

PROBLEM AREAS IN THE BANGSAMORO BASIC LAW*

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I. INTRODUCTION: THE CONSTITUTION AND THE POWERS OF THE STATE

In promulgating the Constitution, the people entrusted the powers of the State to the Government established under that fundamental law by endowing it with a complex of functions, authorities, jurisdictions, immunities, and limitations. Embodying the State, the people proclaimed the foundation principle in Article II, Section 1 of the Constitution, affirming that “[s]overeignty resides in the people and all government authority emanates from them.” This affirmation embodies the promulgation of the Constitution and the establishment of the Government as the people’s act of sovereignty.

As an inherent act of sovereignty, therefore, the Constitution is out of reach of contravention. In that respect, more than the formal law of the national community, it is the political and economic formula for self-determination, its social framework growing out of the historical roots of its constituents.

This holds true whatever fascinating or attractive political theory may seize the mind questioning the binding force of the Constitution. On the same premises, the Constitution as an act of sovereignty becomes the supreme standard for determining the validity of the Comprehensive Agreement on the Bangsamoro (CAB),¹ together with its implementing

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¹ Executive Order No. 120, constituting the Transition Commission, uses the nomenclature “2012 Framework Agreement.” House Bill No. 4994, however, employs the expression “Comprehensive Agreement on the Bangsamoro” in the Explanatory Note. Paragraph 2 of Part IX of the Framework Agreement on the Bangsamoro stipulates: “The Parties commit to work further on the details of the Framework Agreement in the context of this document and complete a comprehensive agreement by the end of the year.”

The components of the Comprehensive Agreement on the Bangsamoro are: (1) Framework Agreement on the Bangsamoro; (2) Annex on Transitional Modalities and Arrangements; (3) Annex on Revenue General and Wealth Sharing; (4) Annex on

instrument in the Bangsamoro Basic Law (BBL) as proposed in House Bill No. 4994 and in Senate Bill No. 2408.

II. THE POWERS OF THE STATE UNDER THE BANGSAMORO BASIC LAW

Proceeding from the foregoing premises, the powers of the Government as constituted under and pursuant to the Constitution are beyond the juridical competence of any person or subject, whether acting in a private or an official capacity. They cannot be bargained or negotiated away in contractual relations, as was done in the CAB by the Government of the Philippines Peace Negotiating Panel, purporting to represent the Philippine Government, with the Moro Islamic Liberation Front.²

The CAB, as implemented by the BBL, restructures the powers of the National Government in relation to the Bangsamoro Government. On the whole, the powers of the Government are reduced to a contractual agreement between the Parties to the CAB, resulting in a new configuration of political authority. In the first place, such authority raises the fundamental issue of whether a government office, together with an organized non-governmental group, may reorganize the powers of the National Government as spelled out in the CAB, a usurpation of the act of sovereignty expressed in the Constitution. Obviously, the legal competence of this government office in the exercise of such a function, objectionable as it is, is prohibited by the fundamental law. Powers in contradiction to its principles cannot be derived from the Constitution.

The CAB enumerates the categories of powers in paragraph 1 of Part III of the Framework Agreement on the Bangsamoro (FAB), which reads: “The Central Government will have *reserved powers*, the Bangsamoro Government shall have its *exclusive powers*, and there will be *concurrent powers* shared by the Central Government and the Bangsamoro Government.”³ The BBL deals with reserved powers in Section 1, concurrent powers in Section 2, and exclusive powers in Section 3, in Article V on “Powers of Government.”

Normalization; (5) Annex on Power Sharing; (6) Introductory Text; and (7) Addendum on the Matter of Bangsamoro Waters.

² The CAB was signed by both Parties on March 27, 2014, while the FAB was signed on October 15, 2012.

³ Emphasis supplied.

Forming part of the CAB is the Annex on Power Sharing (APS) that “contains details about the particular competencies and authorities of the Central Government and the Bangsamoro Government which shall serve as guide in the drafting of the Basic Law pursuant to the Framework Agreement on the Bangsamoro.”⁴ Furthermore, the APS explains as follows: “The Framework Agreement *delineates powers at different levels. The Central Government will have its reserved powers, the Bangsamoro Government will have its exclusive powers within its territorial jurisdiction and there will be concurrent powers shared by the Central Government and the Bangsamoro Government.*”⁵

1. Reserved Powers

The FAB provides that “[t]he Central Government will have reserved powers.”⁶ It goes on to stipulate that the Central Government shall have powers on: (a) defense and external security, (b) foreign policy, (c) common market and global trade, (d) coinage and monetary policy, (e) citizenship and naturalization, and (f) postal service. This list is without prejudice to *additional powers that may be agreed upon by the Parties.*⁷

How is this concept of reserved powers defined? The APS of the CAB has conceptualized them as “powers or matters over which authority and jurisdiction are *retained by the Central Government.*”⁸ Apparently, these powers pertain to those which the Central Government may exercise in its relationship with the Bangsamoro Government.

