REPORT BY THE COMMITTEE ON CONSTITUTIONAL AMENDMENTS AND REVISION OF CODES

SUMMARY

The Bangsamoro Basic Law (BBL) has much merit, but its promulgation requires constitutional amendment or revision; mere legislation will not suffice, and will spark Supreme Court litigation.

In effect, the BBL seeks to change certain constitutional provisions on local autonomy. Notwithstanding the peace-driven merits of the bill, it cannot be promulgated by means of mere legislation by Congress. It has to be promulgated by nothing less than an amendment to the Constitution.

BACKGROUND

In this assessment of the national debate pro and con the BBL, we are guided by the immortal words of the great Chief Justice Marshall in the landmark case of *M'Culloch v. Maryland* (1819, US)[1]: "In considering this question, **we must never forget, that it is a constitution we are expounding**. (Emphasis added.)

And then again, we cite the same Chief Justice Marshall in words that echo through the centuries in *Cohens v. Virginia* (1821, US)[2]: "The people made the Constitution and the people can unmake it. It is the feature of their will, and lives only by their will. **But the supreme and irresistible power to make or unmake, resides only in the whole body of the people; not any subdivision of them."** (Emphasis added.)

It is clear from our constitutional fathers that two houses of Congress acting only by themselves do not suffice to change the constitution. We quote

the famous classic, *Treaties on the Constitutional Limitations* 5th edition, by the great Thomas Cooley. Justice Cooley clearly states that a change in the constitution must proceed according to the method prescribed by the constitution itself:

> In accordance with universal practice, and from the very necessity of the case, amendments to an existing constitution, or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose . . . . But no body of representatives, unless specifically clothed with power for that purpose by the people when choosing them, can rightly fully take definitive action beyond amendments or revisions; **they must submit the result of their deliberations to the people - who alone are competent to exercise the powers of sovereignty in framing the fundamental law – for ratification or rejection**. The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendments, upon which the people are to pass; **but the changes in the fundamental law of the State must be enacted by the people themselves.** (At page 41). (Emphasis added.)

The Committee on Constitutional Amendments appreciates the brilliant efforts of the hardworking men and women who put the BBL together. However, in its present state, the BBL raises many insidious doubts on constitutionality. If so, we have to listen again to Cooley:

> It may still happen that the construction remains a matter of doubt. In such a case it seems clear that everyone called upon to

act where, in his opinion the proposed action would be of doubtful constitutionality, is bound upon the duty alone to abstain from acting . . . . **A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it** . . . . (At page 88). (Emphasis added.)

ISSUES

First, BBL fails to conform to the constitutional provision that: "There shall be created autonomous regions in Muslim Mindanao . . . . **within the framework of this Constitution, and the national sovereignty, as well as territorial integrity** of the Republic of the Philippines.[3] (Emphasis added.)

Second, the President as head of the executive branch of government appointed the Peace Negotiating Panel to negotiate with the Moro Islamic Liberation Front (MILF), which resulted in the Comprehensive Agreement on the Bangsamoro (CAB). Thus, the BBL would be *ultra vires*, because although a simple government office negotiated with a non-government organized group, the result would be to amend the Constitution. The BBL, pursuant to the CAB, reorganizes and restructures the powers of government, thus usurping the sovereignty which the Constitution defines as residing in the people.

PART 1. SOVEREIGNTY

Sovereignty

The main issue is whether the changes brought about by the BBL are such as to change the Constitution. If the BBL succeeds in changing certain provisions of our Constitution, then the promulgation of the BBL would

constitute an act of sovereignty. Hence, we have to search for that agency which is empowered under our system to carry out an act of sovereignty. This search is categorically answered by the Constitution, which provides: "Sovereignty resides in the people and all government authority emanates from them." [4]

The term "sovereignty" means supreme dominion, authority, or rule. A sovereign State is a state that possesses an independent existence, being complete in itself. While the Philippines remains a sovereign state, the changes sought by the BBL conspire to create a **part-sovereign state or a sub-state**, meaning a political community in which part of the powers of external sovereignty are exercised by the home government, and part are vested in or controlled by some other political body or bodies. Thus creating what today we usually call a sub-state, the BBL creates an entire state within the Philippine state.

