VOICES OF DISSENT

A Postscript to the MOA-AD Decision

Magbassa Kita Foundation, Inc.

Philippine Council for Islam and Democracy

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The views in this book are of the authors alone and do not necessarily reflect the views of the Philippine Council for Islam and Democracy and the Konrad Adenauer Stiftung.

INTRODUCTION

A year ago on August 5, 2008, the Government of the Republic of the Philippines was to sign an historic document in Kuala Lumpur: the Memorandum of Agreement on Ancestral Domains (MOA-AD), an agreement it had negotiated for almost four years with the Moro Islamic Liberation Front (MILF) with the facilitation of the Malaysian government. Instead, the Supreme Court issued a Temporary Restraining Order on August 4, 2008 in response to the petition opposing the signing of the MOA-AD. Later, the government pulled the plug on the MOA-AD.

The fighting that ensued immediately after the non-signing claimed more than a hundred lives as well as displaced 600,000 people from August 4 to September 4. The agreement that was supposed to have been signed was intended to bring peace. Instead, its non-signing has brought humanitarian crisis to the peoples of Mindanao. The Norwegian Refugee Council report (2009) stated that: “the Philippines was the most neglected displacement situation in 2008", citing the displacement after August 4.

The debate that surrounded the MOA-AD controversy made two things clear: one, that the general public were generally uninformed of the fundamental issues, not just of the MOA-AD, but also the history of the struggle for self-determination of the Muslims in the Philippines; and two, because of this ignorance, public opinion easily fell prey to the misinformation coming from opportunistic politicians.

It was the Philippine high court, however, that put the final nails on the coffin of the MOA-AD. On October 14, 2008 the Supreme Court issued an 87-page majority decision penned by Associate Justice Conchita Carpio Morales based on an 8-7 vote declaring the MOA-AD “contrary to law and the Constitution.”The decision focused on two key issues: (1) that the GRP Peace Panel and Presidential Adviser on the Peace Process (PAPP) violated constitutional and statutory provisions on public consultation and the right to information when they negotiated and later initialed the MOA-AD; and (2) that the contents of the MOA-AD violated the Constitution and the laws.

While the rule of law and the authority of the high court as the final arbiter of legal controversies has to be respected, there is a danger that the decision might confine to the margins of history the very valid claims of the Bangsamoro as detailed in the brilliant dissertations of Muslim and non-Muslim intellectuals and peace advocates.

And while the Supreme Court decision might have snuffed the life out of the agreement, the issues that were the subject of the MOA-AD remain valid. They are issues that embody the struggle of the Moros for self-determination, justice and equality. They are issues that will linger beyond the legal debates of the MOA-AD.

This collection of essays and articles entitled "Voices of Dissent: A Postscript to the MOA-AD Decision" is thus aimed at presenting critiques of the SC decision. While some might argue that this is moot and academic, there are two reasons why this is important. First, while the country's system of laws recognizes the authority of the Supreme Court to decide legal issues with finality, the political issues that remain unresolved require critical analysis. As government continues to search for a politically negotiated solution to the conflict in Mindanao, these unresolved issues call for further discussion and debate. Second, this collection of Moro voices also documents the dissent of peace advocates as well as presents the perspectives contrary to the pronouncement of the Supreme Court. In this sense, the essays aim to contribute to legal and political scholarship.

The Essays and Articles

Atty. Nasser Marohomsalic and Atty. Soliman Santos, Jr. provide us with summaries of the motions for reconsideration filed by the Muslim Legal Assistance Foundation, Inc (MUSLAF), the Consortium of Bangsamoro Civil Society (CBCS) and the Bangsamoro Women Solidarity Forum, Inc. (BWSF). Atty. Santos' two essays follow: **"Disappointing SC Denial of MOAtions for Reconsideration: A Tale of Two Very Differently Treated Cases" and "Initial Notes and Comments on the SC Decision on the MOA-AD"** outlining his analyses of the Supreme Court's denial of the motion for reconsideration as well as the earlier decision declaring the MOA-AD unconstitutional. Atty. Michael

Mastura's **"Analyses and Comments on the MOA-AD Supreme Court Decision"** then provides "a different view to reconsider the focal point and the judicial review about the worriers of GRP-MILF peace negotiation, so it's seen as 'hard barriers', which are the necessary obstacles in itself." **"The MOA-AD Decision"** and **"Peace Negotiations"** by Fr. Joaquin G. Bernas explore the SC decision in terms of how it can inform future attempts at a negotiated peace settlement to the conflict in the southern Philippines.

Atty. Sedfrey Candelaria's **"Postscript to the Supreme Court MOA-AD Judgment: No Other Way Buy to Move Forward"** provides an analysis of how the peace process can proceed vis-à-vis the SC decision. Amina Rasul's article entitled, **"How to make GRP-MILF peace process work"**reviews the lessons learned from past peace processes and argues that genuine autonomy and peace cannot be divorced in the effort to end the conflict.Finally, Fr. Eliseo Mercado's **"Forging Ahead Post MOA-AD"** and the **RTD Reports of the Philippine Council for Islam and Democracy** provide insights on recommendations on how to learn from the MOA-AD debacle and forge ahead with the peace process.

AMINA RASUL
Lead Convenor
Philippine Council for Islam and Democracy

MESSAGE

Despite the Supreme Court decision declaring the Memorandum of Agreement on Ancestral Domain (MOA-AD) as constitutionally flawed, many peace advocates including the members of the GRP and MILF peace panels have hailed the MOA-AD as a "triumph of diplomacy."

The SC decision, while welcomed by the oppositors of the MOA, ignored the bigger perspective of attaining a political solution to the problem in Mindanao in favor of a strict adherence to legality. It disregards the fact that political solutions have always required conformity with the constitution. It is important to point out that the MOA-AD is not just a legal document rather it represented an attempt to find a lasting solution to the problem in Southern Philippines. The MOA-AD recognized the historic struggle of the Muslims in the Philippines for self-determination. This struggle is rooted in its historical resistance against the colonizers and in its historical claim as the first religion, the first political and economic system in the country. And while the decision of the Supreme Court has effectively caused the demise of the MOA-AD, "the inspiration of the MOA-AD is still alive."

This is the idea underpinning the articles in this new book, Voices of Dissent: A Postscript to the MOA-AD Decision. The Magbassa Kita Foundation, Inc (MKFI) and the Philippine Council for Islam and Democracy (PCID) are pleased to publish this collection of "dissenting opinions" from scholars and advocates of peace in Mindanao. We are particularly grateful to the Konrad Adenauer Stiftung for their assistance in making this possible.

We hope that readers will get a better grasp of the issues that will continue to animate our quest for a lasting and genuine peace in Mindanao.