By way of implementing the FAB, the BBL in Section 1 of Article V repeats the enumeration of reserved powers in the FAB, *with the addition* of immigration, customs and tariff, and intellectual property rights. That these specified powers are “retained” by the Central Government appears to be the emphasis in this provision. The addition of more reserved powers must have resulted from the intent of the parties to the FAB that the “list [of reserved powers] is without prejudice to *additional* powers that may be agreed upon by the Parties.”⁹

⁴ Annex on Power Sharing, ¶1 (Dec. 8, 2013)[hereinafter “APS”].

⁵ *Id.* at ¶2. (Emphasis supplied.)

⁶ Framework Agreement on the Bangsamoro, III, ¶1 (Oct. 15, 2012) [hereinafter “FAB”].

⁷ *Id.* at III, ¶2. (Emphasis supplied.)

⁸ APS, at ¶3. (Emphasis supplied.)

⁹ FAB, at III, ¶2.

By managing the concept of such powers, the Parties to the CAB have achieved results with the following implications. They assume that they have the legal competence and personality to engage in contractual relations that will determine and restructure the powers of the Government and create relations between the National Government and its constituent autonomous regions. These matters pertain to the sovereign act of the people and are subsumed in their promulgation of the Constitution; they can only be changed by an amendment or a revision of the fundamental law. In conceptualizing reserved powers, the CAB Parties have usurped the sovereign function which the people have already enshrined in the Constitution.

After providing the list of reserved powers in Part III of the FAB, the Parties added the stipulation that “[t]his list is without prejudice to additional powers that may be agreed upon by the Parties.” Indeed, in Section 1 of Article V of the BBL, additional reserved powers are added, as indicated above. These provisions signify that the powers of the Government are treated by the Parties as a subject matter of free stipulation, subject to their contractual intentions.

The Parties also appear to be of the impression that the powers of the Government are of such a broad range that they defy a determination in the CAB; however, in their agreement they singled out only those that are listed in Part III of the FAB and finally those listed in Section 1, Article V of the BBL. In doing this, the Parties have resorted to the scheme of dividing the so-called reserved powers into two categories: those that will not be applied by the National Government in dealing with the Bangsamoro Government and those that will be applicable in its relationship with the Bangsamoro Government. The second category is referred to in the CAB and in the BBL as “reserved powers.”

This categorization of powers necessarily implies that the intent of the CAB and the BBL is that certain powers of the National Government are not to be applied in its relationship with the Bangsamoro Government. In effect, the CAB and the BBL have moved to deprive the National Government of certain powers in its relation with the Bangsamoro Government. This consequence appears clear by reason of the provision in the Annex on Power Sharing where it is stated that “reserved powers” pertain to the “authority and jurisdiction” “*retained* by the Central Government.”¹⁰ This means that those which are not retained are not

¹⁰ *APS*, at ¶3.

exercisable by the National Government in dealing with the Bangsamoro Government.

The emergent principle under the CAB and the BBL is that the National Government has no power and authority over the Bangsamoro Government other than those provided under the CAB and as implemented by the BBL. This non-retention scheme of powers is the product of the contractual discretion of the Parties which was derived outside of the constitutional box; it was proposed under the mistaken notion that Congress, by means of enacting the BBL, can assume the competence to amend the fundamental law through a normal legislative process.

This fragmentation of government powers—in particular, their categorization into those which are reserved and those which are not—finds no basis in the Constitution. Are there powers of the National Government which are not reserved powers under the Constitution and, thus, not exercisable by its authority in relation to the autonomous regions? In the first place, this categorization is alien to the fundamental law and to our system of government. Emphasis must be placed on the constitutional prescription that all powers not provided by the Constitution and the national laws to the autonomous regions pertain to the National Government.¹¹

2. Concurrent Powers

In Section 2 of Article V, the BBL provides that “[c]oncurrent powers shall refer to the powers shared between the Central Government and the Bangsamoro Government within the Bangsamoro, as provided in this Basic Law.” These “concurrent powers” are defined in the fourth paragraph of the APS of the CAB: “Concurrent powers shall refer to the shared powers between the Central Government and the Bangsamoro Government, as contained in this Annex and as shall be further provided in the Bangsamoro Basic Law.”