When the BBL provides for certain provisions that collide with the Constitution, the effect is for the BBL to derogate the powers of sovereignty of the people. In providing for three different kinds of power – reserved, concurrent, and exclusive – the BBL allows the Bangsamoro government the power to diminish national sovereignty. When the BBL provides for concurrent powers, it means that the Bangsamoro government shares power with the national government. When the BBL provides for exclusive powers, it means that the Bangsamoro on occasion even exercises power independently of the national government.

In other words, the concept under the BBL of "concurrent powers" and "exclusive powers" tear asunder the supreme authority possessed by the sovereignty of the people. Many powers, functions, and responsibilities are

sought to be transferred to the internal sovereignty of the Bangsamoro government, which is supposed to have a co-equal status with the national government. The Bangsamoro government under the BBL will be a part-sovereign state or a sub-state. This was never intended nor ever approved, by the Philippine Constitution.

It bears emphasis that the Constitution provides:

> Section 15. There shall be created autonomous regions in Muslim Mindanao . . . . sharing a common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.[5]

However – and this is of extreme importance – the Constitution then proceeds to add: "**All powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the national government.**"[6] This is the crucial provision of the Constitution which is at war with the totality of the BBL. If a power has not been granted to the Bangsamoro government by the Constitution, then it is the Bangsamoro which should respect it. But instead, we are faced with the insistence that instead of changing the Bangsamoro law, it is the Constitution which should be changed! This is constitutional impiety.

To quote former U.P. law Dean Merlin Magallona: "These national laws or statutory enactments of national character are not subject to amendments or repeal by the BBL or any other legislative enactments, if they **are intended to or for the purpose of, changing the constitutionally ordained powers and attitudes of autonomous regions. To this extent or under these limitations,**

the BBL suffers from basic infirmity and may justifiably be pronounced as in contravention of the fundamental law."[7]

PART 2. AUTONOMY

The issue of sovereignty raises the issue of autonomy. Autonomy indicates a dependence on that which is bigger than itself. The State in which sovereignty resides possesses external sovereignty. An autonomous region is located with the State but shares the internal sovereignty of the State. For example, the Philippine Congress could share legislative competence with a sub-state entity such as the Bangsamoro government with its own legislative body.

Partly because it is only the national government which has power to conduct external relations with other states, international law finds it necessary to define autonomy. Thus: "Autonomy is a territorially circumscribed singular entity in what otherwise would be a unitary State, and introducing thereby asymmetrical feature in the State. This is done through transfer of exclusive law-making powers on the basis of provisions, which often are of public nature.

Usually, the State possesses residual powers while the sub-state (the Bangsamoro government) should rely on enumerated powers. Under this template, the sub-state or Bangsamoro government would have no institutional representation at the state level. And the national government would not exercise law-making powers within the jurisdiction of the sub-state (Bangsamoro). This is carried out under territorial and other forms of autonomy.

Although the BBL is reminiscent of a federal state, it has to be emphasized that federal sub-state structures are different from

autonomous territories. A federation entails a more or less symmetrical designation of exclusive law-making powers.

The constitution of a federal state bears no similarity to a proposed Bangsamoro government, because a federal constitution gives powers at the sub-state level to both the national government and the federal state. Normally, the division of powers is as follows: enumerated powers are given at the federal level; while residual powers are given to the sub-state. The authoritative background can be found in the number of autonomous arrangements already existing before the 20th century.

After World War 1, the initiation of the autonomous arrangements became a domestic constitutional measure. In this historical development, it should be underlined that the autonomous arrangement was a "constitutional measure." Hence, a 2011 study reached this conclusion: "It is hence possible to conclude that autonomy is primarily effected **by means of constitutional provisions in the national level**."[8] (Emphasis added.)

The BBL presumes that the Philippines could be easily converted into a federal form of government with what it calls "asymmetrical relationship." But it has to be emphasized that the U.S.A. is a government of enumerated powers, with the balance of powers retained by the government of several states. By contrast, the Philippine government is a unitary government and possesses all powers of sovereignty except only those given to the autonomous regions by the Philippine Constitution. In other words, **for the asymmetrical relationship to work, there must first be a federal government.** (Emphasis added.)