DR. SANTANINA T. RASUL
Chairperson
Magbassa Kita Foundation, Inc

MESSAGE

To many insiders involved in the Peace Process, the decision of the Supreme Court on the Memorandum of Agreement on Ancestral Domain (MoA-AD) was not a big surprise. The majority of lawyers among the peace advocates have always expected that the implementation of the basic ideas as expressed by the MoA-AD will require Charter Change. Therefore, it is within expectations that the Supreme Court has declared the document unconstitutional.

But it wasn't the law that made the Peace Process collapse. The bigger problem lies in politics. Major differences on how to pursue the Peace Process has made it impossible to find a way in following the basic principles within the MoA-AD without major political and legal disputes. The MoA-AD has been the proposal of the negotiating panels and some peace advocates; however, it is not the proposal of the majority. When the agreement became public, it hit a completely unprepared audience that ultimately went against it.

While the document was declared unconstitutional and—in my opinion—was too incomplete to avoid any misunderstandings or to convince opponents, it carries along with it many principles that will be needed to establish lasting peace in Mindanao. The politicized debate overshadowed the fact that the MoA-AD is the result of 6 years of negotiation between the government of the Republic of the Philippines and the Moro Islamic Liberation Front. It follows the basic ideas of many peace documents the Philippine government has approved since the 1970s. The MoA-AD is therefore a most relevant resource document for any peace negotiation to follow.

However, getting the Peace Process back on track is no easy task. Negotiating parties, peace advocates and their supporters will have to follow two basic principles:

Supporters and opponents of the MoA-AD should listen to each other carefully;

The Peace Process must become more inclusive to make a political agreement that can be supported by all crucial groups possible. Such a solution will serve as the foundation for a lawful implementation of the agreement, whether Charter Change will be needed or not.

This booklet describes dissenting opinions; however, it also paves the way towards building a consensus on how to pursue the Peace Process. It is a major contribution towards building long-lasting peace in Mindanao.

MR KLAUS PRESCHLE
Country Representative
Konrad Adenauer Stiftung

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"The Philippine Constitution as Prison Wall"

SUMMARY OF THE MOTION FOR RECONSIDERATION FILED BY THE MUSLIM LEGAL ASSISTANCE FOUNDATION (MUSLAF) INC SEEKING THE REVERSAL OF THE PONENCIA OF THE SUPREME COURT THAT DECLARES THE MEMORANDUM OF AGREEMENT ON ANCESTRAL DOMAIN UNCONSTITUTIONAL

By Atty. Nasser A. Marohomsalic

The Memorandum of Agreement on Ancestral Domain (MOA-AD) was initialed by the representatives of the Philippine Government and the Moro Islamic Liberation Front (MILF). During the pendency of several petitions assailing the MOA-AD with the Supreme Court, the Philippine Government through the Office of the Solicitor General abandoned it, declaring it a nullity for lack of authority on the part of its negotiating panel to append its imprimatur to the document even as it announced its intentions not to forge one in any form in the future. Furthermore, the Philippine Government claimed that the MOA-AD is an unfinished document.

PONENCIA

Against this backdrop, the Supreme Court considered the controversies the Agreement engendered of transcendental significance and passed upon its constitutionality. It regarded the Agreement an agreement *sui generis*, a peace agreement that must conform to the constitution.

Finally, the High Court held the MOA-AD as unconstitutional, its *Ponencia* adverting to so-called errant provisions of the Agreement that militate and subvert the Philippine Constitution.

Particularly, the *Ponencia* scored against the MOA-AD for creating an independent State of *BangsamoroJuridical Entity* (BJE) or, in the minimum, an Associated State or a near-independent State that is disruptive of national unity and beyond the contemplation of the 2007 United Nations Declaration for the Rights

of the Indigenous Peoples (UN DRIP) that grants indigenes the right to internal self-determination or self-government. It explained that in the contemplation in the Agreement the "BJE is a state in all but name as it meets the criteria of a state laid down in the Montivideo Convention, namely, a permanent population, a defined territory, a government, and a capacity to enter into relations with other states." Most telling, in the Opinion of the High Court, is the grant to the BJE of the right to maintain its own internal police and security force. Even if the MOA-AD would not sever any portion of the Philippine territory, the *Ponencia* considered BJE's shared competences with the National Government as a preparation for self-independence for the Entity, which is a violation of Article 46 of the UN DRIP that proscribes any state, people, group of persons to engage in any action which would dismember, totally or in part, the territorial integrity or political unity of sovereign and independent state.

Secondly, the *Ponencia* ruled that the MOA-AD does not respect the property rights including the ancestral domain of other indigenous peoples, describing the Agreement as a peculiar program that unequivocally and unilaterally vests ownership of a vast territory to the Bangsamoro, which could pervasively and drastically result in the diaspora or displacement of a great number of inhabitants from their total environment. It also scored against the lack of procedural rules in the Agreement as a violation of the IPRA Law that requires prior informed consent on the part of the indigenous people for any program that may interfere with their right to their ancestral domain.

Thirdly, the *Ponencia* considered the promise by the Executive Department in the MOA-AD to effect the amendment or revision of the Constitution to accommodate the terms of the Agreement without derogation as an unduly exercise of legislative power, which province constitutionally belongs to Congress or the sovereign people, as the case may be.

Other issues were addressed in the *Ponencia* including the nature and justiceability of the MOA-AD and the right to public information, which, in the Opinion of the High Court, was vitiated against in the course of the negotiation over the MOA-AD between the Peace Panels of the Philippine Government and the MILF. Except for this latter question, MUSLAF addressed itself to the Ponencia, setting things in perspective with a prefatory social commentary on the Philippine Constitution.

MUSLAF'S ARGUMENTS

The Philippine Constitutionis a Prison Wall for the Bangsamoro

MUSLAF considered the 1987 Constitution as one such policy that ensures the dominance of the Christian majority over the Bangsamoro minority, providing as it does only limited autonomy for the latter. Particularly, it only affords them enjoyment of their personal, family and property relations. Secondly, the powers devolved to them pertaining to their ancestral domain and natural resources, cultural heritage and economic, social and tourism developments, among others, are made subject to the prevision of the Constitution and national laws.

The enabling law passed in 1989, Rep. Act No. 6737, which fleshed out the structure and form of autonomy for the Bangsamoro replicated the catchall colatilla in the Constitution that delimits the powers of the regional autonomous government. Worse, it denied it jurisdiction over "uranium, coal, petroleum and other fossil fuels, mineral oils, all sources of potential energy, aquatic parks, forest and watershed reservations as maybe delimited by all."

The grant of power to enact an agrarian reform law to the autonomous Legislature under the Organic Act was rendered nil with a proviso in the law that made any such enactment conformable to the Constitution and national policies.

The law does not grant special or preferential rights to the Bangsamoro in the exploitation of the natural resources within their ancestral domain.

In 1996, the MNLF signed a Final Place Agreement with the Philippine Government, where the latter committed to amend Rep. Act No. 6734 and incorporate the Agreement into the amendatory law.