Part III of the APS contains 14 areas in which “the Central Government and the Bangsamoro Government shall exercise powers within the Bangsamoro.” The same matters are provided in Section 2 of Article V of the BBL; among the more important of these appear to be the authority to manage land registration, human rights and humanitarian protection,

¹¹ CONST. art. X, §17.

auditing, civil service, customs and tariff laws and regulations, administration of justice, and public order and safety.

Installing these concurrent powers means granting the Bangsamoro Government a measure of independence and authority to exercise the powers of the Central Government, which, in turn, implies that these same powers may have already been transferred to it. This also means that the powers of the Bangsamoro Government have been institutionalized. Thus, in the implementation of the CAB, the BBL envisages “to organize its own social security system and pension system,” to create its own office of land registration, to have the “Bangsamoro auditing body” made distinct from the Commission of Audit of the National Government, and to build the Bangsamoro Civil Service office with its own “professional civil service corps,” despite the existence of the Civil Service Commission, among other cases of institutional separation.¹² This institutionalization may lend permanence to the fragmentation of national powers.

The provisions pertaining to concurrent powers raise the main issue of whether or not they have been validly created, in particular because they are segmented from the powers which the Constitution has mandated to belong to the National Government. The result is that in the hierarchy of authority, the Bangsamoro Government, as it stands in the BBL, is in parity with the National Government, in the main subject only to “cooperation and coordination” with the latter as the BBL stipulates. This may find justification in paragraph 2 of Part I of the APS which, *inter alia*, provides that “[t]he Central Government and the Bangsamoro Government shall be guided by the principle of parity of esteem and accepted norms of good governance.”

The concurrent powers which are institutionalized by the BBL through the establishment of separate Bangsamoro offices are at present treated as integral powers of the National Government by our national laws; these laws would have to be amended to reflect the reorganization of powers in the National Government that will pave the way for the exercise of the Bangsamoro concurrent powers, if permissible. Hence, the creation of concurrent powers also touches on how congressional authority may be exercised.

¹² APS, at III, ¶2; H. No. 4994, 16th Cong., 2nd Sess., art. V, §2. Bangsamoro Basic Law [hereinafter “BBL”].

3. Exclusive Powers

Section 3 of Article V of the BBL is a litany of 58 areas of governance described as exclusive powers of the Bangsamoro Government; they are “matters over which authority and jurisdiction shall pertain to the Bangsamoro Government” in its territory. This provision of exclusive powers necessarily implies that they are exercisable only by the Bangsamoro Government, that is, to the exclusion of the National Government. In fact, because of the nature of these powers, the Bangsamoro Government is the only governing authority in its territory, displacing in the process the National Government in its current areas of governance pursuant to the fundamental law.

Under this provision, the BBL appears to be complying with the CAB in its APS which refers to exclusive powers as “powers or matters over which authority and jurisdiction pertain to the Bangsamoro Government.”¹³ Deserving focus is the mandate of the CAB in its APS that “[t]he Central Government shall respect the exercise of the competencies and exclusive powers of the Bangsamoro Government.”¹⁴ The emphasis on the exercise of exclusive powers is further affirmed by the concept of devolution which “the Parties accept” in the APS as “[involving] a process of empowerment, mobilization, capacity building and financing”;¹⁵ this may further justify the

¹³ *APS*, at ¶5.

¹⁴ *Id.* at I, ¶2.

