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The Role of Parliament in the Bangsamoro Administrative Code: A Comparative Assessment by Sir Paul Silk

*The **Westminster Foundation for Democracy (WFD)** is the UK's democracy assistance agency, working in partnership with parliaments, political parties and civil society organisations around the world to create more inclusive, accountable and transparent democratic systems. Over the course of 2020-2021, WFD is delivering a programme to support the Bangsamoro Parliament and the wider transition in the Bangsamoro through the United Kingdom's Conflict, Stability and Security Fund (CSSF). Recognising the importance of the Bangsamoro Organic Law (BOL) as a foundational document for the Bangsamoro, WFD's programme is designed with the overall aim of supporting the implementation of BOL.*

The Bangsamoro Administrative Code is one of the key codes provided for in the BOL which the Bangsamoro Transition Authority (BTA) is responsible for promulgating. This comparative assessment of the Administrative Code, conducted by Sir Paul Silk, looks specifically and in-depth at the role of parliament within the Bangsamoro Administrative Code and provides analysis that may be helpful to policy- and law-makers when considering the draft code.

Structure and contents of the Code

What does the Code contain?

1. The Administrative Code is a lengthy and detailed document, large parts of which articulate the structures for public administration in the Bangsamoro Autonomous Region of Muslim Mindanao (BARMM). It contains much detail on bureaucratic organisation - for example, about half of the Code is taken up with details on the structures of the 15 Ministries, down to details such as the arrangement of hospitals or the responsibility for the care of street children or for bridge maintenance. There are even sections on good public sector human resource practice (for example, Chapter XVIII).
2. Important central sections of the Code deal with the Chief Minister and the with the Cabinet. One Book deals with the Chief Minister. Title I sets out his powers, with separate chapters on his power of control; his rule making power; his power of appointment and designation; his power to contract loans; and his power of Eminent Domain. Title II sets out over nine pages how his Office is organised. Title III deals mainly with a large number of Offices, Councils in and attached agencies to the Office of the Chief Minister, and with his power to reorganise executive offices. The next Book deals with the general functions of Cabinet Ministers, including such matters as their administrative relationship; their supervision and control and their powers to make appointments and enter contracts.

3. Preceding these sections on the organisation of the Executive, there are three Books. The first deals with miscellaneous matters, both general and specific, to do with Bangsamoro autonomy and administration; the second with intergovernmental relations; and the third with the Bangsamoro autonomous government. This third Book is divided into five Titles, dealing respectively with the Bangsamoro Government; the Wali; the Bangsamoro Parliament; the Bangsamoro Cabinet (divided into two Chapters, on Executive Officers and Administrative Organisation respectively) and finally the Bangsamoro Justice System.

Are there changes that could be made to the structure or contents?

4. Before examining the applicability of the Code to the parliamentary system (the subject on which I have expertise), there are some points to make on other aspects of the structure and contents of the Code.
5. Much of the second half of the Code, and parts of the first half, consist of what one would expect to see in an Administrative Code - even if, from a UK viewpoint, details of the way a bureaucracy is organised are not usually set out in primary legislation: whether some of the more minor administrative details set out in the Code really need to be expressed in primary legislation is a question worth considering further.
6. However, there are other sections that simply replicate all or part of the contents of the BOL (a document equivalent to Germany's Basic Law). This is the case with the sections on the Parliament, and other parts such as those defining the territory of the BARMM, the duties of the Wali, the justice system and the mechanisms for intergovernmental relations. There seems to be no good reason for repeating in the Code provisions of the BOL - and, indeed, it is undesirable to do so, seeing that the Code is a subsidiary document to the BOL and (as I understand it) cannot amend it. The rationale for why certain sections of the BOL were omitted from the Code (especially, in the case of Parliament, the BOL provisions on Sessions; Officers; Rules; Proceedings), and also for why other provisions of the BOL were subject to minor amendments in the Code, also needs to be considered further.
7. Other parts of the Code may need further amplification, perhaps in a separate Code. An example is Chapter II on intergovernmental relations - these are likely to be tested as disputes about boundaries of powers arise, and more detail about, for example, dispute resolution mechanisms may be needed. The Bangsamoro justice system also probably merits its own Code.
8. Finally, the Code could benefit from some reorganisation (for example, it seems irrational that Book III, Title IV deals with the Chief Minister, Ministers and the bureaucracy when other provisions about these are contained in later Books). The inclusion of an index and a Table of Contents would also be very helpful.