The amendatory law, Rep. Act No. 9054, was passed by Congress in 2001, but it failed to include substantive terms of the Agreement, and the MNLF rejected and scored against it, thus:

1) The GRP, acting through Congress, has unilaterally arrogated to itself the power to define strategic mines and minerals, which violated Paragraphs

146 and 147 of 1996 FPA. This contravenes the agreement, which mandates that the MNLF and the GRP, with the positive contribution of the technical experts of the OIC, will mutually agree on the definition of the strategic mines and minerals on a latter date. This is a gross violation of the Agreement because its strikes into the heart of the jurisdiction of the Autonomous Government over Mines and Minerals within its territory.

2) By putting the ARRM under the Office of the Presidential Adviser on Peace Process (OPAPP), the five-century old conflict is addressed and relegated to a mere advisory office that only demonstrates government's indifference to the problem.

3) The GRP has not made any single appointment pursuant to Paragraph 65 FPA and to RA 9054, Article V, Sec. 2, where it provides that appointment should be through the recommendation of the Regional Governor.

4) There continues to be an insufficiency of funds for the educational system in the ARMM. There is a general disconnect between what is stated as policy and what is effected on the ground.

There are other areas that have not been addressed. For example, according to OPAPP itself, there are 19 vacancies in the Shari'ah circuit courts, and only 1 out of the 5 district courts have been filled, which indicates that Shari'ah is implemented very poorly, and in some areas, not at all.

Furthermore, while the Regional Legislative Assembly enjoys similar powers or restrictions of the provincial boards in the rest of country, the Regional Executive Council – perhaps the most important political institution in the region – exercises authority only to the extent that this is exercised on behalf of the President. This dependent character of the relationship between the Regional Autonomous Government and the National Government has made the former subject to the whims of the latter, to the fluctuations of opinion among members of the national legislature, and to the inter-departmental or inter-agency squabbles over priorities or funds. Given this, the nature of autonomy of the ARMM Regional Executive Council can be likened to that of any other local government unit in the country.

Except for the provisions for the appointment of one Cabinet member to the National Government from among the inhabitants of Muslim Mindanao, one (1) Supreme Court justice and two (2) justices of the Court of Appeals including their representation in the central agencies of government, constitutional bodies and government-owned or controlled corporations, the amendatory law made no significant improvement on the amended Organic Act, Rep. Act No. 6734. Even these provisions requiring the National Government to appoint members of the minority to policy-making positions in government are qualified with the phrase "as far as practicable."

Whatever, like the amended law, RA 9054, was made subject to the Constitution and national laws.

Indeed the introduction of the two (2) organic acts of autonomy in Muslim Mindanao did not do much to change the nature of our political system as unitary where political powers are concentrated in the Central Government. In fact, no such organic act could be crafted to make for an ideal autonomy responsive to the aspirations of the Bangsamoro.

The MOA-AD does not create the BJE as an independent State, or an Associated State, or near-independent State.

MUSLAF differed from the *Ponencia*, finding the BJE only a sub-state of the Philippine State and within the latter's territorial integrity and political map. The MOA-AD sees to that with its provisions as follows, thus:

> First, BJE's external defense is the duty and obligation of the Central Government; second, both parties have to forge an economic cooperation agreement or arrangement over the income and revenues that are derived from the exploration, exploitation, use and development of any resources for the benefit of the Bangsamoro; third, royalties, bonuses, taxes, charges, custom, duties or imposts on natural resources have to be shared by the Parties on a percentage ratio of 75-25 in favor of the Bangsamoro Juridical Entity; fourth, in times of national emergency, when public interest so requires, the Central Government may, during the emergency, for a fixed period and under reasonable terms as may be agreed by both parties, temporarily assume or direct the operations of

> such strategic resources which include all potential sources of energy, petroleum, in situ, fossil fuel, mineral oil and natural gas, whether onshore or offshore; fifth, BJE may establish and open Bangsamoro only trade missions in foreign countries, not embassies; sixth, the Central Government is to take necessary steps to ensure BJE's participation in international meetings and events and its participation in Philippine Official missions and delegations in negotiations of border agreements or protocols for environmental protection, equitable sharing of incomes and revenues, in the areas of sea, seabed and inland seas or bodies of water adjacent to or between islands forming part of the ancestral domain, in addition to those of fishing rights; seven, beyond the fifteen (15) kilometers internal waters, the Central Government and the BJE shall exercise joint jurisdiction, authority and management over areas and all natural resources living and non-living contained therein and etcetera.

It may be emphasized that one distinguishing mark of an independent state is its establishment of embassies abroad and deployment of its Ambassadors therein, which is not granted to the BJE.

The associative arrangement between the BJE and the Central Government defined in the MOA-AD, namely –

> The BJE's capacity to enter into economic and trade relations with foreign countries friendly to the GRP; the commitment of the Central Government to ensure the BJE's participation in meetings and events in the ASEAN and the specialized UN agencies; participation by the BJE in Philippine official missions and delegations engaged in the negotiation of border agreements or protocols for environmental protection, equitable sharing of incomes and revenues in the areas of sea, seabed and inland seas or bodies of water adjacent to or between islands forming part of the ancestral domain, in addition to those of fishing rights; and ownership by the BJE of aerial domain and atmospheric space,

--are no more significant than they are as political competences shared by the BJE and the Central Government; they are not exercised by the BJE unilaterally or to the exclusion of the GRP, the parent-state. They are not the associative

powers that are proscribed in Article 46 of the UN DRIP because they would not lead to the independence of the BJE, unless entrenched to, or they would not "dismember or impair, totally or in part, the territorial integrity or political unity" of the country as a sovereign and independent state.

In fact, the BJE as such territorial and political entity or associated state is far different from Marshall Islands and the Federated States of Micronesia (FSM) which exercised more powers than the proposed BJE and which powers are exercised by both governments to the exclusion of the United States. These powers include the right to terminate the association anytime consistent with the right of independence, issue travel documents which is a mark of statehood and conduct foreign affairs in their own name and right on matters such as the law of the sea, marine resources, trade, banking, postal, civil aviation and cultural relations. Except for their defense, which is charged on the United States, the two (2) Pacific Island States are independent states in every sense of the word and they're members of the United Nations.

Under the international human rights order which holds in primacy the right to internal self-determination of indigenous peoples and in the light of developments in the resolution of ethno-political conflicts the world over through the sovereignty-earned approach that accords insurgent community some measure of sovereignty, these associated powers granted to the BJE could easily come within the definition of the recognized right of internal self-determination.

Against the backdrop of the contemporary rebellion of the Bangsamoro in Mindanao that has raged for almost forty (40) years and shown no sign of abatement and which tore into the national fabric and disrupted economic growth, the MOA-AD, which seeks for an expanded powers for the ARMM short of, to use the word of Mayall, secessionist self-determination, is most ingenious and certainly cannot be antipodal to national unity.