Although the BBL purports to be an exercise in local autonomy, it bursts its bounds and turns into a part-sovereign state or a sub-state. The mere term "Bangsamoro territory" implies that although it is under the jurisdiction of the

Philippines, it is a separate part. It is highly similar to the "associative state" which in 2008 the Supreme Court struck down for posing the threat of territorial dismemberment.

Even the most vigorous of its proponents would accept the following warning in that case issued by the Supreme Court:[9]

"Indeed, BJE (Bangsamoro Juridical Entity) is a state not only by name as it meets the criteria of a state laid down in the Montevideo Convention, namely, a permanent population, a defined territory, a government, and a capacity to enter into relations with other states." (Emphasis added.)

By using the questionable phrase "Bangsamoro people," the BBL takes a slippery path toward a possible Bangsamoro Electoral Code that might limit suffrage to membership in the Bangsamoro government and the Bangsamoro people. The BBL provides for a parliamentary form of government within a presidential form of government. There is no constitutional basis for this effort to change the form of government. It is a violation of the constitutional provision that: "**the organic act shall define the basic structure of government for the region consisting of the executive department and the legislative assembly**, **both of which shall be elective and representative of the consequent political units**." [10] (Emphasis added.)

As former Supreme Court Justice and constitutional law expert Vicente V. Mendoza states: "The question is precisely whether the bill is not contrary to the Constitution because of such relationship between the two governments. Such relationship cannot justify recognition of the right of the Bangsamoro people to 'self-determination, to chart their political future' without impairing the sovereignty and territorial integrity of the Philippines."

PART 3. SUB-STATE OR LESS-THAN-SOVEREIGN STATE

A sub-state or not-fully sovereign state is not contemplated by the Constitution. The 1933 Montevideo Convention laid down the classic definition of a sovereign state as one with a permanent population within a defined territory, whose government has the capacity of entering into relations with other States. Hence, a sub-state unit is a government or administrative unit that is constitutionally subordinate to the ultimate sovereignty of its respective central government that meets the Montevideo standards for legal personality. In other words, a sub-state is a non-sovereign, non-centrally administered or governed unit under a sovereign state. Supreme Court decisions on local autonomy shed abundant light on the proper parameters of autonomy.

In 1991, the Supreme Court ruled that "the concept of local autonomy does not imply the conversion of local government units into 'mini-states.'"[11] In 1994, the Court was moved to emphasize that any step toward fragmentation of national sovereignty and territorial integrity was not within the purview of the Constitution: "**Ours is still a unitary form of government, not a federal state.** Being so, any form of autonomy granted to local governments will necessarily be limited and confined within the extent allowed by the central authority. Besides, the principle of local autonomy under the 1987 Constitution simply means 'decentralization.' It does not make local governments sovereign within the state or on '*imperium in imperio*.'"[12] (Emphasis added.) An anticipating any future advocacy of a bifurcated state, the Court said in a 2000 case: "Policy-setting for the entire country state lies in the President and Congress."[13]

To enhance the understanding on the relationship between the national government and the autonomous areas, in 2011 the Supreme Court found it

necessary to turn to the records of the Constitutional Convention: "Interestingly, the framers of the Constitution initially proposed to remove Section 17 of Article 10 believing it to be unnecessary in light of the enumeration of powers granted its autonomous regions in Section 20, Article 10 of the Constitution. Upon further reflection, the framers decided to reinstate the provision in order **to make it clear, once and for all, that these are the limits of the powers of the autonomous government. Those not enumerated are actually to be exercised by the national government.**"[14] (Emphasis added.)

In the more recent case of *Pimentel v. Aguirre*,[15] the Supreme Court prophetically stated: "Certainly, we yield on unreserved power of governance to the local government unit as to preclude any and all involvement by the national government in programs implemented in the local level would be to shift the tide of monopolistic power to the other extreme, which would amount to a decentralization of power explicated in *Limbona v. Mangelin*, as beyond our constitutional concept of autonomy."

