Positive-Peace Paradigm for Transitional Justice' 35(3) *Fordham Int. Law J.* (2012) 780–814.

24 *Ibid.*

25 Davidson, *supra* note 19.

26 Carranza, *supra* note 18, p. 26.

of the wealth illegally amassed by the Marcoses and their cronies remains unaccounted for to this day.<sup>27</sup> Notably, the Marcos family has recovered some of its political influence, forming close association with the current president Duterte.

Duterte's Philippines provides yet another confusing setting for transitional justice. Espousing illiberal rhetoric and policies, Duterte steered the country back to an authoritarian mode of rule.<sup>28</sup> Concluded in 2014 during the Benigno Aquino II administration, the peace deal with the MILF, however, was not implemented until Duterte endorsed and enacted the BOL in 2018. As mentioned, a noteworthy feature of the peace agreement is the inclusion of provisions on transitional justice which emphasised the importance of 'dealing with the past'. Yet, as will be seen in the next section, the issue of which 'past' is being addressed, and how best to 'deal' with it, is not exactly a straightforward problem that the people in Mindanao think can be solved by conventional transitional justice approaches.

### 3 Transitional Justice in the Bangsamoro Peace Agreement: Managing the Past

While the peace negotiation took place before a final agreement was reached, the Philippine government and the MILF agreed to 'normalisation measures' that were meant to enhance trust in the peace negotiations. Importantly, these measures relied on funding from international donors to be carried out. These measures mostly pertained to the rehabilitation or reconstruction of war-ravaged MILF camps and the socio-economic projects promised for MILF fighters who would be decommissioned.<sup>29</sup> Crucially, transitional justice was discussed as and included in these 'normalisation measures'. Transitional justice provisions were tucked in the Annex on Normalization dated January 25,

27 See, e.g., P. Lustre Jr, 'Recovering Marcos' Ill-Gotten Wealth: After 30 Years, What?' *Rappler* (27 February 2016), available online at [www.rappler.com/newsbreak/in-depth/123664-recovering-marcos-ill-gotten-wealth-30-years](http://www.rappler.com/newsbreak/in-depth/123664-recovering-marcos-ill-gotten-wealth-30-years) (accessed 21 January 2020).

28 N. Curato (ed.), *A Duterte Reader: Critical Essays on Rodrigo Duterte's Early Presidency* (Ateneo de Manila University Press, Manila, 2017); W. Bello, *Counter Revolution: The Global Rise of the Far Right* (Practical Action Publishing, Rugby, 2019).

29 These measures were intended to be immediately carried out, i.e., ahead of recognition of the peace deal by the Philippine legislature, in order to enhance the atmosphere for peace negotiations and peacebuilding. Thus, the TJRC was established at the tail end of Benigno Aquino II's term and before the enactment of the BOL.



2014, which, though one of the constituent agreements of the Comprehensive Agreement on the Bangsamoro, indicated it was regarded as somewhat marginal to the core agreements.

The Annex on Normalization provided for a Transitional Justice and Reconciliation Commission (TJRC) which was tasked '[t]o work out a program for transitional justice to address the legitimate grievances of the Bangsamoro people, correct historical injustices, and address human rights violations'.<sup>30</sup> Given its origin in 'normalisation measures', the work of the TJRC reflected the substantial involvement and influence of international donors, particularly Swiss experts.<sup>31</sup> The programme and 'dealing with the past' framework that it outlined reimagined the Mindanao conflict through the conventional lens of transitional justice as espoused by Swiss experts and agreed to by representatives of the Philippine government and MILF panels. The TJRC's three members consisted of the chair of the commission M<sup>o</sup> Bleeker, who was a special envoy of the Swiss Federal Department of Foreign Affairs, and one representative each from the Philippine government and the MILF. A Senior Adviser Jonathan Sisson, also an expert in the Swiss foreign affairs department, assisted the commission; and it also had a Senior Gender Adviser who had worked for the United Nations.

Transitional justice in the Bangsamoro agreement is informed by a conception of transition towards democracy, assumptions that the immediate violence of the past needs to be addressed and overcome, and that justice takes the form of atoning for past sins. The parties to the peace agreement tasked the TJRC with 'undertak[ing] a study and recommend[ing] to the Panels the appropriate mechanisms for transitional justice and reconciliation'.<sup>32</sup> Accordingly, the TJRC undertook an ambitious research which set out

<sup>30</sup> Annex on Normalization of the Framework Agreement on the Bangsamoro (FAB) (25 January 2014), para. H (1).

<sup>31</sup> On the involvement of international actors in the MILF peace negotiations more generally, see A. Abubakar and K. Askandar, 'Mindanao', in A. Özerdem and R. MacGinty (eds), *Comparing Peace Processes* (Routledge, Abingdon, 2019), Chapter 9. At the earliest stage, the negotiation agenda between the MILF and the Philippine government was thematically divided into: security arrangements, rehabilitation and development, and ancestral domain. Given the interests of foreign investors in resource-rich areas such as the Lanao Lake and Liguasan Marsh, control over resources (part of the discussion on ancestral domain) was particularly relevant to certain foreign governments. Participation by foreign governments and international non-government organizations increased with the elaboration of the International Monitoring Team (IMT) structure (branching out from ceasefire monitoring into foreign donor-funded socio-economic programs) and the creation of the International Contact Group (ICG) as guarantors to ensure both sides adhered to agreements.