The last issue in point is the inclusion in the MOA-AD of the aerial domain and atmospheric space immediately over the ancestral domain of the Bangsamoro, which the *Ponencia* finds beyond the purview of the right to internal self-determination conceded to indigenes under the UN DRIP, reasoning out that the instrument delimits their ownership to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

MUSLAF excepted to the ruling, adducing for support doctrinal teaching in property law that defines ownership over real estate beyond possessory title thereof but its enjoyment without impairment, whether for personal comfort or its use for economic activity, which principle gained currency in our jurisdiction since its articulation in the 1946 case of U.S. vs. Causby by the U.S. Supreme Court, thus:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See Hinman v. Pacific Air Transport, 9 Cir., 84 F. 2d 755. The fact that he does not occupy it in a physical sense-by the erection of buildings and the like-is not material. As we have said, the flight of airplanes, which skim the surface but do not touch, it, is as much an appropriation of the use of the land as a more conventional entry upon it.

The MOA-AD respects vested property rights including the ancestral domain of the other indigenous peoples

MUSLAF took issue against the apprehension in the *Ponencia* that the grant of vast territory to the BJE could pervasively and drastically displaced a great number of people from their total environment, arguing that the MOA-AD does not derogate against the protection afforded by the State to the ancestral domain and lands of the *Lumads* under the Rep. Act No. 8371 or the Indigenous People's Rights Act of 1997 as well as vested rights under the Torrens System obtaining in the country.

Paragraph 7 on Concepts and Principles of the MOA-AD sees to that, thus:

> Vested property rights upon the entrenchment of the BJE shall be recognized and respected subjected to paragraph 9 of the strand on

Resources.

Paragraph 9 on Resources of the MOA-AD provides that "Forest concessions, timber licenses, contracts or agreements, mining concessions, Mineral Production and Sharing Agreements (MPSA), and other land tenure instruments of any kind or nature whatsoever granted by the Philippine Government including those issued by the present Autonomous Region in Muslim by the present Autonomous Region in Muslim Mindanao (ARMM) shall continue to operate from the date of formal entrenchment of Bangsamoro juridical entity unless otherwise expired reviewed, modified and/or cancelled by the latter."This provision extends protection to concessions and the like within the Bangsamoro homeland, and it is not meant to derogate against the ownership by the *Lumads* of their ancestral lands and ancestral domain.

The lack of procedural rules in the Agreement for the delineation of the limits and boundaries of the ancestral domain of the Bangsamoro does not make the MOA-AD a scare-crow, much less a violation of the IPRA Law, which provides for the requirement for a prior informed consent of the *Lumads* before any portion of their ancestral domain is intruded into by the territorial limits of the BJE. For one, the Agreement is only a part, albeit significant, of a series of agreement which cold culminate in the amendment or revision of the Constitution, which process makes for time and opportunities to address the issue.

The promise by the Executive Branch to cause the amendment or revision of the Constitution to accommodate therein the terms of the MOA-AD without derogation is not an exercise of legislative power.

Contrary to the ruling of the *Ponencia,* MUSLAF argued that the promise or "guarantee" or "commitment" by the Executive Department through its Peace Panel to incorporate the terms of the MOA-AD without derogation into the Legal Framework necessitating thereby the amendment or revision of the Constitution, does not constitute an arrogation of legislative power by the Executive Branch. Neither does it operate to make the Agreement ripe for judicial determination.

Paragraph 7 or Governance of the MOA-AD that states –

> The Parties agree that the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively.

Which is relied upon by the *Ponencia* for support, is ambiguous enough as to allow for the interpretation that its recognition of the Constitutional process for the implementation of the MOA-AD carries with it obeisance to the Constitution on the part of the Executive Department, which Constitution prescribes for its amendment or revision the exercise of constituent power by Congress or the sovereign people, as the case may be, not the Executive Branch. This interpretation is in keeping with doctrinal principle that states that government is expected to go about its duties and obligations according to the rules and regulations.

Corollary, the said promise does not make the MOA-AD ripe for judicial determination. For the Agreement could still shape up into some forms through the peace process.

The MOA-AD is a Treaty, or an International Agreement, or an Executive Agreement

For another reason, the MOA-AD is beyond the province of judicial inquiry, it being a Treaty or an International Agreement or Executive Agreement, not a municipal law or agreement *sui generis*, hence, superior to the Constitution and its observance and implementation is therefore a matter of *jus cogens*.

The MOA-AD came about with the facility of the Malaysian Government and the participation of the Office of the Secretary-General of the Organization of Islamic Conference. In a previous agreement entitled, The General Framework of Agreement of Intent Between the Government of the Republic of the Philippines (GRP) and the Moro Islamic Liberation Front (MILF), dated 27 August 1998, the government saw fit to sign the Agreement with its counterparts from the MILF that included witnesses from its hierarchy including Sheik Abukhalil Yayha, Chairman of the *Majlis Al-Shura* (MILF Parliament) and Sheik Ali Ismail, Chairman of the MILF Supreme Court.

In fine, the MILF has earned an International personality akin to a State or

lesser to a State but impressed with its characteristics in substantive terms, granting it competence to enter into treaties or agreements pursuant to international law and the Vienna Convention on the Law of Treaties.

The botched signing of the MOA-AD does not derogate against the efficacy of the Agreement as a Treaty or International Agreement, since for all intents and purposes it was authenticated by the parties, hence, agreed upon and the signing, had it happened, would therefore be only a mere formality.

"The Muffled Voices of the Aggrieved Bangsamoro..."

SUMMARY OF THE CBCS-BWSF MOTION FOR RECONSIDERATION OF THE SC DECISION ON THE MOA-AD

By Atty. Soliman M. Santos, Jr.

The second of only two Motions for Reconsideration (MRs) of the Supreme Court (SC) Decision on the aborted Government of the Republic of the Philippines (GRP)-Moro Islamic Liberation Front (MILF) Memorandum of Agreement on Ancestral Domain (MOA-AD) was the one interposed by the joint respondents-in-intervention Consortium of Bangsamoro Civil Society (CBCS) and the Bangsamoro Women Solidarity Forum, Inc. (BWSF). It was dated 4 November 2008 and filed the next day, consisting of 73 pages plus 19 documentary annexes. Counsels for the joint intervenor Bangsamoro organizations were Atty. Raissa H. Jajurie of *Sentro ng Alternatibong Lingap Panligal* (SALIGAN) and Atty. Laisa Masahud Alamia of Bangsamoro Lawyers' Network, Inc. (BLN). The MR had this Outline:

A. PREFATORY REMARKS
B. SUBSTANTIVE CONSTITUTIONALITY
   1. Peace Agreements and Constitution-Making
   2. The Proposed MOA-AD's Contents vis-à-vis the Constitution
C. NO GUARANTEE AND USURPATION
D. PUBLIC CONSULTATION AND PEACE NEGOTIATIONS
   1. Consultation, Information and Other Facets of the Ancestral Domain Negotiations (2005-08)
   2. Inherent Character and Purpose of the Peace Negotiations
E. AUTHORITY, MANDATES AND PARAMETERS FOR THE PEACE NEGOTIATORS
   1. Under Executive Order No. 3 and the Memorandum of Instructions from the President
   2. Under the Constitution: Strong Mandates for Peace
   3. Sovereignty and Self-Determination of Two Peoples
F. FINAL REMARKS