¹⁵ *Id.*, at I, ¶5; Exclusive powers in the *BBL* as provided in Section 3, Article V apply to the following areas or matters: agricultural, livestock and food security; economic and cultural exchange; contract loans, credit and other forms of indebtedness with any government, private bank and other lending institutions, except those requiring sovereign guaranty; trade, industry, investment, enterprise and regulation of business; labor, employment, and occupation; registration of business names; barter trade and counter trade with ASEAN countries; economic zones and industrial centers; establishment of free ports; tourism; creation of sources of revenue; budgeting; financial and banking system; establishment of Bangsamoro government-owned and/or controlled corporations and financial institutions; authority to regulate power generation, transmission and distribution operating exclusively in the Bangsamoro; operation of public utilities; receive grants and donations; education and skills training; science and technology; research councils and scholarships; cultural and language; sports and recreation; regulation of games and amusement operations; libraries, museums, historical, cultural and archeological sites; regulation on manufacture and distribution of foods, drinks, drugs, and tobacco; Hajj and Umrah; customary laws; declaration of Bangsamoro holidays; ancestral domain and natural resources; protection of the rights of the indigenous people; land management, land distribution, and agricultural land use reclassification; cadastral land survey; expropriation and eminent domain; environment, parks, forest management, wildlife, natural reserve and conservation; inland and waterways for navigation; inland waters; management, regulation and conservation of all fishery, marine and aquatic resources within the Bangsamoro territorial jurisdiction; Bangsamoro settlements; customary justice; Shari’ah courts and

exclusive powers given to the Bangsamoro Government in addition to its concurrent powers.

The BBL areas within the scope of these exclusive powers in the Bangsamoro territory are so extensive that they cover the entire range of governmental authority, effecting the exclusion of the National Government, and, as a consequence, eliminating the accountability of the latter as a duly constituted government established by the sovereign authority of the Constitution.¹⁶

There can be no recognition of powers and jurisdictions exclusive to the Bangsamoro Government; otherwise, the Republic would be conceding that it does not possess internal sovereignty or supreme authority over matters within the exclusive powers of the Bangsamoro Government. National sovereignty, however, is indivisible.

III. THE CONSTITUTION'S AUTONOMOUS REGION AND THE BANGSAMORO

In Section 15 of Article X, the Constitution mandates that “[t]here shall be created autonomous regions in Muslim Mindanao.” Together with the appropriate provisions of the fundamental law, national laws form part of the constitutional standards to be used in the creation and governance of autonomous regions.¹⁷

The core directive of the fundamental law is that the autonomous region “shall be created [...] within the *framework of this Constitution* and the

Shari’ah justice system; public administration and bureaucracy for the Bangsamoro; health; social services, social welfare and charities; waste management; establishment and supervision of humanitarian services and institutions; identification, generation and mobilization of international human resources; establishment of Awqaf (endowment) and charitable trusts; *Hisbah* office for accountability as part of Shari’ah justice system; registration of births, marriages, and deaths; housing and human settlements; development planning; urban and rural development; water supplies and services, flood control and irrigation systems in Bangsamoro; public works and highways within the Bangsamoro; establishment of appropriate mechanisms for consultation of women and marginalized sectors; special development programs and laws for women, the youth, elderly, labor, the differently-abled, and indigenous cultural communities; and local administration, municipal corporations and other local authorities including the creation of local governments.

In addition to these 57 matters which the APS in Part III also provides, it includes a general welfare clause which says “[e]stablishment or creation of other institutions, policies and laws for the general welfare of the people in the Bangsamoro.”

¹⁶ CONST. art. X, §§16-17.

¹⁷ CONST. art. X, §§16-18, 20.

national sovereignty as well as the *territorial integrity* of the Republic of the Philippines.”¹⁸ Thus the elements integral to the creation of an autonomous region are: (1) conformity to the directives of the Constitution; (2) the Republic’s national sovereignty; and (3) its territorial integrity.

1. Constitutional Framework

As to the first element, the Bangsamoro appears to base its creation not on the Constitution, but on the contractual relations between the GPH Peace Negotiating Panel and the MILF to be implemented by the BBL. As a consequence, the definitive features of the BBL in terms of powers, jurisdictions, rights, and accountability appear to implement the CAB, together with all the Annexes. In other words, the BBL is the CAB shaped into a legislative form for the formality of enactment by Congress.

Deserving emphasis is the extraordinary character of the BBL in that it affirms in its Preamble (common to both House Bill No. 4994 and Senate Bill No. 2408) the idea that its promulgation into law is done by the Bangsamoro people themselves. It reads as follows:

*We, the Bangsamoro people and other inhabitants of the Bangsamoro, imploring the aid of the Almighty, [...] for genuine and meaningful self-governance as stipulated under the Comprehensive Agreement on the Bangsamoro (CAB); [...] do hereby ordain and promulgate this Bangsamoro Basic Law, through the Congress of the Republic of the Philippines, as the basic law of the Bangsamoro [...]*¹⁹

In this light, Congress, which is the sole repository of plenary legislative power under the Constitution, becomes a mere instrumentality of the Bangsamoro people’s self-determination. This may imply that Congress, in the exercise of its legislative function in the process of enacting the BBL, is circumscribed by the mandate of the Bangsamoro people expressed in the CAB and the BBL.