As Dean Magallona said in his paper submitted to the House of Representatives: "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 is indivisible."** (Emphasis added.)

This critic does not contemplate the BBL with a forgiving eye. Instead, throughout his paper, he protests loudly the very concept of a BBL with its characteristic provisions. The BBL seeks to establish what it calls an "asymmetrical political relationship" between the national government and the Bangsamoro Government.

The critic's voice resounds with pain, as he points out: "As a result, the CAB and the BBL have the effect of reviewing 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 on the Constitution as brought out in the present review, incredibly to say the least, is the direct involvement of the President and the Congress in the inordinate claims of the CAB and BBL . . . ."

The BBL seeks to establish a political entity so far unknown in the rest of constitutional democracies. While the Constitution takes care to define the limits of local autonomy, the BBL is vested with powers far beyond constitutional limits.

Ironically, the BBL seeks to establish limitations to the powers of Congress. The Congress will be entitled to reserved powers, but the Bangsamoro would be excluded from the laws passed by Congress with respect to autonomous regions. Even if the Congress uses its concurrent powers under the BBL, it would be severely limited by the concept of exclusive powers that will be exercised by the Bangsamoro Parliament. One distinctive example is the interpretation of the "general welfare clause" which, when exercised by the Bangsamoro Parliament, will almost certainly collide with the power exercised by the Congress. Thus, the Bangsamoro Parliament would become not subordinate, but equal to, the Congress.

In accessing the BBL, the results would be to conduct affairs with the national government on a status of co-equality. While the Bangsamoro Parliament will be operating as a mere political subdivision of the national government, yet the Bangsamoro Parliament could issue its own laws which could have the same binding national character as congressional enactments.

This is unacceptable, and would render the BBL defenceless were it placed under judicial scrutiny in the Supreme Court.

Should the Bangsamoro government be allowed into an asymmetrical relationship with the national government, it would even more so be asymmetrical to the Constitutional. The Philippine Constitution cannot be an object of negotiation which in effect would result merely in a contractual stipulation.

PART 4. TERRITORIAL INTEGRITY

There are two main factors of Statehood: territorial integrity and political independence. Territorial integrity means that the State is one or is a whole. Territorial integrity is a norm in international law. Not only does it protect the territorial framework of the independent State but most importantly, territorial integrity is an essential foundation of the sovereignty of the State.

The two concepts of territorial integrity and political independence are linked together, because they form the foundation of the sovereign State. It is territorial integrity which makes possible the identifying characteristics of political independence:

- Autonomy in the affairs of the State with respect to its institutions.
- Freedom of political decisions, policy-making, and in matters pertaining to its domestic and foreign affairs.

However, the relationship between territorial integrity and political independence is not absolute. They are subject to limitations for even State sovereignty is itself subject to limitations and qualifications. Such limitations could include:

- Self-determination
- Human rights
- Humanitarian law
- Self-defense in the context of fighting terrorism

There is a defined relationship between self-determination and territorial integrity. Self-determination is defined as: "The right of a people to freely determine their political status and freely pursue their economic, social, and cultural development."

The principle of self-determination was used by States (including the Philippines) as a primary basis for decolonization. Under the Spanish and American regimes, Filipino "freedom fighters" (now considered as national heroes) used self-determination as a right and did not consider it a violation of territorial integrity.

Thus, self-determination was originally confined to colonial territories. But today, in the post-colonial context, if one section of a State claims self-determination, it would be widely regarded as a secession. This is a major challenge to the relationship between territorial integrity and political independence.