ANNEXES (Mainly information materials on the ancestral domain negotiations)

In the Prefatory Remarks, the CBCS-BWSF MR asked the SC to **"listen [this time] to muffled voices of the aggrieved Bangsamoro."** The MR pointed out that: "The three Muslim/ Moro respondents-in-intervention, namely the Muslim Legal Assistance Foundation, Inc. (MUSLAF), Muslim Multi-sectoral Movement for Peace and Development (MMMPD), and herein respondents-in-intervention, were not (allowed to be) heard during any of the three oral argument hearings. Their Memorandums (including a major Supplement by herein respondents-in-intervention) and arguments are not even referred to in the Decision, showing that these were probably not even read."

The MR would proceed to argue and show that the Honorable Court should reconsider and set aside its dispositive declaration of the MOA-AD as "CONTRARY TO THE LAW AND THE CONSTITUTION" because this is too sweeping as well as unnecessary, (re-)considering among others that:

- The Decision itself recognizes most importantly that, in the context of peace negotiations with rebel groups (not just the MILF) to resolve armed conflict, solutions thereto may require changes to the Constitution.
- There is in the draft MOA-AD no "guarantee" or "commitment" by the GRP Peace Panel to the MILF "to amend the Constitution to conform to the MOA-AD," and thus no "usurpation of the constituent powers."
- The so-called violations of the mandates of public consultation and the right to information have been over-stated, considering numerous documented consultation and information efforts by respondents during the three years and eight months of often difficult ancestral domain negotiations, an executive process that also has its inherent confidentiality requirements.

In pursuing fully the discourse relevant to the constitutional and legal issues pertaining to the aborted MOA-AD, the MR hoped to further illumine the issues by devoting the rest of the discussion, as outlined above, to the inherent character and purpose of the peace negotiations, and then to the authority, mandates and parameters of the peace negotiators, especially under the Constitution with its strong mandates for peace. Still under constitutional parameters, the MR dealt specially with the principles of sovereignty and self-determination, which are

the most relevant to the GRP and MILF, respectively. The MR's Final Remarks included an explanation of a warranted "Deviation from the Moro National Liberation Front (MNLF) Model of Pursuing Peace with Rebels."[1]

Substantive Constitutionality

The MR pointed out that under the SC Decision, peace negotiations can "think outside the box" of the existing provisions of the Constitution (and more so national laws), as long as the constitutional processes and mechanisms for constitutional change are followed, particularly by the President submitting the relevant proposals or recommendations to Congress. In fact, to perhaps highlight that the "unthinkable" is "not (necessarily constitutionally) impossible", the Decision stated at p. 83 that: "The sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any [way] it wants…" In other words, the constituent power of the sovereign people trumps even the sacrosanct constitutional principle of territorial integrity.

The MR posited that this point is crucial on at least two levels. First is the strategic level of not "boxing in" future peace negotiations with rebel groups (not just the MILF) to existing provisions of the Constitution. Second is the more tactical (but actually also strategic) level of counter-posing the contents of the proposed MOA-AD vis-à-vis the present Constitution and laws, the second substantive issue in the Decision as a basis for its ruling of unconstitutionality.

Regarding the first strategic level of not "boxing in" future peace negotiations, this might not be as clear as indicated in a crucial passage of discussion in pp. 69-73 of the Decision because of the latter's dispositive portion, its other passages, and some separate opinions. The dispositive portion's declaration of the MOA-AD as "CONTRARY TO LAW AND THE CONSTITUTION" has a tenor, which goes against the grain of "thinking outside the box." Stated otherwise, it is "incongruous"[2] with the said crucial passage of discussion in the Decision itself.

[1] Taken from the title of section III (pp. 14-17) in the Separate Concurring Opinion of Chief Justice Reynato S. Puno.

[2] With apologies for the use of this word taken from the Separate Opinion of Associate Justice Dante O. Tinga (at p.16).

It is important to keep open the options to explore possible solutions even beyond the present Constitution, especially where this has become part of the Bangsamoro problem, like the highly centralized unitary structure of government, among other constitutional obstacles to better Bangsamoro self-determination. The MR asked that, **in the process of reconsidering the Decision, the SC make this crucial point clearer so as to address some mixed or even wrong signals.** In ruling (at p. 83) that the respondent GRP Peace Panel "may not preempt" the sovereign people or for that matter Congress in exercising constituent powers, *neither should the SC preempt the latter from acting on constitutional proposals as may arise from peace negotiations.*

Regarding the second level of counter-posing the contents of the proposed MOA-AD vis-à-vis the present Constitution and laws, the whole lengthy discussion in the Decision (at pp. 46-65) on the second substantive issue of the proposed MOA-AD's content "being inconsistent with the Constitution and laws" also goes against the grain of "thinking out of the box." The fact that the proposed MOA-AD's contents – esp. its underlying concept of an "associative relationship" between the GRP and a "Bangsamoro Juridical Entity (BJE)" -- are "inconsistent" or "cannot be reconciled" with the present Constitution and laws should not be an issue in that context. Of course, the proposed MOA-AD's contents would naturally turn out that way, and this is precisely because the peace negotiators on both sides were "thinking out of the box."

Unless "thinking out of the box" as explained is no longer allowed (contrary to its actually being allowed by the Decision itself), then there is no ground to strike down the whole of the proposed (repeat, merely proposed) MOA-AD as "unconstitutional." This is actually the logic of the afore-mentioned crucial passage of discussion in the Decision, which it should follow to a logical conclusion but which it does not when it disposes of the MOA-AD as "unconstitutional."

No Guarantee and Usurpation

And so, apart from the consultation issue, **the striking down of the proposed MOA-AD as "unconstitutional" really boils down to the SC Decision's justificatory interpretation (in pp. 74-75) for this of**

the second paragraph under No. 7 of the Governance strand of the proposed MOA-AD. This crucial paragraph reads: "Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework with due regard to non derogation of prior agreements and within the stipulated time frame to be contained in the Comprehensive Compact."

The Decision (at p. 87) interprets this paragraph in this way: "… Moreover, as the clause is worded, it virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place. Neither the GRP Peace Panel nor the President herself is authorized to make such a guarantee. Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process…respondents' act of guaranteeing amendments is, by itself, already a constitutional violation that renders the MOA-AD fatally defective."