Moreover, the President of the Republic has committed himself to the enforcement of or compliance with the CAB vis-à-vis the enactment into law of the BBL. In his Executive Order No. 120 of December 17, 2013, issued for the “Constituting the Transition Commission” in compliance with the CAB, he made the following commitment:

¹⁸ CONST. art. X, §15. (Emphasis supplied.)

¹⁹ Emphasis supplied.

[First,] [...] the Government entered into the 2012 Framework Agreement [...], which is envisioned to pave the way for the peaceful resolution of the armed struggle in Mindanao [...]

[Second,] the Government acknowledges *its commitment to exert all efforts towards realizing the full implementation of the Agreement*; [...]²⁰

[Third] [the Transition] Commission shall have the function “To draft the proposed Bangsamoro Basic Law *with provisions consistent with the 2012 Framework Agreement on the Bangsamoro*; [...]²¹

The act of creating the Transition Commission appears to be the President’s implementation of the FAB’s directive in Part VII, *particularly addressed to him*, namely: “There shall be created a Transition Commission through an Executive Order [...]”²² and “[t]he draft Bangsamoro Basic Law submitted by the Transition Commission shall be certified as an urgent bill by the President.”²³

As indicated above, the President has ordered the BBL to be drafted “with provisions consistent with the 2012 Framework Agreement on the Bangsamoro.” It would have been wise if he had desired it to have been consistent instead with the Constitution. However, he intended that it be the Constitution that is to be amended in order to suit it. His Executive Order says in section 3(b) that “[w]henever necessary, [the Transition Commission] recommend[s] to Congress [...] the proposed amendments to the 1987 Philippine Constitution.” Apparently, he is of the view that it is the Constitution which must comply with the CAB or the FAB.

The President has fulfilled the foregoing mandate, but which mandate is derived from the CAB, not from the Constitution or other existing national laws. After considerable delay in its submission to Congress on account of amendments to the Commission’s draft by the Office of the President, *the BBL has formally become the act of the President by reason of his certification of the BBL as his urgent bill* in compliance with the CAB.

Section 17, Article X of the Constitution provides that “[a]ll powers, functions, and responsibilities not granted by the Constitution or by law to the autonomous regions shall be vested in the National Government.” In an

²⁰ Exec. Order No. 120; *FAB*, at VII, ¶4a. (Emphasis supplied.)

²¹ Exec. Order No. 120, §3a. (Emphasis supplied.)

²² *FAB*, at VII, ¶3.

²³ *Id.* at VII, ¶7.

extensive departure from the fundamental law in this mandate, the BBL, in implementing the CAB, creates an entire political system imbued with powers, functions, and responsibilities independent from those of the National Government; in fact, the impact of that system consists in the intrusion of concepts of governance alien to the Constitution's own political system. Under the fundamental law, the organic act of the autonomous regions shall have as "the basic structure of government for the region [...] the executive and the legislation assembly."²⁴ This is understood to require that such structure shall be "consistent with the provisions of this Constitution and [existing] national laws."²⁵ The constitutional system as thus prescribed undergoes a radical revision with both the CAB and the BBL establishing an "asymmetrical political relationship" between the National Government and the Bangsamoro Government. As a result, the CAB and the BBL have the effect of rejecting the cornerstone principle of the Constitution, namely, the separation of powers. What may have become asymmetrical is the Constitution.

Taking into account the violence done to the Constitution as brought out in the present view, incredible, to say the least, is the direct involvement of the President and the Congress in the inordinate claims of the CAB and the BBL.

2. National Sovereignty

The second premise of the Constitution in the creation of an autonomous region is that it be established within the framework of national sovereignty. Under the fundamental law, national sovereignty pertains to the people's act of sovereignty pursuant to the supremacy clause of the Constitution in Section 1, Article II that "[s]overeignty resides in the people and all government authority emanates from them." The powers of the National Government that the fundamental law ordains are expressive of sovereignty, the contravention of which by the CAB and the BBL is effected by their derogation of such powers. How the Parties to the CAB derive their authority to this effect and by what legal capacity they are empowered to do so continue to be a juridical vacuum.

At any rate, the concept of reserved powers, together with those of concurrent powers and exclusive powers, is a creation of the Parties that are at war with the concept of national sovereignty. In the concept of

²⁴ CONST. art. X, §18.