<sup>32</sup> Transitional Justice and Reconciliation Commission, *supra* note 3, p. x.

an analysis illustrating and interrelating ‘the root causes of the current conflict’<sup>33</sup> and how they may be tackled. These root causes were identified by the Philippine government and MILF in the TJRC’s written mandate as follows: legitimate grievances of Muslims; historical injustice; human rights violations; and marginalisation through land dispossession.<sup>34</sup> The TJRC’s research involved documenting these issues by ‘listening’ to some 3,000 individuals from more than 210 Muslim, non-Muslim indigenous, and settler communities.<sup>35</sup> It also engaged experts and reviewed academic literature, documentary archives, field studies, and government policies.<sup>36</sup>

While violations of human rights, particularly, civil and political rights, were staple for the transitional justice field, the other specified root causes, i.e., legitimate grievances, historical injustice and marginalisation through land dispossession were not. Thus, they needed to be specified. Moreover, land dispossession hinted at structural issues of a socio-economic character that went beyond the usual focus of the transitional justice field. This potentially gave the TJRC, which was tasked to recommend solutions, some leeway to arrive at mechanisms that addressed structural violence or economic exploitation, and therefore, mechanisms that went beyond legal and political reforms. In actuality, the TJRC made their own interpretation of the issues within their mandate so that they fit a more familiar transitional justice framework. Its so-called ‘dealing with the past’ framework and its recommendations were crafted around four international legal principles called the Joinet/Orentlicher principles, *viz.*, the right to justice, the right to reparation, the right to know, and guarantee of non-recurrence.

The TJRC interpreted legitimate grievances, historical injustice, human rights violations, and marginalisation through land dispossession as overlapping or intertwined concepts. It acknowledged that grievances held by Moros ranged widely from experiences of religious intolerance to discrimination against them; moreover, they were widely shared among Moros. Indeed, generations of Moros expressed grievances, and unified them in a long-running narrative against the state.<sup>37</sup> These grievances or feelings of hurt were legitimate because they were founded on real historical injustices, thus the link between religious intolerance and the state. Historical injustices were ‘wrongdoings committed or sanctioned by governments (Spanish, American, and Japanese

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33 *Ibid.*, p. xi.

34 The phrase ‘marginalization through land dispossession’ was added in the Terms of Reference for the TJRC (22 March 2014), see Annex 1 of *Transitional Justice and Reconciliation Commission (n 3)* 114.

35 *Ibid.*, p. xi.

36 *Ibid.*, pp. 2, 7.

37 *Ibid.*, p. 19.

colonial governments and the Philippine Government) that hurt or harmed people [and] affected relationships repeatedly over time and were not (properly) addressed'.<sup>38</sup> These historical injustices included human rights violations. Moros predominantly narrated human rights violations as excessive violence against the physical integrity of persons committed by the state's armed forces and state-affiliated paramilitaries in the course of armed conflict with the Moros. These were experienced, for example, as massacres and rapes.<sup>39</sup> Human rights violations, furthermore, involved the staggeringly complex phenomenon of land dispossession, the fourth identified 'root cause'.

The TJRC found the dispossession of the traditional owners of Mindanao lands to have been caused by successive colonial and post-colonial governments' land policies. These included the regalian doctrine which made all lands public unless otherwise classified, land registration laws, land resettlement programmes and the creation of settler-dominated provinces and cities.<sup>40</sup> These policies led in the course of several generations to the influx of corporations and migrant settlers into Mindanao and rendered Moros and indigenous peoples displaced and minoritised in their own ancestral domains. They also ensued in the destruction of their traditional political structures, such as the sultanates, and the marginalisation of their ways of life.

The report of the TJRC illustrated the four root causes of conflict with vivid examples that conveyed the complexity of the Bangsamoro question. However, the TJRC structured and steered this complexity towards solutions that are familiar within the transitional justice field. The root causes of the Mindanao conflict were recoded into three simpler rubrics, namely, violence, impunity and neglect, recasting conflict as driven by recurring violence and centring the state's management of impunity as the means to prevent recurring violence. The concept of violence, the TJRC argued, was capacious enough to encompass the variety of documented experiences of Moros and indigenous peoples with not only direct physical abuse, but also cultural othering, and even structural violence. Impunity was defined as 'the impossibility, *de jure* or *de facto* of bringing the perpetrators of violations to account'.<sup>41</sup> Together with violence, the concept of impunity was crucial to the work of the TJRC as it gave the TJRC a simple explanatory scheme for the recurrence of violence and also a formula for halting violence. If impunity begot more violence, then managing and eventually overcoming impunity should stop the violence. Renee Jeffery points out that the TJRC's approach that he called 'managed impunity' departs

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38 *Ibid.*, p. 24.

39 *Ibid.*, p. 32ff.

40 *Ibid.*, p. 44ff.

41 *Ibid.*, p. 62 citing Diane Orentlicher.

from the previous assumption that the acceptance of impunity through the grant of amnesties was a prerequisite to peace. Thus, both past abuses and ‘present wrongdoings’ are addressed.<sup>42</sup> This was because the TJRC has argued staunchly for curtailing impunity in the future—as peace is consolidated—to prevent the recurrence of violence.<sup>43</sup>

According to the TJRC, the business of overcoming impunity has already been codified in the so-called ‘principles against impunity’ endorsed by the United Nations. These principles, developed by legal scholars Dianne Orentlicher and Louis Joinet, identified the necessary measures to be the preservation of the memory of what happened to victims; investigation, prosecution and punishment of violators; reparation; and reforms of the security sector and the judiciary, among others.<sup>44</sup> Thus, the TJRC recommended a familiar package of legal, political and institutional reforms that is assumed to be capable of being carried out by the Philippine government.

Furthermore, the concept of neglect affirmed the status of the Bangsamoro as part of the Philippine state, the key compromise in the peace agreement. Neglect was used by the TJRC as a shorthand for ‘exclusion, failed development schemes, and malgovernance’.<sup>45</sup> These could as well have been encompassed by the concept of violence. But neglect further emphasised the importance to peacebuilding of its opposite, i.e., the proper functioning of the national government to deliver public services to the marginalised Muslim regions.