In international law, there is no clear query whether self-determination in the post-colonial context should be excluded on the one hand, or rejected on the other hand, on the ground that it violates territorial integrity. On the one hand, it is argued that self-determination is a human right and therefore, could be presented as a necessary pre-condition for the proper exercise of democratic rights. But this kind of argument seems to be most persuasive only in such cases as an "extreme and unremitting persecution . . . with the lack of any reasonable prospect for reasonable challenge." International recognition has

been given to States that were born out of self-determination, included three features:

- An effective claim process
- Clear evidence of inability or unwillingness of the parent State to regain control over the claimant
- Absence of protest against international recognition of the claimant

One commentator claims that the Security Council has a bias to favor territorial integrity over self-determination claims, unless dictates of human rights and peace and security demand otherwise. Thus, when the Kurds demand the independence from Iraq, the Security Council consistently affirmed the independence, sovereignty, unity and territorial integrity of Iraq, without referring to the demands of the Kurdish people to self-determination.[16]

It appears that one proposed test is a balancing test. One commentator recommends: "In general, balancing the competing demands of self-determination and territorial integrity is a delicate process that may also be detected by pragmatism to meet the interest of international or regional peace and security." [17]

An instructive example is the Kosovo conflict in 1999. Initially, the Security Council affirmed the "Commitment of all Member States to the Sovereignty and Territorial Integrity of the Federal Republic of Yugoslavia."[18]

While Kosovo demanded self-determination, the Security Council only affirmed "substantial autonomy and meaningful self-administration for Kosovo."

However, the Security Council later adopted in 2006 the Ahtisaari Plan, which allowed what used to be the Province of Kosovo "meaningful

determination." This seemed to be in conflict with the territorial integrity of Serbia.

The result of this territorial balancing test as applied by the Security Council is: "The choice of 'meaningful self-determination' for Kosovo over a strict adherence to territorial integrity in favor of Serbia in the Ahtisaari Plan may be considered a pragmatic recognition that forcing Kosovo Albanians back into a constitutional relationship with Serbia can honor its territorial integrity would potentially reignite violence, and thereby undermine peace and security in the region and the stability of Serbia itself."[19]

In the case of Philippine territory, the Bangsamoro already have a constitutional relationship with the national government. Previous incidents of violence under claim of self-determination have been met with reason, accommodation and when possible a problem of political stability in the Philippines, is not likely to undermine peace and security in the Southeast Asian region.

A full debate in a constitutional convention – instead of a mere debate during plenary sessions of the Congress – would show clearly that the concepts of territorial integrity and political independence now occupy the status of independent principles of law in the international legal system. The two concepts over time have gained international respect. In the same way that this has been done under the UN Charter, **these two concepts of territorial integrity and political independence have been consolidated into important international norms against territorial changes, particularly through the use of force**.

National sovereignty includes territorial integrity. Thus, the Constitution states that all lands and natural resources are **owned by the State**.[20] Further, the

Constitution is similarly emphatic in providing that the exploration, development, and full utilization of natural resources shall be **under the full control and supervision of the State**.[21]

By necessity under constitutional language, nothing of value may be exclusively allocated to any territorial part of the Philippine archipelago. This reservation of all the properties of any value within the territory are essential. Firstly, these territorial properties are necessary for the very survival of the Filipino people, and of their successors to come. Secondly, the legal contemplation is that for so long as there is national sovereignty, there should be a unity in territory.

Territorial integrity cannot be bargained away – no matter how lofty the purpose – because it is nothing less than the "right of the people." It is not the right of any single branch of the government or even of the Congress.

This concept of the right of the Filipino people to their natural resources is now part of international law, under two covenants: International Covenant on Economic, Social, and Cultural Rights; and International Covenant on Civic and Political Rights. In both Covenants, Article 1, paragraph 2 provides that: "In no case may a people be deprived of its means of subsistence." Moreover, Common Articles 25 and 27 provide: "Nothing in the present Covenant shall be interpreted as impairing the **inherent right of all peoples** to enjoy and utilize fully and freely the natural wealth and resources."

Contrary to international law and therefore to constitutional law in the Philippines, the BBL provides that the Bangsamoro shall have exclusive powers and use of natural resources as long as they are found in the Bangsamoro. Even more questionably, the BBL provides that: "The Bangsamoro Government shall

have authority and jurisdiction over the exploration, development, and utilization of mines and mineral resources in its territory."[22]

Added to the dissonance of this bifocal reading of the constitutional provision, the BBL grants "preferential rights" to its citizens in this provision: "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."[23] (Emphasis added.) It would thus seem that the BBL is animated by the belief that Philippine national territory is a fungible commodity that can be furcated.