²⁵ CONST. art. X, §18.

concurrent powers, the CAB and the BBL set up a reorganized structure of power into a hierarchy unknown in the Constitution where the Bangsamoro Government stands in parity with the National Government, and, in specified areas of authority, exercises power in relative independence from the National Government.

Consequently, the entire system of governmental powers is split into two by the concept of powers exclusive to the Bangsamoro, leaving the Bangsamoro in the exercise of exclusive powers covering vast areas of authority. Thus, national sovereignty itself is subjected to a dichotomy of powers, functions, and responsibilities, from which emerges the Bangsamoro entity under the CAB and BBL imbued with an “internal sovereignty,” through the application of which it will maintain relations with the National Government. Overall, the BBL in implementing the CAB presents a creation of a political system within the Philippine State that has its own territory, population, government, and natural resources and is intended to function in relative independence from the National Government.

From the projected concept that the National Government delegates or devolves powers to the Bangsamoro Government, the latter is said to derive, in the language of the CAB’s APS, the “process of empowerment, mobilization, capacity building and financing that can be strengthened by strong cooperation and partnership” between the two governments.²⁶ But this arrangement is a reversal of constitutional principles and, therefore, impermissible; only such powers and responsibilities as the Constitution grants to autonomous regions may be exercised or applied by the Bangsamoro Government and those “not granted by the Constitution or by law to the autonomous regions shall be vested in the National Government.”²⁷ And as granted to the National Government, they are not delegable or transferable by devolution or by any other means to any political subdivision.

The limits which the Constitution imposes on the powers, functions, and responsibilities of autonomous regions are not confined to those explicitly provided for in the fundamental law; the Constitution sets additional limits by means of “law” in Section 17, or by “national laws” in Section 20 of Article X. A reasonable interpretation of these provisions is that these national laws or statutory enactments of national character are not subject to amendment or repeal by the BBL or any other legislative

²⁶ *APS*, at I, ¶5.

²⁷ CONST. art. X, §17.

enactments if they are *intended to, or for the purpose of, changing the constitutionally ordained powers and status of autonomous regions*. To this extent or under these limitations, the BBL suffers from a basic infirmity and may justifiably be pronounced as in contravention of the fundamental law.

In expressly providing in the organic acts of autonomous regions that their legislative power to the governed should be subordinated to national laws, the Constitution created a secondary tier of legislative enactment, namely, the organic act below and its obedience to *national laws*.

3. Territorial Integrity

Integrated in the idea of national sovereignty is the element of territorial integrity; in particular, this may pertain to how the Constitution characterizes the nation's wealth and resources. On two fundamental principles, the Constitution prescribes that:

[First,] [a]ll lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests, or timber, wildlife, flora and fauna and other natural resources are *owned by the State*.²⁸

[And second,] [t]he exploration, development and utilization of natural resources shall be *under the full control and supervision of the State*.²⁹

The ownership and control of the State do not pertain or relate to the exclusive authority and jurisdiction of any local government unit or autonomous region. That the natural resources belong to the State, together with the full control of their exploration, development, and utilization, is a designation of ownership by the people for their life's support. It is an act of sovereignty justified by the premise that "all government authority emanates from them." Inherent in the people's ownership is the principle of intergenerational equity that takes into consideration the interests of the future generations of Filipinos.

So essential is this mandate that as embodied in the international law of human rights, it is more appropriately described as the "right of the people." Common to Articles 25 and 27 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on

²⁸ CONST. art. X, §17. (Emphasis supplied.)

²⁹ CONST. art. X, §17. (Emphasis supplied.)

Civil and Political Rights is the following text: “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.”

Both Covenants also provide in common paragraph 2, Article 1, that “[i]n no case may a people be deprived of its own means of subsistence.” The two Covenants have the force of law on the Philippines, being a State Party to both.³⁰

On the other hand, both the CAB and the BBL are of the assumption that the natural resources of the State in the Bangsamoro territory are matters consigned exclusively to the Bangsamoro; in their long litany of exclusive powers, for example, are listed natural resources, wildlife, natural reserves, marine and aquatic resources, inland waters, agricultural land use, and power generation.³¹

Under the “power sharing” arrangement of the CAB, and as provided in Section 8, Article XIII of the BBL, the Bangsamoro Government “shall have the authority, power, and right to explore, develop and utilize the natural resources including surface and sub-surface rights, inland waters, coastal waters, and renewable and non-renewable resources in the Bangsamoro.”