## 4 Marawi: the Continuing Past and Unrealisable Recommendations for Transitional Justice

### 4.1 *The View from a Battle Zone*

Our interviews in the Bangsamoro region revealed a community view in Marawi City which reflects conceptions of time, transition and justice that

42 *Ibid.*, p. xvii.

43 R. Jeffery, ‘Amnesties and Intractable Conflicts: Managed Impunity in The Philippines’ Bangsamoro Peace Process’, 17(4) *J. Human Rights* (2018) 436–452.

44 D.F. Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Previous Regime’, 100(8) *Yale Law J.* (1991) 2539–2615; United Nations Economic and Social Council Official Records, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised Final Report Prepared by Mr. Joinet’ (1997) U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1.

45 Transitional Justice and Reconciliation Commission, *supra* note 2, p. 56.

challenge the analysis and recommendations of the TJRC. Marawi was the ground zero of a spectacular battle between Duterte's armed forces and new Muslim armed groups that prompted Duterte's Martial Law declaration, an arrangement at odds with the image of a peaceful Mindanao secured by the MILF peace agreement. Marawi residents emphasise that their experiences of land dispossession and human rights violations underline the perpetuation of the injustices of the past and disprove a discernible 'transition to peace' in the present.

The Marawi perspective reveals how the root causes of conflict persist and have not been challenged in a fundamental way. They underline the importance of implementing measures to prevent the perpetuation of land dispossession and take serious measures against impunity for human rights abuses. Thus, in this section, the recent experiences in Marawi of land dispossession and human rights violations are utilised to illustrate the complexity of the Bangsamoro situation and to probe the limits of the analysis and recommendations of the TJRC.

#### 4.2 *Continuing Land Dispossession*

Marawi residents' land dispossession relates to the fact that years after the fighting between Philippine government and ISIS-affiliated forces, hundreds of thousands of Marawi residents remain internally displaced. They are prevented by government authorities from returning to the city centre close to Lake Lanao, the traditional homeland of the predominantly Muslim Maranao people. In the name of reconstruction, government started to demolish structures including houses that were largely intact. Facilitating government's take-over of properties, many Maranaos who live in prime locations have no registered titles to their dwellings.<sup>46</sup>

Hamidullah Atar, peace advocate and Marawi community leader argues that Philippine government-led reconstruction effectively dispossessed the

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46 Although 2015 census data show that 66% of households report that Marawi residents own or have 'owner-like' possession of the houses and lots they occupy, an undetermined number do not actually have registered titles. Marawi residents have relied on traditional land tenure practices which carried legitimacy alongside the Torrens system. 'As a result, land ownership is often disputed; land values are difficult to gauge; sale and transfer of land is vexed; and key assets of citizens are not able to be leveraged for broader growth or other productive investments.' I. Fernandez, D. Garcia and A. Baunto, 'Community-Led Rehabilitation Is the Practical Thing to Do in Marawi: Critical Points for Addressing Land Issues after the Siege' (2018), available online at [www.openmarawi.com](http://www.openmarawi.com), pp. 5, 9.

Maranao people of their land. During the fighting, Philippine forces bombed the city which resulted in the destruction of some 12 000 structures including 'our cultural heritage built over centuries'.<sup>47</sup> Amnesty International decried the destruction as unjustified by military necessity and that it contravenes international humanitarian law relating to the conduct of hostilities.<sup>48</sup> President Duterte's reconstruction plan for Marawi City funded by a consortium of Chinese investors would permanently push out residents from their original dwelling sites. It features new state-of-the-art buildings and multi-lane highways and the establishment of military bases.<sup>49</sup> Atar criticises the government's reconstruction as exclusionary and not in keeping with the needs of the Maranaos. 'This is not what we need. We don't need six-lane highways'. He adds:

The area most affected by artillery fire and bombings is only 240 hectares, occupied by 24 *barangays* [villages]. If you put up all these ambitious mega-structures, like the proposed cultural center and marketplace, where will people live?

Marawi illustrates the persistent nature of violence against and the marginalisation of Moros in their own homeland that was well noted by the TJRC. The government forces' conduct in the Marawi hostilities recalls the excessive use of force that resulted in the human rights violations that generations of Moros remember and that the TJRC analysed in its report. Human rights violations, the commission concluded,

are a significant part of [Moro] historical experience and continue to be part of their current narratives. The cumulative effect of historical injustices and continuing human rights violations should not be underestimated, as it has had a dramatic impact on the life and consciousness of the Moro.<sup>50</sup>

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47 Interview with Hamidullah Atar, 24 April 2018. Atar is a community leader with extensive experience in peace building work. Part of his organization's efforts is the rebuilding of traditional Maranao political structures; and in this vein, he goes by the title of Sultan of Marawi.

48 Amnesty International, *"The Battle of Marawi": Death and Destruction in the Philippines* (ASA 35/7427/2017) pp. 30–31.

49 T. Regencia, 'After Daesh, Anger Simmers in Marawi as Duterte Builds New Army Base' *TRT World* (5 July 2019), available online at [www.trtworld.com/magazine/after-daesh-anger-simmers-in-marawi-as-duterte-builds-new-army-base-28019](http://www.trtworld.com/magazine/after-daesh-anger-simmers-in-marawi-as-duterte-builds-new-army-base-28019) (accessed 31 January 2020).

50 Transitional Justice and Reconciliation Commission, *supra* note 2, p. 30.

The commission found that Moros remember ‘mass atrocity crimes’ targeted at them and ‘meant to “cleanse” lands of their original inhabitants’, to be acquired by individuals and corporations and to be populated by settler communities.<sup>51</sup> Most of these atrocities ‘have yet to be fully documented, formally investigated, and addressed’.<sup>52</sup> The exclusion of the Maranaos from prime locations close to Lake Lanao shows the land dispossession of the Muslims through policies and devices of the central government continues to be experienced in the present.