In the view of international law: "The category of statehood has priority over the category of acquisition of territory. In other words, the definitive establishment of a new State on certain territory defeats claims by other States that relate to the whole of that territory; where the claims relate to part of any of the territory, they may survive but they become **dependent for settlement on the consent of the new State.**"[24]

While the Philippine Constitution highlights the priority of the national territory, the BBL refers to the autonomous region as a "territory" and as the "ancestral homeland." With respect, the BBL misleads itself. It has no power to create the "Bangsamoro territory,"[25] which proceeds from the view that although Bangsamoro is under Philippine jurisdiction, it can be moulded into a separate territory of the Philippines.

The territorial integrity of states is a principle in international law. There is no objection to the establishment of autonomy on a territorial basis for the Bangsamoro. However, it has to be pointed out that the right of indigenous populations to self-determination is restricted to autonomy and self-governance.

The autonomous region in Muslim Mindanao is "less-than-sovereign self-determination." Should autonomy lead to an excess of decentralization, the spectre of "Balkanization" will rise to haunt us – action of dividing an area into smaller eventually hostile states.

PRINCIPAL POINTS

This report is a later and somewhat expanded version of the statement on SBN 2408 delivered orally by former Justice Florentino P. Feliciano on 26 January 2015 before the Senate Committee on Constitutional Amendments.

FIRST POINT

The Bangsamoro Basic Law is not just a piece of proposed legislation by the Congress of the Philippines. This Proposed BBL also constitutes the so-called "Comprehensive Agreement on the Bangsamoro" between the Government of the Republic of the Philippines (GROP) and the Moro Islamic Liberation Front (MILF). It purports, in other words, to be the result of prolonged negotiations for peace between the sovereign ROP and the rebel group MILF, allegedly reached sometime in March 2014. Both the GROP and the MILF presumably claim the capacity to enter into agreements which have purported binding effect under some, if unnamed, system of law.

The committee chair wishes to refer, as a preliminary matter, to the Statement on SBN 2408 by former Justice Vicente V. Mendoza. In the interests of economy of time and effort, the Committee would make clear that we agree with the principal points made by Justice Mendoza in his statement and will

hence avoid elaborating on those points, although making some comments on a few of them.

Whether viewed as a bill or draft legislation submitted to our Congress, or as the consequence of an agreement-making process, it must be clear to everyone that the Proposed BBL must be consistent with the provisions of the 1987 Constitution of the Philippines. Otherwise, the Proposed BBL cannot have any legal effect or consequence as a matter of Philippine law, in any part of the territory of the Republic of the Philippines. Please note that the words "basic law" are attached to, and used to define or refer to, the BBL. "Basic law", so far as lawyers and judges are concerned, is a synonym for "constitutional law" and "organic law." Thus, the **BBL**, **by its own terms**, is intended, by those who drafted it, to have the same effect as the "**constitution**" or "**constitutional law**" of the territory that is designated as the "Bangsamoro." The BBL is, in other words, intended to have the same primacy and consequences as the Constitution of the territory of the Bangsamoro as the 1987 Constitution in the territory of the Republic of the Philippines. But it goes without saying that two **different** constitutional instruments **cannot** have legal effect at the same time and in the same territory.

SECOND POINT

The second point that the Committeee wishes to underscore is that the so-called "peace effort" the GROP and the MILF are supposed to be engaged in, is in fact a discussion between the Government of a sovereign state and a group of rebels seeking either to overthrow or secede from the former. Rebellion is a serious crime against the sovereign. Ordinarily, "peace" is discussed between

the sovereign and the rebels only after the former has militarily imposed its will on the latter criminals. "Peace" negotiations are **not** a substitute for military success – recent illustrations include the case of the Sri Lankan Civil War where the legitimate government defeated the Tamil Tigers in May 2009; and that of the then-Federation of Malaya where the KL Government and Commonwealth armed forces crushed the military arm of the Malayan Communist Party seeking to overthrow the former from 1948-1960.

It is also bears noting that MILF is not the only Islamic terrorist and secessionist group active in the Philippines. There is also the MNLF (the Moro National Liberation Front) an older rebel grouping from which the MILF apparently split off some time ago and which was very active indeed. What relationships persist between the MILF and the MNLF to this day is not easy to determine. What is sufficiently clear is that both groupings seek to detach themselves from the GROP.