All these matters are covered by the exclusive powers of the Bangsamoro Government. As to mineral resources in particular, the BBL in Section 13, Article XIII provides that “[t]he Bangsamoro Government shall have authority and jurisdiction over the exploration, development, and utilization of mines and mineral resources in its territory.”

In the extraordinary grant of preferential rights, Section 11, Article XIII of the BBL reads: “Qualified citizens who are *bona fide* inhabitants of the Bangsamoro shall have preferential rights over the exploration, development, and utilization of natural resources, including fossil fuels (petroleum, natural gas, and coal) and uranium, within the Bangsamoro territory.”³²

³⁰ Respectively: 993 U.N.T.S., *entered into force* on January 3, 1976; 993 U.N.T.S. 171, *entered into force* on March 23, 1976.

³¹ *APS*, at III; *BBL*, art. V, §3.

³² CONST. §16: “The President shall exercise general supervision over autonomous regions to ensure that *the laws are faithfully executed*”. §17: “All powers, functions, and responsibilities *not granted by the Constitution or by law* to the autonomous regions shall be vested in the National Government”. §18: “The Congress shall enact an organic act for each autonomous region [...] The organic acts shall likewise provide for special courts with personal, family and property law jurisdiction *consistent with the provisions of the Constitution*”

In our constitutional system, the concept of a territory is that of an element integral in the formation and praxis of the Philippines as a State. The fundamental law characterizes it as a unity in “national territory [...] with all the islands and waters embraced [...] and all other territories over which the Philippines has sovereignty and jurisdiction.”³³ Territory as a geographical area is unified by national sovereignty and not fragmented by the grant of exclusive jurisdictional control to local government units or autonomous regions.

The CAB and the BBL, however, conceive of the Bangsamoro territory as an integration of essential features, namely, its own powers and jurisdiction constituted into a government, population, and territory, which are in relative independence from the National Government and the Constitution.

IV. DEROGATION OF NATIONAL GOVERNMENT TO CO-EQUALITY WITH THE AUTONOMOUS REGION

In establishing the validity of the creation and governance of an autonomous region in Muslim Mindanao, the mandate of the Constitution adopts *national laws*, together with those which the fundamental law itself stipulates, as the bases. Thus, the Constitution in Section 16, Article X directs the President to exercise general supervision over autonomous regions “to ensure that the *laws* are faithfully executed.”³⁴ Section 17 of that Article says that “[a]ll powers, functions, and responsibilities *not granted by this Constitution or by law* to the autonomous regions shall be vested in the National Government”;³⁵ this provision necessarily implies that the autonomous region in Muslim Mindanao shall only have the “powers, functions, and responsibilities” granted by the Constitution and the *national laws*. This provision controls the interpretation and application of Section 20 of the same Article even as it provides that “the organic act of the

and *national laws*”. §20: “Within its jurisdiction and *subject to the provisions* of the Constitution and *national law*, the organic act of autonomous regions shall provide for legislative powers [...]”(Emphasis supplied.)

³³ These legislative powers are over: “Administrative organization; Creation of sources of revenue; Ancestral domain and natural resources; personal, family, and family relations; Regional, urban and rural planning development; Economic, social, and tourism development; Educational policies; Preservation and development of the cultural heritage; and Such other matters as may be *authorized by law* for the promotion of the general welfare of the people of the region.” CONST. art. I, art. X, §20.

³⁴ Emphasis supplied.

³⁵ Emphasis supplied.

autonomous regions shall provide for legislative powers” in specified areas of governance. Such legislative powers are “*subject to the provisions of [the] Constitution and national laws.*”³⁶

As framed under the CAB and the BBL, the Bangsamoro political entity is created outside of the constitutional box. It is imbued with powers, functions, and responsibilities far in excess of those attributed to autonomous regions by the Constitution or to any other political subdivision in the Republic. This entity is distinct from the autonomous regions characterized in the Constitution.

Under the CAB and the BBL, it is the Bangsamoro Government that will establish limitations to the powers of Congress. Beginning with the concept of reserved powers, Congress may provide general or specific powers or jurisdictions exercisable by the National Government in its relationship with local government units, including autonomous regions. On account of the CAB and the BBL, the Bangsamoro will be excluded from the application of such national laws. The derogation of national legislative power is necessarily implied or expressly provided if exercised within the scope of concurrent powers and, in particular, within the coverage of exclusive powers as exercised by the Bangsamoro Parliament.