While the TJRC’s analysis of land dispossession resonates with Marawi residents’ current experience, the TJRC’s recommendations to address land dispossession fall short of the community’s own resistance to the Duterte government’s Marawi reconstruction plan. Importantly, while Maranaos clamour to be returned to their properties close to Lake Lanao, the TJRC recommendation on land dispossession did not espouse the right to be returned to stolen lands nor clearly provided for the redistribution of land.

Critics have previously highlighted that conventional transitional justice often neglects to implicate international actors in past injustices limiting its range of solutions.<sup>53</sup> This is a relevant point to make in relation to land dispossession in the Bangsamoro and the search for potential solutions. Indubitably, land grabbing in the Moro areas during the Marcos regime constituted part of its many economic crimes. Yet the TJRC did not highlight the nexus between land dispossession and economic crimes in its analysis. Thus, in its recommendations on addressing land dispossession, it did not make specific recommendations about pursuing surviving perpetrators or beneficiaries of these crimes. Given Switzerland’s banking sector’s known role in hiding the proceeds of Marcos’ economic crimes, this omission should raise eyebrows.

Nevertheless, the TJRC’s recommendation to ‘redesign land services’ was potentially innovative and showed a desire to address a structural problem with socio-economic dimensions. The TJRC analysed land dispossession as a complex process facilitated by land titling and registration laws. Accordingly, it recommended an ‘overall redesign of land services’ in the Bangsamoro ‘*including changes in the legal framework and all procedures relating to land titling [and] registration*’.<sup>54</sup> This might suggest openings for advancing recognition of traditional titles for Muslims, but as the TJRC acknowledged, such measures

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51 *Ibid.*, p. 42.

52 *Ibid.*

53 Abou-El-Fadl (*supra* note 23); Carranza (*supra* note 23).

54 Transitional Justice and Reconciliation Commission, *supra* note 2, p. 78 (emphasis added).

relied on action by the state in the form of changes to the laws and regulations governing the land titling and registration system.

However, the potential of this recommendation has been substantially limited by the BOL. The BOL recognised the interest of the dispossessed in obtaining redress for land dispossession, but made very clear that the invalidation of land titles issued by the Philippine government was not going to happen. The provision of Article XI, section 2 in the BOL reads:

Sec. Reparation for Unjust Dispossession.—The Parliament [of the BARMM] shall enact laws providing for adequate reparation to the Bangsamoro people affected by unjust dispossession of territorial and proprietary rights or customary land tenure, which may include payment of just compensation to and relocation of such people. *No land title issued by the National Government shall be invalidated.*<sup>55</sup>

Thus, in a clear prioritisation of security of existing property rights, justice for victims of land dispossession was not allowed to mean the invalidation of existing titles. Instead, justice was limited to reparation of some kind such as payment of just compensation and relocation. The provision illustrates a form of impunity similar in effect to amnesties for the sake of peace. Past injustices in the form of titling of land grabbed from Moros were accepted, leaving victims with fewer remedies.

While reparation for land dispossession is still a welcome change from total lack of acknowledgment of and legal consequence for land dispossession, until there is clarity as to the funding source, implementation of reparation will be highly unlikely or reparation won't be substantial. Again, the TJRC's failure to link justice for land dispossession to measures that aimed to redistribute property held by perpetrators and beneficiaries of land-grabbing is a major problem. In this regard, previous Philippine experience with measures and demands to link agrarian reform and the reparation for Marcos' Martial Law victims to recoveries of Marcoses' ill-gotten wealth hidden in Swiss banks were already more inventive than the TJRC's recommendation. Thus, the inability to address grievances of the past does not inspire confidence in the transitional justice mechanisms that seek retributions for past human rights violations. As will be seen in the next section, such violations have not ceased and continue to take place in Mindanao.

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<sup>55</sup> Article XI, section 2, Bangsamoro Organic Law (emphasis added).



### 4.3 *Continuing Human Rights Violations*

Human rights violations during the fighting in Marawi further illustrate the continuation of the past and test the adequacy of the TJRC's recommendations on curbing impunity. During the siege of Marawi City by Muslim extremist groups in 2017, residents reported abuses committed not only by ISIS-affiliated forces but by government forces as well.<sup>56</sup> Amnesty International reported that an undetermined number of people—the ISIS-affiliated fighters, but also their hostages, and people who were trapped and unable to escape the city—had been killed as a result of government's aerial bombings and artillery attacks in the five month-long battle.<sup>57</sup> Many hostages or trapped residents who had been able to escape Marawi while the military assault was already in full swing were suspected by government forces of being sympathetic to ISIS-affiliated forces rather than being treated as victims. For this reason, they were subjected to detention, tortured or otherwise ill-treated by government soldiers at military checkpoints.<sup>58</sup> In addition, both ISIS-affiliated and government forces have engaged in large-scale looting of properties including jewellery, cash and household appliances that had been left behind by fleeing residents.<sup>59</sup>

Atar explained that from 2017 to 2019, the Duterte government has not acknowledged any of these misdeeds against civilians by government forces in the battle of Marawi as human rights violations.<sup>60</sup> Indeed, Duterte himself has often lashed out against the residents of Marawi for supposedly coddling ISIS-affiliated forces, thus putting the blame on their supposed disloyalty to the state for the destruction of their city.<sup>61</sup> These unacknowledged experiences of indiscriminate killings, detention, torture and theft of Muslim residents give government rhetoric of the 'liberation of Marawi' a colonialist ring to it. Furthermore, Duterte used the fighting in Marawi as justification to declare Martial Law in the entire island of Mindanao, increasing the sense of Philippine military control over everyday life beyond Marawi.