The Code and the parliamentary system

What is a parliamentary system?

9. Bangsamoro has opted for a parliamentary system of government rather than the presidential system that operates at a national level in the Philippines. This is guaranteed in Article IV.3 of the BOL. This has led to debate about what constitutes a parliamentary system. There is no defining international text prescribing what a parliamentary system should consist of, and there is a world-wide spectrum of parliamentary systems ranging from those where the legislature appoints the executive and controls them scrupulously to systems where the legislature is weak and the executive, though nominally answerable to the legislature, is very powerful. In Bangsamoro, the term "Whig" has often been used to apply to the first type of system, and "Peelite" to the second - though these terms, drawn from British constitutional history, are not common elsewhere.
10. It is, however, possible to describe essential elements of a parliamentary system: that the Executive is formed from the majority in the Parliament, whether one party or a coalition, and is responsible to - or answerable to - that Parliament; that this Executive, also usually called the Government, is made up of Ministers, all or most of whom are MPs; that Ministers answer questions from MPs, appear before parliamentary Committees and reply to debates in Parliament; that their legislative proposals are subject

to the scrutiny and approval of Parliament; and that Parliament can withdraw its support from Ministers, so causing either a change of Ministers or an election. In the UK, where there is no written constitution, there is even a doctrine of “parliamentary sovereignty” under which Parliament theoretically exercises supreme control without any power by a constitutional court to overrule legislation passed by Parliament.

11. Other frequent characteristics of a parliamentary system are a neutral and permanent civil service; a doctrine of collective Cabinet responsibility; a Cabinet subject to the direction of a Prime Minister; an adversarial parliamentary culture; and a tension between two roles undertaken by the Parliament – simultaneously sustaining the Executive and scrutinising the Executive (scrutiny of the Executive being the job of MPs who support the Executive as much as of those who oppose the Executive).
12. The variation in the balance of power between Executive and Parliament in parliamentary systems depends on the strength of the Executive’s majority in Parliament, the loyalty of Executive’s parliamentary support and the system of Rules of Procedure. The latter can, for example, restrict control of the agenda or effective legislative initiative to the Executive (the position in the UK) or allow all MPs freely to initiate legislation (true of Ukraine) or to control the agenda through a party-balanced Business Committee (as in France).
13. First-past-the-post electoral systems tend to result in strong governments, whereas Proportional Representation tends to result in coalitions and a greater balance between the respective powers of Executive and legislature. Thus it is a characteristic of the UK parliamentary system (where elections are conducted by first-past-the-post) that one political party dominates the legislature, and that power is concentrated in the hands of that party’s leader, the Prime Minister – so long as he or she retains the confidence of his or her parliamentary party. The UK is therefore a majoritarian democracy (it has even been characterised as an “elective dictatorship”). By contrast, power is more diffused in the non-majoritarian, consensus-based parliamentary system of countries like the Netherlands or Sweden that employ strictly proportional methods of election and which emphasise the primacy of Parliament over the Executive.
14. There is an added complication in the case of Bangsamoro. This is because there appears to be some haziness both in the Code and other constitutional documents in the descriptions of the functions of the Parliament and of the Government. Thus Title III.1.3 of the Code clearly gives executive authority to Ministers, but Title III.1.1 suggests that it is Parliament that governs. In the Code’s definition clause, the “Government of the day” is defined as “the political party or party coalition with a majority in the Bangsamoro Parliament. The Government of the Day forms the executive government, composed of ministers, and headed by the Chief Minister.” This reflects an ambiguity in the BOL where, under Art. XVI.2, the Bangsamoro Transition Authority (“BTA”) – the interim appointed Parliament – is described as the “interim government” of the BARMM, while Art. XVI.3 goes on to appear to make a distinction between “executive power” (which is to rest with the BTA) and “executive authority” (which is to rest with the Chief Minister).
15. Perhaps it is most useful to think of “ultimate control” in a parliamentary system as resting with the Parliament but that the day-to-day running of the business of governing as resting with Ministers.

Does the Code truly describe a parliamentary system?