For example, what is the implication of the general welfare clause which may be enacted by the Bangsamoro Parliament? It provides in Section 24, Article VII of the BBL that “[t]he Bangsamoro Parliament shall pass laws that promote the general welfare of the people of the Bangsamoro.” In the event that Congress enacts laws of the same nature, would the scope of their application or enforcement be implied or expressly articulated as excluding the Bangsamoro population on account of the Bangsamoro’s own legislative powers as stipulated in the BBL? Or would congressional enactments retain their national scope?

Beyond this specific area, the authority of the Bangsamoro Parliament is plenary “on matters that are within the powers and competencies of the Bangsamoro Government,”³⁷ which may embrace all the concurrent powers and exclusive powers, together with the powers which the CAB and the BBL exclude from the reserved powers attributed to the National Government. Moreover, the expansive jurisdiction of the Bangsamoro Parliament may overlap with the entire field of national legislation owing to the conception that, in matters with respect to

³⁶ Emphasis supplied.

³⁷ *BBL*, art. VII, §2. (Emphasis supplied.)

Bangsamoro, “[t]he powers of government shall be vested in the Bangsamoro Parliament, which shall exercise those powers and functions expressly granted to it in this Basic Law, *and those for or incidental to the proper governance and development of the Bangsamoro.*”³⁸

With the Bangsamoro Parliament endowed with such expansive powers and accountability, it is placed by the CAB and the BBL in equal standing with the Congress of the Republic. This parity status gains recognition by means of the following provisions of the BBL in implementing the CAB:

There shall be a Philippine Congress–Bangsamoro Parliament Forum for purposes of cooperation and coordination of legislative initiatives.³⁹

The Central Government and the Bangsamoro Government shall establish a *mechanism at the highest levels* that will coordinate and harmonize their relationships[...]

[A] primary mechanism shall be the *Central Government–Bangsamoro Government Intergovernmental Relations Body to resolve issues on intergovernmental relations*. All disputes and issues relating to these *intergovernmental relations* shall be resolved through regular consultations and constituting negotiations in a non-adversarial manner.⁴⁰

The disputes and issues referred to in the foregoing provisions of the BBL arise from incidents in the relations between two political systems or entities which are relatively equal in status. The assumption is that the Bangsamoro Government is in an *intergovernmental relationship* with the National Government at the same “highest level.” It should be obvious, however, that as the Constitution prescribes, all autonomous regions and subdivisions are subject to, and under the supreme authority, of the National Government, in particular of its Legislative Department.

In the established legal system, the ordinances, rules, and regulations promulgated by the legislative bodies of the local government units operate as binding within their respective local jurisdictions. In striking difference from such localized “laws,” the BBL institutes a new category in the legal system. Although a mere political subdivision of the Republic, the binding

³⁸ *BBL*, art. VII, §1. (Emphasis supplied.)

³⁹ *BBL*, art. VI, §8.

⁴⁰ *BBL*, art. VI, §4. (Emphasis supplied.)

scope of its laws are of the same national character as the enactments of Congress. Of the same subject matter and nature of applicability are the legislative enactments of the Bangsamoro Parliament, as well as the concurrent and exclusive powers of the Bangsamoro Government; they are inherently to the interest of the nation or people *as a whole*, such as human rights, natural resources, waters, environment, and matters covered by the general welfare clause.

In our constitutional system, an autonomous region in Muslim Mindanao is a territorial and political subdivision of the Republic of the Philippines. A part can neither be greater than, nor stand in co-equality with, the whole. This may appear axiomatic in the nature of things, but in the down-to-earth reality of the living Constitution, its juridical status is enforced by a dynamic hierarchy of powers where the autonomous region of Muslim Mindanao is without power except insofar as it has been endowed with by the Constitution and the national laws. It cannot be asymmetrical to the fundamental law. The concept of an autonomous region remains immutable in the Constitution as it stands without amendment. And it stands impervious to change by contractual stipulation.

V. CONCLUDING STATEMENT

With all these infirmities, it is submitted that the Bangsamoro Basic Law is outside legislative process of a bill becoming a law as set forth in Article VI of the Constitution. It may be constituted as a major constitutional reform that pertains to the functions of Congress under Article XVII of the Constitution on “Amendments or Revisions.” Its substantive content may be transformed into an Ordinance to be appended to the Constitution.