The MR argued that this interpretation was stretching it too far. This is shown, among others in its highly suspicious and speculative closing phrase "for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process." It was as if the Decision was trying to find fault in a good faith, although possibly vulnerable, paragraph of the proposed MOA-AD in order to strike down the whole document and what it stands for. The Decision and some Separate Opinions went too far in reading too much into the afore-quoted crucial paragraph as a "guarantee" or "commitment" by the GRP Peace Panel to the MILF "to amend the Constitution to conform to the MOA-AD," in "usurpation of the constituent powers" for amending the Constitution.

Take the key phrase in that crucial paragraph: "upon effecting the necessary changes to the legal framework with due regard to non derogation of prior agreements and within the stipulated time frame." Not only are the words "guarantee" or "commitment" not found here. **At the most, the "commitment"** made by the GRP Peace Panel **was to work for that:** "effecting the necessary

changes to the legal framework with due regard to non derogation of prior agreements and within the stipulated time frame." But it was not a "guarantee" to actually "effect the necessary changes to the legal framework."

Ironically, the crucial phrase "upon effecting the necessary changes to the legal framework," which was the GRP Peace Panel's safety valve for the operation of constitutional processes, had been misinterpreted by the Decision as a "guarantee" of constitutional changes. The Panel's mode was not usurpation but working for good faith implementation of peace agreements through the various available constitutional processes. To say "upon effecting the necessary changes to the legal framework" is **not really a definite guarantee**, knowing the constitutional processes and bodies necessary for that. It is really just a best effort, as should be, to work for "effecting the necessary changes" in fidelity to what has been honorably, honestly and sincerely agreed upon at the negotiating table.

Public Consultation and Peace Negotiations

The SC Decision posed as the first substantive issue whether the respondent executive officials violated constitutional and statutory provisions on public consultation, and discussed this extensively (at pp. 36-46). In the Decision's Summary ruling, it then stated (at p. 86): "IN SUM, the Presidential Adviser on the Peace Process [PAPP] committed grave abuse of discretion when he failed to carry out the pertinent consultation process, as mandated by E.O. No. 3, Republic Act No. 7160, and Republic Act No. 8371. The furtive process by which the MOA-AD was designed and crafted runs contrary to and in excess of the legal authority, and amounts to a whimsical, capricious, oppressive, arbitrary and despotic exercise thereof. It illustrates a gross evasion of positive duty and a vital refusal to perform the duty enjoined."

The MR argued by pointing out (and substantiating by several annexes) numerous documented consultation and information efforts by respondents during the three years and eight months of the often difficult ancestral domain aspect of the **peace negotiations, which is an executive process that also has its inherent confidentiality requirements**. Let us say, for the sake of argument, that these were inadequate for whatever reason. **But the Decision itself (at p. 43) says that "The Court may not, of course, require the**

PAPP to conduct the consultation ***in a particular way or manner."*** **He, and more so the GRP Peace Panel, did conduct consultations; there was no failure to carry out the pertinent consultation process. Surely, any inadequacy in this regard hardly passes for "grave abuse of discretion."**

Or, as constitutionalist-columnist Fr. Joaquin G. Bernas, S.J., had said: "Failure to consult the general public during a process of difficult negotiation does not make the preliminary outcome unconstitutional, especially if broader consultation will necessarily have to follow, as in this case."[3] In fine, without setting aside the constitutional guidance it has given on the role of public consultation, the MR asked the SC to **reconsider and set aside its ruling on "grave abuse of discretion" by the PAPP for "fail(ure) to carry out the pertinent consultation process" and any basing on this for the declaration of the MOA-AD as "CONTRARY TO LAW AND THE CONSTITUTION."**

As the experience of many years of engagement in the Mindanao Peace Process has taught, public consultation is not the "be all and end all" of the peace negotiations. The latter have a certain purpose and inherent character, and public consultation is only one, even if a major one, aspect of the support infrastructure for negotiations. The application or interpretation of constitutional principles, processes and parameters vis-à-vis the peace negotiations are best based on a good appreciation of the latter's context, purpose and inherent character.

Peace negotiations with rebel groups are of an even more **sensitive nature** than most diplomatic negotiations. Though both have bearing on national security, the former has an *armed conflict* context that much of the latter does not have. In other words, as current events show, peace negotiations with rebel groups like the MILF can be or often are a *life-and-death* matter, while many diplomatic negotiations, like for the Japan-Philippines Economic Partnership Agreement (JPEPA), are not. Still on national security, there is a *military component* involved in peace negotiations with rebel groups.

And thus the corresponding need for **confidentiality** in peace

[3] Joaquin G. Bernas, S.J., "That 'piece of paper' or Relax 'lang'!," Philippine Daily Inquirer, August 18, 2008, p. A11.

negotiations with rebel groups, much like the confidentiality practice in diplomatic negotiations. The literature on negotiation processes describes confidentiality as "*a keystone of negotiation*" which is part of the necessary *confidence building and trust* between the parties. At the same time, there is also the difficult tension, balancing and oftentimes dilemma between transparency and confidentiality.[4]

The Separate Concurring and Dissenting Opinion of Associate Justice Arturo D. Brion (at pp. 22-23) made an important "last point on a dead issue" when he insightfully pointed out the need to "distinguish (not done in the Decision) between disclosure of information with respect to the *peace process in general* and the *MOA-AD negotiation in particular*… Thus, the consultations for this general peace process are necessarily wider than the consultations attendant to the negotiations that has been delegated to the GRP Negotiating Panel. **The dynamics and depth of consultations and disclosure with respect to these processes should, of course, also be different considering their inherently varied natures."** (bold face ours)

The MR argued that the whole process, basic rules, and standard practices of peace negotiations must be respected in the same way that we must respect the whole process, basic rules, and standard practices of international treaty negotiations and other executive functions, of the legislative mill, of judicial decision-making, and even of the planning and conduct of military operations. All these processes deal with matters of public concern but have, in varying degrees, their respective aspects of public information, consultation and consultation -- perhaps more with the political branches of government than with the judiciary and the military because of the nature of the work involved. Each has its specific characteristics, including rules of confidentiality.

In the case of peace negotiations, the line for public access should be drawn at *signed* agreements, even interim ones. This public access should not be allowed for *mere drafts*, even final drafts already initialed but still unsigned. Otherwise, there will be no end to intrusions into sensitive peace negotiations

[4] See David Bloomfield, Charles Nupen and Peter Harris, "[Chapter] 3. Negotiation Processes" in Peter Harris and Ben Reilly (eds.), Democracy and Deep-Rooted Conflict: Options for Negotiators (Stockholm: International Institute for Democracy and Electoral Assistance, 1998), esp. at 84-85 and 94.

with every draft having to be served up to the public – which is a "recipe for chaos."