Many Marawi residents seek justice for these wrongdoings. These demands include the full accounting of the casualties, the ascertainment of their identities—whether combatants or civilians, and the acknowledgement by government of the existence of civilian casualties. In Atar's estimate, civilian deaths could reach about 1,000. He added that the local disaster office and rescue

<sup>56</sup> Amnesty International, *supra* note 49.

<sup>57</sup> Amnesty International, *supra* note 49, p. 24.

<sup>58</sup> *Ibid.*, pp. 18–22.

<sup>59</sup> *Ibid.*, pp. 23–24.

<sup>60</sup> Interview with Hamidullah Atar, 24 April 2018.

<sup>61</sup> J.T. Cordero, 'Duterte Blames Maranaos Anew for "letting" in Terrorists in Marawi', *GMA News Online* (1 July 2017).

teams have reported hundreds of unidentified dead. But many residents do not come forward to claim the bodies fearing their deceased relatives will be accused by the military of being extremists.<sup>62</sup> In seeking for an impartial investigation and accounting, Atar's group says the language of transitional justice, particularly the 'right to truth', an integral element of the United Nations principles against impunity, was useful for articulating demands. However, it isn't clear how the TJRC's anti-impunity recommendations facilitate translation or even consideration of their demands by government authorities as legitimate demands for justice. In contrast, silence over their demands confirms the impenetrability of impunity for human rights violations.

Impunity was a key word in the TJRC's analysis of the root causes of conflict. In its report, the TJRC acknowledged that impunity in the Philippine context was so complex and deeply ingrained that it makes sense to say there was 'a pervasive culture of impunity' in the country.<sup>63</sup> There was impunity for even the most extreme forms of violence such as massacres. Impunity was an expression not only of a weak or failing judicial system but also cultural-political factors like patronage, clientelism and corruption, and the hold of organised crime in the region.<sup>64</sup> Indubitably, Duterte's illiberal rhetoric protecting his security forces from any form of scrutiny or criticism for human rights violations, whether in the name of counterterrorism or his aggressive War on Drugs, adds another layer of complication to this culture of impunity. Managing this kind of impunity through legal, political, and institutional reforms as recommended by the TJRC clearly requires enormous effort and resolve. Furthermore, the necessary legal, political, and institutional reforms will certainly require a long time, perhaps generations, to undertake. Here, then, the TJRC already acknowledges that transitional justice in the form of anti-impunity requires a long and open-ended process rather than being secured in a relatively brief window period. Indeed, the TJRC grasped impunity as requiring multi-dimensional responses including prosecution but also political-institutional changes intended to catalyse longer-term changes to culturally ingrained practices.

Despite the central role of impunity in its analysis, the TJRC struggled to make impactful anti-impunity recommendations. Indeed, the TJRC's proposal for a government body to address impunity appears too modestly worded if not weak. The TJRC proposed an anti-impunity body to 'identify, investigate and *recommend*' measures which are aimed to 'overcome practices of

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62 Amnesty International, *supra* note 49, p. 26.

63 Transitional Justice and Reconciliation Commission, *supra* note 2, p. 56.

64 *Ibid.*, p. 62ff.

impunity at all levels, whether of a technical, political or financial nature'.<sup>65</sup> The sub-commission may also *request* disciplinary proceedings against erring officials. These proposals are potentially important and may provide openings for addressing the culture of impunity from within government. But without enormous resolve and resources, it is difficult to imagine the recommendations and requests of the proposed anti-impunity body being taken seriously by government.

Until there is clarity over the content of anti-impunity measures, perpetrators of injustices at the government level—where many of the crimes originate—will continue to remain exempt from punishment. The TJRC left anti-impunity measures largely undefined and to be determined by a body that has yet to be created by government, further calling into question the ability of the TJRC to invoke 'justice'. Consistent with the conventional practices of transitional justice (i.e. the four pillars), the TJRC left the hope of transformational change largely in the hands of elite actors who are willing to atone for their sins and create the tribunals and reparation mechanisms that they must then subject themselves to. While the risk of elite capture might have been alleviated by recognising civil society practices that go beyond support for the state's transitional justice initiatives,<sup>66</sup> the limitations in this section further highlight the weaknesses of conventional transitional justice measures in quelling the violence and addressing injustices of the past.

## 5 Federalism: Moving Forward?

While the previous section demonstrates the limitations of the TJRC's largely conventional approach to transitional justice, this final section will emphasise that political will for implementing/adopting the TJRC's transitional justice recommendations is missing. As the country veers further into authoritarian rule, the existence of a transition period in the Bangsamoro is put in question. We illustrate an impediment to the implementation of transitional justice provisions of the peace agreement under the Duterte administration, viz., the government's federalism proposal. Federalism has attracted enthusiasm among many of our respondents in Mindanao. It is touted as a more comprehensive solution to the Mindanao conflict both by the Duterte administration and adherents from sections of Mindanao's civil society, but federalism is also

65 *Ibid.*, p.77 (emphasis added).

66 P. Gready and S. Robins, 'Rethinking Civil Society and Transitional Justice: Lessons from Social Movements and "New" Civil Society' 21(7) *Int. J. Human Rights* (2017) 956–975.

feared by critics as a ruse to change the constitution to give Duterte and his circle more powers. Duterte believes that a federal form of government would help end conflict with the Muslims better than the BOL. Thus, in December 2016, Duterte kicked off his proposal to change the Constitution through Executive Order 10 creating a consultative committee to explore a federal system of government for the Philippines.<sup>67</sup>

Key to federalism's ability to impede implementation of transitional justice measures in the Bangsamoro agreement and to sap the energy for accountability for past abuses more generally is its competing vision of time and justice. The federalism proposal displaces the clamour for accountability for past violations through transitional justice mechanisms in the name of 'moving forward' from the past. That is, the rapid economic development, stability and a sense of normalcy of the Bangsamoro region. Moreover, by presenting itself as the transcendence of an unjust Manila-centred past, i.e., as a form of redress for historical and collective harm, federalism further reveals the confusion in the Bangsamoro about the need to deal with individual harms as well as collective harms.