THIRD POINT

The Committee's third point relates to the term "territory" as used in both SBN 2408 and in the Comprehensive Agreement on the Bangsamoro (CAB). It may be recalled that one of the constitutive elements of a state in international law is the "territory" of the entity seeking recognition as an independent and sovereign subject of public international law. Under Philippine Administrative law, provinces, municipalities, municipal districts, etc. do have defined territories as designating the earthly limits of exercises of their legislative and law enforcement competences. The concerns many have over "Bangsamoro territory" as indicating demands for a separate state have, to some extent, been

eased by addition of the sentence "The Bangsamoro Territory shall remain a part of the Philippines." But this statement in the BBL has to be given forceful meaning; it cannot be treated as a mere window-dressing exercise. The general statement must not be contradicted or emasculated by the details of the resulting structures and institutions of the Bangsamoro entity.

FOURTH POINT

The fourth important concern that the Committee has is based on Art. III, Sec. 2(d) of the Proposed BBL – which expressly provides for **expansion of Bangsamoro territory** by a simple resolution of the local government unit, or a petition of at least 10% of the voters of a contiguous land area asking for inclusion in the territory of Bangsamoro, plus a "popular ratification" within such area. No historical or anthropological or political basis need be shown "justifying" unilateral absorption into the territory of the Bangsamoro. Further, the structures and processes set up by the existing administrative law of the ROP may be expected to be modified or swept away by acts of the Bangsamoro Government. This is not something that can be authorized to be done by any statute or regulation enacted by the Philippine Congress. The ten percent (10%) of the registered voters of a contiguous local government unit cannot simply push away or ignore what the ninety percent (90%) wish to do.

The proposed distribution of governmental powers and functions between the GROP and the Bangsamoro Government needs very particular and detailed attention.

The GROP – will have what the BBL describes as "**reserved** powers" – e.g., defense and external security; foreign policy; citizenship and naturalization; economic agreements with third countries; immigration, etc.

The Bangsamoro Government – will have "**exclusive** powers," the term used by the BBL – e.g., agriculture, livestock, food security; loans from foreign corporations or countries; trade, industry, foreign investment, labor regulation, free ports; banking system; education; etc. Please note that those exclusive BM powers are inevitably all **reductions** or **diminutions** of the comprehensive sovereign authority of the GROP over the so-called Bangsamoro territory and the population thereof. What is given to the Bangsamoro Government is necessarily torn away from the Government of the ROP.

The GROP and the Bangsamoro Government will have – "**concurrent** powers," e.g., private schools, public utilities, etc. Note that the GROP will have fewer and more limited functions and duties than the Bangsamoro Government in respect of matters touching the daily lives of people. Constitutional amendments will be required to put the re-distribution of powers envisaged by the Proposed BBL into effect. Our 1987 Constitution requires that the national community be consulted and its consent obtained before such extraordinary and alarming changes can be put into effect.

FIFTH POINT

Finally, we must note that the Bangsamoro Government is given by the BBL extensive **taxing and revenue raising powers**. Some idea of the scope of this taxing authority may be obtained by examining certain provisions of the BBL.

It thus appears that the Bangsamoro (rebel) Government is to be financially supported by the Government of the Republic of the Philippines, a truly extraordinary situation. Effectively, the Bangsamoro Government will have seceded from, and been allowed to do so by, the Government of the Republic of the Philippines.

CONCLUSION

This Committee is persuaded by this concluding statement from Dean Magallona: "With all these infirmities, it is submitted that the Bangsamoro Basic Law (BBL) is way outside the legislative process involved in the 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 function of Congress under Article XVII of the Constitution on "Amendments or Revision". Its substantive content may be transformed into an Ordinance to be appended to the Constitution."