16. There is some concern in Bangsamoro that the draft Code does not comply with the fundamental principles of parliamentary system. There seem to me to be three ways of looking at this question. First, does the Code give a full description of how a parliamentary system operates? Secondly, are there provisions in the Code that are inimical to the principal characteristics of a parliamentary system, and can these be altered to strengthen the position of Parliament? Thirdly, does the Code do anything to enhance the powers of Parliament?
17. The first question is really a straw man. An administrative code is not the place where the powers and responsibilities of Parliament should be set out, let alone details of its organisation or operational methods. That should be in the basic constitutional document (the BOL in the case of the BARMM) and then in the Parliament’s own Rules of Procedure. So the fact that the Code does not fully describe how the parliamentary system operates does not seem to me to be a problem.
18. The second issue is more complex. Many of the elements of a parliamentary system are contained in the

Code. So the Chief Minister is elected by the Parliament; a majority of Cabinet Ministers must be drawn from the Parliament; and there is a system of requests, questions, interpellations and motions by which Ministers can be held to account by MPs and their committees. As provided under Article 36 of the BOL, dissolution of the Parliament, and early elections, also occur in case of a vote of no confidence in the Chief Minister by Parliament. The fundamentals of a parliamentary system are therefore contained in the Code.

19. The Code certainly provides for a strong Chief Minister with wide powers over other Ministers and the agencies of the Executive, including power of appointment and dismissal. This has concerned some commentators who worry that such a system is incompatible with the parliamentary model. However, the Prime Minister in India, the Prime Minister in the UK, the Federal Chancellor in Germany and the Prime Minister in New Zealand all have similar powers in systems that are fully parliamentary. Of course, the Chief Minister's powers could be curtailed and some could be given to Parliament instead. But the present provisions are perfectly compatible with a parliamentary system.
20. There has also been concern about the powers of the Chief Minister to issue Rules under Book IV Title I Chapter 2. The scope of these powers are not clear from the Code, and there is no provision for any type of parliamentary oversight of the rule-making. If the Rules are concerned only with the internal operation of the bureaucracy that supports the Chief Minister, then there is no need for any parliamentary involvement in their making. If, however, the Rules to which this Chapter refers could have the nature of legislation placing obligations on citizens, then there are strong grounds for some parliamentary involvement. In the UK, for example, such Rules would be a form of secondary legislation and would be laid before Parliament at the minimum and, in the case of more important Rules, subject to approval by Parliament. The Majlis of the Maldives is one of many Parliaments that has a special Committee to consider secondary legislation.
21. In addition, there are several missed opportunities for the Code to be expressed in a way that clearly empowers Parliament. For example, Section 16 of the Title concerning the Parliament in the Code (the principal part of this Title which does not originate in the BOL) reads as follows:

The right to initiate legislation is primarily lodged in the Government of the Day [this is defined in the footnote as the Bangsamoro Cabinet] . District-specific bills may, on the other hand, be introduced by the members of the Parliament elected from single parliamentary districts.... Members of Parliament may, both in plenary session and in committee, table requests, questions, interpellations and motions for which presence of the Chief Minister and/or the Bangsamoro Cabinet may be summoned. The Parliament shall regulate popular initiative as regards the submission of bills which are to be considered by it, in accordance with whatever is established by the Parliamentary Rules and Procedures.

22. This section appears to constrain Parliament by restricting the legislative initiative of ordinary MPs and of committees, as well as creating two classes of MP so far as legislative initiative is concerned. It is also unusual in restricting MPs' legislative initiative while mandating a system of popular initiative. The section is also vague on the circumstances in which requests, questions, interpellations and motions can be tabled; as what the difference is between these different mechanisms; and as to the obligations of the Chief Minister and Cabinet in response to these. Vagueness can be remedied in the Rules of Procedure, but the Code ought not to impose a restraint on Parliament that is not contained in the BOL.
23. Generally, the Code does little to strengthen Parliament's position. There is a scattering of references throughout Code to Parliament, but mainly in context of laws that Parliament may make. Areas where specific references to Parliament could be amended include the following:
 - In Book III, Title IV. Section 4 footnote 73 refers to the Chief Minister's obligation under the BOL to ensure that the Government's platform is endorsed or otherwise by the Parliament. It would be helpful to have this obligation set out with more detail in the main text.
 - Book I section 26 contains an obligation for the Reports from Ministries to be provided to the Parliament, but there is no requirement for the Parliament to do anything with the Reports.
 - In most parliamentary systems, the equivalents of the important Commissions mentioned in Chapter XVII (the Human Rights Commission and the Internal Auditing Body) would have a direct line of reporting and responsibility to the regional or national Parliament. This would

be regarded as an important way of safeguarding their independence from the Executive is guaranteed. There is, however, no provision of this nature in the Code.