Our interviews with civil society actors supportive of the federalism proposal revealed elite and community beliefs that federalism can address the *structural* harms of the past, unequal political development, and the need for economic growth. As a promise of justice and project of political change, federalism competes with transitional justice. Thus, this section investigates how federalism negatively affects the energy for implementing transitional justice measures in the Bangsamoro peace agreement.

### 5.1 *'Moving Forward' as Economic Development*

Frank Haldemann and Rachele Kouassi start their chapter with the quip, 'human rights begins with breakfast.'<sup>68</sup> Here, they cite Léopold Senghor, former president of Senegal, who argued that in countries that have suffered civil war, serious issues such as long-term malnutrition, low life expectancy, and high infant mortality have to be addressed before 'luxuries' such as political rights

67 M. Mogato, 'Philippines' Duterte starts moves to amend the Constitution', *Reuters* (9 December 2019).

68 F. Haldemann, and R. Kouassi 'Transitional Justice without Economic, Social, and Cultural Rights?', in E. Riedel, G. Giacca and C. Golay (eds), *Economic, Social, and Cultural Rights. Contemporary Issues and Challenges* (Oxford University Press, Oxford, 2014), pp. 498–516.

and 'justice'.<sup>69</sup> Transitional justice's focus on legal, political and institutional reforms, Lars Waldorf charged, has neglected economic development, risking irrelevance to people in the developing world.<sup>70</sup> In nations such as Nepal, it was argued that economic and political injustice is both the cause and consequence of war, and that the push for transitional justice by civil society ignores this.<sup>71</sup> Finally, Geoff Dancy and Eric Wiebelhaus-Brahm argue that transitional justice actually increases inequality and does little to address economic growth.<sup>72</sup> These criticisms of the transitional justice paradigm elsewhere are echoed in views supportive of federalism among many of our respondents in Mindanao.

Despite its vast and rich natural resources and great economic potential, Mindanao has remained underdeveloped over the years. Among the country's 17 regions, the Autonomous Region of Muslim Mindanao had the lowest level of socioeconomic development in 2015.<sup>73</sup> Many studies discuss the island's ongoing armed conflicts between the state and numerous insurgency groups as preventing broad-based socio-economic development.<sup>74</sup> While perceptions in the media and academic studies do not always reflect the situation on the ground, our interviews highlighted that of all the descriptions of Mindanao, poverty remained the most important issue to our interviewees.

Some of our respondents said transitional justice was unnecessary and 'moving forward' and growing the economy was more important than dwelling on the past. These views revealed a conception of the opportunity opened by the peace agreement as largely about economic development rather than about personal healing. According to Ishak Mastura, the MILF's representative to the TJRC, healing can mean economic development. He stated that it is 'not just

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69 This is also described as the "full belly thesis." See R. Howard, "The Full Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa" 5(4) *Human Rights Q.* (1983) 467–490; A corollary argument can be found in Asia as well. See M. Thompson, "Pacific Asia after 'Asian Values': Authoritarianism, Democracy, and "Good Governance," 25(6) *Third World Q.* (2004) 1079–1095.

70 L. Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', 21(2) *Soc. Legal Stud.* (2012) 171–186.

71 Tafadzwa Pasipanodya, 'A Deeper Justice: Economic and Social Justice as Transitional Justice in Nepal', 2(3) *Int. J. Transit. Justice* (2008) 378–397.

72 Geoff Dancy and Eric Wiebelhaus-Brahm, 'Bridge to Human Development or Vehicle of Inequality? Transitional Justice and Economic Structures', 9 *Int. J. Transit. Justice* (2015) 51–69.

73 Capuno, Joseph J. "Probing Conflict Contagion and Casualties in Mindanao, Philippines." 7 *Def. Peace Econ.* (2020) 810–829.

74 M. Knudsen, 'Agrarian Transition in the Southern Philippines: More than Poverty, Dispossession, and Violence', 51(2) *Critical Asian Studies* (2019) 232–252.

compensation, the return of properties, and the reparations for damages', and added that anyway 'there is a whole new generation that doesn't remember the wars of the 1970s.'<sup>75</sup> He emphasised, rather, that what people want from the transition to peace is economic betterment: '[I]n Mindanao, we don't want to be a ghetto. We need to take advantage of the stability wherein all [of] the region grows...and there's an [economic] boom.'<sup>76</sup> Echoing Mastura's de-emphasis of reparation in favour of human development, a community development worker emphatically asks:

How do you monetise hurt? Or quantify forgiveness? I suppose, if services and basic rights of people are addressed, such as education, health, transportation, the healing comes. Maybe this is the nearest we can get to the 'compensation'... This is the way federalism can help.<sup>77</sup>

Therefore, 'moving forward' understood as addressing the basic economic needs of a society that has long felt underserved and underdeveloped at the hands of Manila was thought to satisfy the demand for reparation or undermine its basis. In contrast to the perception that transitional justice was indifferent to the need for development, federalism was seen to potentially support positive economic change that would allow the region to move forward.

Other supporters of federalism thought federalism also addressed government's past broken promises with the MILF's predecessor organisation, the Moro National Liberation Group (MNLF), founded by Nur Misuari. The MNLF and Misuari continue to mobilise support from Tausug communities, a Moro people who elected not to join the new Bangsamoro region.