Authority, Mandates and Parameters

The SC Decision measured the validity of the acts of the GRP Peace Panel and the PAPP in negotiating the MOA-AD on the basis of their mandates under mainly Executive Order No. 3 and secondarily the Memorandum of Instructions From The President dated March 1, 2001, and found that they either "failed to carry out" or acted "in excess of" such mandates. The MR argued that as regards whatever needed constitutional amendments, as well as needed administrative action and new legislation, in pursuit of reforms aimed at addressing the root causes of the armed conflict, that emerge from long discussions and eventual consensus at the negotiating table, were well within the authority, mandate and parameters of the GRP Peace Panel to submit *by way of recommendations* to the Executive through the PAPP. Thereafter, the Executive may consider these for appropriate action by itself, or in coordination with and referral to the Legislature, which may then take the necessary legislative and constitutional processes.

The authority for the GRP Peace Panel to conduct peace negotiations with the MILF *necessarily carries with it the very definition or concept that* "negotiation is a process aimed at mutual problem solving and reaching a joint settlement acceptable to all parties."[5] And this is precisely what the GRP Peace Panel was conducting until the Panel Chair and the PAPP initialed the final draft of the MOA-AD preparatory to its signing. Conducting peace negotiations to reach peaceful settlement with the different rebel groups *necessarily includes entering into and thus signing peace agreements* which document or formalize the joint settlements reached by the parties. If the GRP Peace Panel Chair can sign final peace agreements (like the 1996 Final Peace Agreement between the GRP and the MNLF), then with more reason can he sign interim agreements (like the MOA-AD).

The conduct of negotiations to reach peaceful settlement with the different rebel groups is clearly the realm of the Executive Department or the

[5] Christine Chinkin, "Chapter 12, Peaceful Settlement of Disputes," in H. Reicher (ed.), Australian International Law Cases and Materials (1996) 964.

President, even if "not explicitly mentioned in the Constitution," as the Decision (at p. 68) affirms. It is therefore usually scrutinized through the prism of the valid exercise of **executive power** vested in the President of the Philippines (whose official emissaries in the GRP Peace Panel do the actual conduct of face-to-face negotiations). But, as the MR argued, **this is not the only constitutional prism, perspective or "angle of vision"[6] to view and validate the executive exercise of peace negotiations.**

All told, **there is a richer reservoir for peace than is usually imagined and found in the Constitution**. It is a matter not just of executive power and separation of powers but also of constitutional policy, principles and rights. We tend to emphasize checks and balances when the whole point of governance is to "cooperate in the common end of carrying into effect the purposes of the constitution."[7] The MR found and **argued strong mandates for peace, supportive of the MOA-AD negotiations, in various constitutional provisions and jurisprudence relating to: social justice, general welfare, police power, peace, renunciation of war, and finally national sovereignty and the right to self-determination**. In fact, the MR asked and argued for the SC to make a declaration on the constitutional status of the human right of self-determination of peoples, as this would ease the constitutional passage of further peace negotiations with the Moro liberation fronts that could be more solidly (re-)framed on the basis of this right – IF AND WHEN there can be further negotiations after the MOA-AD debacle.

Final Remarks

There are of course many lessons, both positive and negative, about the MOA-AD debacle. Despite the big setback to the GRP-MILF peace process, it has at least placed the need to find a solution to the Bangsamoro problem on the national agenda. And it has emerged that the solution, whether called BJE or otherwise, will have to be one which is "outside of the box" of the Constitution. The Moro Islamic challenge, which was also addressed to the SC, is one of

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[6] To use words from the Dissenting Opinion of Associate Justice Antonio Eduardo B. Nachura (at p. 27).

[7] Phrase from the Dissenting Opinion of Associate Justice Presbitero J. Velasco, Jr. at p. 8, citing O'Donaghue vs. US, 289 U.S. 516 (1933).

constitutional rethinking for the Mindanao peace process.[8]

The MR mainly argued here that *the "unusual model" of the GRP-MILF peace negotiations up to the draft MOA-AD is actually better than the "traditional model" of the GRP-MNLF peace process, or the "MNLF Model."*[9] The latter is supposedly better because it was based on constitutional provisions already in place, namely Art. X, Secs. 15-21 on Autonomous Regions in the 1987 Constitution. Unfortunately, these constitutional provisions were *unilaterally* entrenched by the GRP under the Aquino administration, purporting to implement the 1976 Tripoli Agreement. They were not the product or outcome of the GRP-MNLF peace negotiations, or *were definitely not mutually agreed upon by the parties as the way of constitutional implementation but instead were imposed by one party*, the GRP.

But at the end of the 1992-96 round of the negotiations under the Ramos administration, the MNLF eventually adopted the frame of those constitutional provisions of limited regional autonomy. The resulting 1996 Final Peace Agreement naturally could not rise higher in degree of self-determination than that source, which effectively "boxed it in." It was subsequently proven, during more than 12 years now of implementation, including two successive ARMM governments under the MNLF, to be an *unsuccessful model* which did not bring enough of its promised peace, development and autonomy.

In the "unusual" but better model of the GRP-MILF peace negotiations, the idea was for the talks to first look at the Bangsamoro problem, dissect it to its roots, and see where the discussion would lead in terms of a conclusion on the solution. Because parameters can be obstacles, the panels would not talk of parameters like the Constitution (and for that matter independence) but instead focus on the problem and how it can be solved. This allowed for "thinking out

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[8] For the full argument on this, see Soliman M. Santos, Jr., The Moro Islamic Challenge: Constitutional Rethinking for the Mindanao Peace Process (Quezon City: University of the Philippines Press, 2001), for 2nd printing in 2009.

[9] Adopting the comparative terms "unusual model" and "traditional model" used by Chief Justice Puno during the oral argument hearing of 29 August 2008, but providing a different conclusion here. See also his discussion in section "III. The Deviation from the MNLF Model of Pursuing Peace with Rebels is Inexplicable" of his Separate Concurring Opinion at pp. 14-17.

of the box." Only as the consensus points on the ancestral domain aspect had crystallized, had started to be codified into a draft MOA-AD, did it become clear that some of these consensus points, if subsequently finalized as agreements, particularly in a Comprehensive Compact, may require "amendments to the existing legal framework," including the Constitution.

In this way, whatever necessary implementing new legislation or constitutional amendments would be based on and be faithful to the Comprehensive Compact between the parties – in other words, *mutual agreement also on the way of its constitutional implementation which is not imposed by one party*. This is the *bilateralism* that is the reverse of the GRP unilateralism in the GRP-MNLF peace process, which the MILF considers a mistake of history that should not repeat itself. A bilateral or shared effort on any solution is *better for the sense of ownership or stakeholdershipover it by the parties concerned*. Constitutional *implementation logically comes after not before* a peace agreement on constitutional solutions; otherwise, it becomes constitutional *preemption*.