- There should be a rational basis for the occasional specific, but apparently arbitrary, roles conferred on Parliament by the Code. Examples are:
 - Why does the Bangsamoro Economic Zone Authority Board report to the Parliament (as well as the Chief Minister) while other Boards do not, including the important Councils in the Office of the Chief Minister or the Attached Agencies, even though they deal with important areas like disaster management, economic development or peace and order (Title XIV, Chapter 6)?
 - Why does the Bangsamoro Barter Trade Council submit recommendations to the Parliament, and what is the consequence of doing so (Title XIV, Chapter 8)?
 - Why does the Bangsamoro Sports Commission have its budget approved by the Parliament while the other Commissions mentioned in Title XVI (Women; Youth; Cultural Heritage) do not, while the Cultural Heritage Commission must report to the Parliament while the others have no such obligation?
 - The reference in Title VI, section 3.I to the power of Parliament to assign functions (without the qualification “by a law”) to the Ministry of Human Settlements and Developments seems anomalous.

24. Most striking of all is the fact that, neither in Title IV, nor in Chapters dealing with individual Ministries and their responsibilities, is there any explicit requirement for Ministers to account to Parliament. This should certainly be remedied.
25. One other legitimate concern is over the Chief Minister’s power to appoint officials. An independent, permanent bureaucracy is found in many of the most successful parliamentary democracies, even if the most senior appointments in some countries (such as Germany) may be made on political grounds, or only with approval of the Prime Minister (such as the UK). There should certainly no place for patronage in a parliamentary system, even if there are nominal parliamentary systems where officials are appointed on that basis.
26. In the context of the appointment of officials, the Code appears silent on the position of officials who work for the Parliament – though the Rules of Procedure of the Parliament imply that parliamentary officials are civil servants (v.1). Good practice world-wide is for parliamentary officials to be employees of the Parliament and to form a distinct group of public officials from officials who work for the Executive. Good practice in parliamentary systems is also for parliamentary officials to be non-political and to be appointed after free and fair competition on the basis of merit – they should not be appointed on the basis of patronage. Their remuneration should also be no worse than that of officials who work for the Executive. Amending the Code to provide for this is highly desirable.
27. Other criticisms of the non-parliamentary nature of the Code appear less well-founded. For example, the power to appoint Ministers that the Chief Minister enjoys parallels the position in parliamentary systems like Germany, New Zealand and India – and, in fact, is more constrained in Bangsamoro in view of the Parliament’s role in approving the two Deputy Chief Ministers.
28. On the positive side, there are some individual provisions in the Code that seem to give Parliament a role that it would not normally hold. For example, Title IV.12.2, in requiring the Attorney General to obtain parliamentary approval for administrative reorganisation in her office, appears to give an unusual power to a Parliament to get involved in the Executive’s administration, while the powers of Parliament to create corporations/pioneer firms etc (Chapter XX) appear to be more appropriate powers for an Executive rather than a Parliament.
29. The explicit responsibility given to the Attorney General to give legal advice to Parliament and its committees (Book IV, Title II, sections 11 and 12) is very welcome.
30. Most importantly, however, there are great indirect benefits for Bangsamoro’s Parliament’s oversight and scrutiny role because of the detail set out in the Code. This detail (for example, of the precise duties of

each Ministry) will be invaluable material for parliamentary committees as they oversee the expenditure, administration and policies of the Bangsamoro Executive. In that sense, the detailed Administrative Code is a rich source for future Parliaments.

How should the Code be considered in the BTA?

31. Post-elections in 2022, the Parliament (and other aspects of public administration) may look very different from the present interim arrangements both in terms of its composition and its behaviours. A question that the BTA will need to consider is the extent to which it wants to shape future arrangements to fit a particular model - and, indeed, what democratic legitimacy it has for doing so. One way of dealing with this would be to provide for a sunset clause so that the Code ceases to have effect at an early date after the 2022 elections. It might also be sensible for the Administrative Code to be as simple as possible so that decisions on potentially contentious issues can be postponed until after the elections.
32. But in any case, it will be important for the BTA to engage in detailed scrutiny of the draft Administrative Code, involving a wide range of stakeholders and the appointment of a Special Committee. There is an understandable desire for the Code to be passed and to be operational without delay. However, if delay is used for constructive and timely scrutiny, that will result in better legislation. Time spent in parliamentary scrutiny of this nature is never wasted.