According to Edgard Ramirez, a former regional official, through federalism, 'there could be two autonomous governments', including one for the Tausugs. MILF's Mastura agrees that 'one of the issues [in Mindanao] is addressing inter-ethnic divides by creating sub-states or sub-regions' and that federalism addresses this more explicitly than the BOL.<sup>78</sup> While this may appease Misuari and the MNLF, Mastura believes it can also enhance the concessions given to the MILF. As expressed by a respondent, 'the current Bangsamoro Organic Law responded to 75% of demands [of the MILF]... meaning that the remaining 25% can be addressed through a federal setup'.<sup>79</sup> Thus, more power, access to

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<sup>75</sup> Interview with Ishak Mastura, 14 April 2019.

<sup>76</sup> *Ibid.*

<sup>77</sup> Interview with Aveen Acuna-Gula, 9 April 2019.

<sup>78</sup> Interview with Ishak Mastura, 14 April 2019.

<sup>79</sup> Interview with Mario Catubay, 15 April 2019.

resources, and response to the demands of the MILF could ensure greater success in quelling the demands for secession from both the MNLF and the MILF. Therefore, as seen in this section, addressing past violations of rights is less important than improving the livelihoods of the present and the economic viability of the future.

## 5.2 *Political Restructuring as Correction of Colonial Legacy and 'Historic' Justice*

Beyond the promise of economic development, political leaders argue that federalism is itself a form of justice, i.e., as the correction of historic political injustice by redistributing administrative power to the regions. Those interviewed agreed.

Duterte emphasises his understanding, shared with civil society, of the conflict in Mindanao as emanating from colonialism, particularly of the 'misdeeds [of the United States] ... the reason why Mindanao continues to boil.'<sup>80</sup> Attorney Randolph Parcasio, who served on the peace negotiation team of the MNLF, highlights that Duterte was an early supporter of Mindanao independence. According to Parcasio, Duterte understands that 'Charter Change should be able to address the centuries old demand for genuine self-rule of all the peoples in Mindanao'. Thus, in constructing the consultative committee on federalism, Duterte appointed three members that had a connection to Mindanao, including Parcasio.<sup>81</sup>

The sense that federalism could address the legacies of colonialism is oft repeated by its advocates. Senate President Aquilino 'Koko' Pimentel III whose father was also a senator and staunch advocate of federalism for decades stated,

As early as the 1890s, our national hero himself Dr. Jose P. Rizal advocated for a federal system of government for our country. Rizal wrote that the country would probably adopt the 'freest government' and he predicted that the islands will probably declare themselves a federal republic.<sup>82</sup>

<sup>80</sup> CNN Philippines Staff (2017), "President Rodrigo Duterte's departure speech (ASEAN Summit)" CNN, September 8.

<sup>81</sup> A. Colina, 'Federalism to give regions more powers, says Cha-Cha committee member', *MindaNews* (21 September 2018).

<sup>82</sup> A. Pimentel, 'From Decentralization to Federalism: The Next Step in Philippine Democracy' *Senate of the Philippines*, 22–23 September 2016, available online at [www.senate.gov.ph/speeches/sp\\_pimentel/sp\\_speech\\_2016\\_fed\\_forum.asp](http://www.senate.gov.ph/speeches/sp_pimentel/sp_speech_2016_fed_forum.asp) (accessed 24 September 2020).

Revolutionary leaders Apolinario Mabini and Emilio Aguinaldo are also cited as proposing a three-state federation representing the country's three island groups—Luzon, Visayas and Mindanao.<sup>83</sup> Antonio Arellano, a member of the Consultative Committee on Charter Change, added that the unitary form of government has only favoured certain areas and families in the country and widened the gap between rich and poor over the years.<sup>84</sup> He argues that the current national government veered away from the 'very essence of the democracy that [Filipinos] wanted to establish from the time of the First Philippine Republic'.<sup>85</sup> These arguments drew upon a version of history that implied that had the Americans not vanquished the First Philippine Republic, the form of government the Philippines would have had today would have been federal—an argument that resonates with deep sentiments against Spanish colonialism and American imperialism in the Philippines.

Federalism is also considered by many of those interviewed as a distinctly 'homegrown Mindanao agenda' and gives voice to different ways of ruling by Mindanao peoples. According to a local resident and former aid worker,

the idea of federalism is very attuned to cultural sensitivities...the Moro have intra-Moro sensitivities that they alone could understand that a non-Moro could not. So if they can resolve things among themselves without intervention from central government for example, they can probably resolve things among themselves faster.<sup>86</sup>

Many believe that a legacy of the failed anti-colonial revolution was the concentration of power in Manila. By loosening Manila's grip on power, federalism corrects this legacy. According to Benny Bacani, former dean of the College of Law, Notre Dame University in Cotabato City and founder of the Mindanao-based NGO Institute for Autonomy and Governance, to a great extent, the Mindanao push for federalism was driven by 'an anti-centre, anti-Manila sentiment'.<sup>87</sup> He adds that, 'with [the new Bangsamoro autonomy] nothing much has changed in terms of the policy framework...the region remains under the national government...'<sup>88</sup> Beyond the Bangsamoro region, the people in Mindanao feel that too much power and wealth have been long concentrated in Manila, and that

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83 G. Araneta, 'Federalism in Our Past', *Manila Bulletin* (19 July 2018).

84 Colina, *supra* note 81.

85 *Ibid.*

86 Interview with Aveen Acuna-Gula, 9 April 2019.

87 Interview with Benny Bacani, 16 April 2019.

88 *Ibid.*



federalism could shift the power and wealth back to the region. Discounting criticism of federalism heard outside Mindanao, development worker Winston Camarinas adds that,

the Luzon people are not too keen on [federalism], because historically, development has been too Manila-centric to the neglect of Mindanao...we [the people of Mindanao] want to have more autonomy and authority to rule for ourselves.<sup>89</sup>

In contrast to the conventional transitional justice mechanisms that aimed to remedy immediate past harms, the harms envisioned here are more historical and regional, tied to colonisation and local notions of justice. Solutions in this context are not admitting wrongdoing through truth commissions or more democracy within a broken system, but through a dramatic shift of power and an institutional transformation that represents a break from the past.