The BBL fails the twofold test set by the Constitution: national sovereignty on the one hand; and territorial integrity on the other hand. The BBL is presented as a certain formula for capping off the peace process in the Mindanao area. However, it bears repetition that the end does not justify the means. The problem with the BBL as an experiment in both creative and innovative political values is that it makes no mention of the possible various consequences of such an experiment in domestic governance. Enthusiasm and dedication to peace have served to diffuse the well-meaning advocates to the principle of sovereignty, which refers to the supreme authority within a territory, and more specifically:

- Supreme authority by the Philippine government within the Philippine territory
- Plenitude of internal jurisdiction
- Immunity from other State's own jurisdiction
- Freedom from other State's intervention on our territory
- Equal rank to the sovereign State.

The gem of statehood is unity, expressed in the concept of sovereignty. If sovereignty seems limited today, the question is raised in international law, not in constitutional law. Conceptions of sovereignty are seen in pairs:

- Political-legal
- Internal-external
- Absolute-limited; and
- Unitary-defined

In today's world, the issue whether sovereignty can be defined is as controversial as that of whether it can be limited. However, the present international debate applies mostly to the vertical or horizontal division of sovereignty that takes place between a state and such unique limitations as the European Union.

Local autonomy under the Philippine Constitution should not be conflated with the subject of modern international sovereignty, under which the State is sovereign and autonomous under international law and domestic law at the same time. This plurality of sources of law and sovereignty in the modern world order is often referred as constitutional pluralism. It should not be confused with constitutional local autonomy.

In conclusion, the Committee on Constitutional Amendments makes the following recommendations:

Recommendation 1. Instead of implying a transfer of sovereignty from the national government to the Bangsamoro Government, the BBL should observe the principle of subsidiarity as a way to allocate decision-making power, but there must be a limit to the amount of division of competencies.

In law, subsidiarity is the principle that a central authority's function should be subsidiary, performing only tasks that cannot be performed effectively at a mere local level. Subsidiarity is the doctrine that the power to make local decisions should be vested with local authorities and not with a dominant central aggregation. [26]

Let us receive these wise words by an international law expert: "In response to the limits of the unitary approach of sovereignty, the idea of this aggregation and reaggregation of sovereignty around a bundle of rights has been brought forward by some . . . . The problem of this kind of model of pooled or shared sovereignty, however, is that by being everywhere it seems that sovereignty is nowhere."[27]

Recommendation 2. The BBL should provide for a minimal threshold of competencies under which national sovereignty may not be limited nor shared.

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ENDNOTES

[1] 4 Wheat 316, 407, 4 L ed 579, 601.

[2] 6 Wheat 264, 389, 5 L ed 257, 287.

[3] Article 10, Section 15.

[4] Art. 2, Sec. 1.

[5] Art. 10, Sec. 15.

[6] Art. 10, Sec. 17.

[7] "Problem Areas in the Bangsamoro Basic Law," during the public hearing on the BBL at the House of Representatives on 18 November 2014.

[8] M. Suksi, "Autonomy" in *1 Max Planck Encyclopedia of Public International Law*, published in 2013 and here known as MPEPIL, 755.

[9] *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain* (GRP), 568 SCRA 402 (2008).

[10] Art. 10, Sec. 18.

[11] *Ganzon v. Court of Appeals*, 20 SCRA 271 (1991).

[12] *Magtajas v. Pryce Properties Corp.* 234 SCRA 255 (1994).

[13] *Pimentel v. Aguirre*, 36 SCRA 201 (2000).

[14] *Kida v. Senate of the Philippines*, 659 SCRA 270 (2011).

[15] 676 SCRA 551 (2012).

[16] Security Council Resolution 688 (1991) of 5 April 1991. See also Resolution 546 (2004) of 8 June 2004.

[17] S. Blay, "Territorial Integrity and Political Independence," in 9 MPEPIL 859.

[18] Resolution 1244.

[19] *Id.* at 867.

[20] Art. 12, Sec. 2.

[21] *Id.*

[22] BBL, Art. 13, Sec. 13.

[23] BBL, Art. 13, Sec. 11.

[24] J. Crawford, "State" in 9 MPEPIL 478.

[25] HBN 4994, Art. 3, Sec. 1.

[26] Black's Law Dictionary 10th ed 2014.

[27] S. Besson, Sovereignty, 9 MPEPIL 378.