### 5.3 *Enthusiasm for Structural Transformation, not Reparations*

The enthusiasm for federalism further displaces the political will to implement transitional justice provisions in the Bangsamoro peace agreement among the same respondents. For example, Mastura, the MILF representative to the TJRC, was enthusiastic about the federalism proposal. On transitional justice, however, he said implementing TJRC's recommendations in the present moment not only was not a priority for both the government and the MILF, but may not be wise to do as measures like reparation for land dispossession can rekindle inter-communal hatred and division. He explains, 'There is a bit of caution now with transitional justice because of what happened in Colombia ... [T]ransitional justice was front and centre in the peace process/agreement in Colombia and that produced its own sets of divides in its society.'<sup>90</sup>

Indeed, it was striking to observe leaders of civil society seeming so willing to take risks with changing the constitution to achieve federalism while appearing to have no appetite for the elaboration of measures for accountability. Undeniably, the energy for federalism emerges in part from the charisma of Duterte himself, i.e., from people's perception of him as a 'Mindanao-borne son' and his understanding of Mindanao issues, to his professed desire to

89 Interview with Winston Camarinas, 15 April 2019.

90 Interview with Ishak Mastura, 14 April 2019. This comment alludes to the fact that seeking reparations in a transitional justice framework, as seen in the Colombian peace talks, exposes the lack of a common ground amongst stakeholders and the potential exacerbation of conflict between such groups.

address the demands of both the MNLF and the MILF. Thus, for a measure that is supposed to realise collective demands, ironically its success is guaranteed by one trusted strongman who is to deliver this solution. Duterte's purported sincerity and personality plays a big role in people's perception of federalism. Reminded of the experience with Ferdinand Marcos when constitutional change and Martial Law installed his dictatorship, Duterte's supporters said Duterte will be different.<sup>91</sup> 'I would imagine Duterte clinging to political power,' Bacani explains, 'but [he is different from Marcos] in terms of sincerity in pushing some of the things he wants for the good of the people.'<sup>92</sup> He adds, 'Duterte can connect with the local population... they can feel like he's with them... Everyday people use foul language so they don't mind him... especially in Mindanao. Even for the Bangsamoro, he's the only president who was willing to push the new law [BOL]'.<sup>93</sup> Parcasio highlighted that 'somebody coming from Mindanao he would be in a better position to [ensure] that charter change ... address[es] the centuries old demand for genuine self-rule of all the people in Mindanao'.<sup>94</sup>

For his part, MNLF's Parcasio described transitional justice as 'an MILF idea' and initially declined to comment thereon. However, he showed great interest in talking about federalism and discussed quite extensively the plan for the layout of the states, and exclusive powers that federalism affords states that allow them to go beyond the confines of the existing constitution. His description of the 'unprecedented' opportunity under the Duterte administration to rewrite the constitution makes the present situation akin to a transition in the sense of the crucial brief period of elite negotiation and political-institutional rearrangement. But the package of reforms that attracts energy is federalism not transitional justice.

## 6 Conclusion

This article first offered a reading of the 'dealing with the past' framework endorsed by the Swiss-supported commission that incorporated transitional justice measures into the recent peace deal in Mindanao as a largely conventional approach to transitional justice—one that addressed immediate past

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<sup>91</sup> Interview with Aveen Acuna-Gula, 9 April 2019.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> Interview with Randolph Parcasio, 13 April 2019.

harms, encouraged more democratic participation, and saw both as essential to 'moving forward'. The article then discussed recent experiences of land dispossession and human rights abuses in Marawi City to demonstrate its limits and anachronism and highlight the necessity for transitional justice mechanisms that are not reduced to bureaucratic or political-institutional fixes. Finally, the article highlighted how even conventional transitional justice is further impeded as the Philippines enters a new phase of authoritarian rule and a transition to federalism is instead pushed—a project that provides a competing formula to 'deal with the past.' Federalism, therefore, is presented by government and supporters as an alternative that addresses the more pressing concerns of political stability and economic development, historical injustices rather than the immediate harms of the past, and transformational change in what is perceived as a largely dysfunctional system.

The Philippines highlights the importance of further developing the discourse of transitional justice to move beyond its current paradigmatic approaches and into a direction that is more nuanced, flexible, and responsive to local conditions. Moreover, this article demonstrates the challenge that the narratives of development as 'moving forward' and political restructuring as 'historic justice' can pose to transitional justice. That is, the perception that transitional justice is unresponsive to the most pressing needs of people emerging from conflict-induced underdevelopment and the structural legacies of centuries-old colonialism. Without offering measures for individual accountability for past violations, the government and supporters present federalism as another formula with a different vision of historical justice, promising development and 'moving forward'. We have argued that a transitional justice approach that delivers a more realistic justice in the Bangsamoro must clarify whether the 'past' starts with immediate harms of a recently ended conflict with the MILF or farther back, how to compensate victims (if at all) of past injustices, and what 'justice' means in the context of ongoing land grabbing and impunity for gross human rights abuses. In the Philippines, the apparent lack of substance of the promise of reparations for past harms makes the achievement of economic stability and political restructuring through federalism appear to those we interviewed as more important than implementing a conventional transitional justice approach.

As the transitional justice framework continues to evolve, the Philippines provides a unique case study that introduces not necessarily new conditions, but rather, a complex arrangement of critical issues. Dealing with the past, or addressing political and economic injustices, are concerns found in many regions of the world struggling to move on from conflict. Yet the experience in

the Philippines demonstrates that for many countries, even with an articulate civil society, overcoming the past may not happen in a linear or predictable manner. Not only can accountability be slow to achieve, but transitions can be interrupted. Further, justice may demand a more dramatic break from the past than what political-institutional remedies currently offer.