The MR ended its plea for reconsideration by taking note of one specific remark of Associate Justice Adolfo S.Azcuna: "The consensus points are still there, [though] you don't have to sign the MOA."[10] The MOA-AD may be a "piece of paper" or now a "scrap of paper." But the consensus points themselves, with or without paper, represent at least two things: (1) Bangsamoro aspirations for self-determination and freedom, themselves representing much blood, sweat and tears; and (2) a political (not yet legal-constitutional) formula or framework to balance that with Philippine national sovereignty. It is this "remarkable balancing" that makes for a "remarkable document" which "can bring lasting peace," in the words of Cotabato Archbishop Orlando B. Quevedo, O.M.I. who lives in the epicenter of the Bangsamoro problem.[11]

Something hard-earned over several years of difficult peace negotiations between the representatives of two peoples, like this balancing of interests, should not be swept away just like that in the heat of the moment. The MR finally pleaded with the SC that it "*can still do its part to reverse and save the situation in a*

[10] Based on counsel's notes of the oral argument hearing of 29 August 2008.

[11] Archbishop Orlando B. Quevedo, O.M.I., Primer on the MOA-AD (Second and Third of a series, 7 and 9 August 2008).

way that gives more hope for peace and justice than does its Decision, as it stands – so it does not destroy but instead helps build the peace process." [12]

To no avail. Just barely six days after the CBCS-BWSF MR was filed, it was summarily DENIED WITH FINALITY in a one-page pro forma resolution without discussion, along with the MUSLAF MR. The SC Decision declaring the MOA-AD "CONTRARY TO LAW AND THE CONSTITUTION" thus stands.

The aggrieved Bangsamoro voices were muffled again.

[12] See Julkipli Wadi, "MOA-AD: Build, don't work to destroy peace process," Moro Times (a monthly news section of The Manila Times), 29 August 2008, p. D1.

DISAPPOINTING SC DENIAL OF MOAtions FOR RECONSIDERATION

(A tale of two very differently treated cases)

By Atty. Soliman M. Santos, Jr.

With due respect, as we are supposed to say, the Supreme Court's one-page resolution of November 11 (but released only on November 21) summarily "deny(ing) with finality" the two Motions for Reconsideration of its October 14 Decision, which by an 8-7 vote declared as "contrary to law and the Constitution" the initialed but unsigned final draft of the GRP-MILF Memorandum of Agreement on Ancestral Domain (MOA-AD), is very disappointing, to say the least. According to a news report on the just released resolution, the SC reasoned therein that it had already passed on the "basic issues" and that "no substantial arguments were presented to warrant the reversal of the questioned decision."

The disappointing nature of the SC resolution can be taken on several levels. But first it has to be pointed out that the two MRs came from several Bangsamoro civil society organizations which were intervenors in the MOA-AD case, intervening in support of the respondent GRP Peace Panel, in effect in support of the proposed MOA-AD and the unfinished GRP-MILF peace negotiations. One MR of 49 pages was filed by the Muslim Legal Assistance Foundation, Inc. (MUSLAF) on October 31. The second MR of 73 pages plus 19 documentary annexes was filed jointly by the Consortium of Bangsamoro Civil Society (CBCS) and the Bangsamoro Women Solidarity Forum, Inc. (BWSF) on November 5. [The GRP Peace Panel and its co-respondent government officials, represented by the Solicitor General, did not itself file a MR but a "Constancia," i.e. a manifestation as a matter on record, expressing continuing concern about SC encroachment into executive power.]

In their MR, the CBCS-BWSF stated at the outset that "The members of the Court should do what great minds and great hearts should do, at least pause to reconsider. This includes listening to the muffled voices of the aggrieved Bangsamoro." The CBCS-BWSF then pointed out that, after all, the several Bangsamoro civil society organization intervenors "were not (allowed to be)

heard during any of the three oral argument hearings [on August 15, 22 and 29]. Their Memorandums and arguments are not even referred to in the Decision, showing that these were probably not even read." It was as if the Bangsamoro were invisible to the SC.

In contrast, it heard on oral argument three petitioners (North Cotabato, Zamboanga City, and Iligan City) and two of their supporting intervenors (former Senator Drilon, and incumbent Senator Roxas), all representing Filipino Christian majority interests. All five of their counsels were ranged in oral argument against the Solicitor General representing basically the Executive Department of the Philippine government, which also had to cater to its Filipino Christian majority constituency. How about the Bangsamoro – where are they in this argumentation? Are they not also key stakeholders here, whose Bangsamoro problem the peace negotiations are supposed to solve? The MUSLAF and CBCS-BWSF MRs were therefore in essence an attempt to get the Bangsamoro voice heard by the SC, while there was still a chance in the MOA-AD case. Unfortunately, it has been to no avail, and in a very disappointing manner.

The SC went on recess from November 1 to 9, returning back to work on November 10. And then on November 11, barely a day after returning to all its backlog, it already issues a one-page resolution denying the two MRs with finality. Strangely this one-page resolution takes all of 10 days to be released on November 21. More strangely was the barely one day to go through and digest the total of 122 pages of the two MRs. The normal, usual or regular course for dealing with MRs in a major case would be to require or allow the other side to comment or oppose within a reasonable time like 10 to 15 days (the latter being the reglementary period itself to file a MR), and then consider the matter submitted for resolution – which would or should then come as a matter of course and of time.

What if, on November 11, the SC instead summarily granted, not denied, the two MRs? You can imagine the all the sound and fury that would be raised by the petitioners and their supporting intervenors – probably a reprise of all the hue and cry that occasioned the Temporary Restraining Order (TRO) last August 4 and the Decision itself last October 14 against the proposed MOA-AD. You can imagine their shrill invocation of the sacrosanct constitutional rights to due process and fair hearing in judicial proceedings. Alas, it seems that these same

rights do not apply for the equal protection of the Bangsamoro.

A contrasting case in point is the Mining Act Case (445 SCRA 1) where the SC reversed itself (from ruling 8-5-1 "unconstitutional" to 10-4-1 "constitutional") within 2004, on reconsideration from its Decision of January 27 to its Resolution of December 1. In that case, the Chamber of Mines of the Philippines (CMP) was allowed even after the initial Decision, to intervene, to file a MR, and then even to be heard on oral argument. What does the mining industry have that the Bangsamoro does not have to be given that kind of due process and fair hearing, if that was even due or fair at all, including to the therein lead petitioner La Bugal-B'laan Tribal Association, Inc.? Why does the protection of the law seem more equal for big business and the mining industry than for the Bangsamoro and the indigenous peoples?

An investigative journalist report on the inside story of that "Goliath Win for Mining"[1] provides some answers. According to this report, "it's clear that the High Court bent its rules to accommodate the chamber [CMP] as intervenor in the case." What soon after turned the tide in there was the oral argument of influential former SC Justice Florentino Feliciano on behalf of the CMP. But both Feliciano and the CMP could not have come into the picture there without the support of an "advocate" within the SC -- then Associate Justice Artemio Panganiban "who relentlessly prodded his colleagues to let the Chamber of Mines air its side," especially through an unprecedented oral argument during the reconsideration stage of the case. And then Panganiban eventually became the ponente (writer) of the new majority Resolution of December 1, 2004.

Going back now to the MOA-AD Case, the Bangsamoro simply did not have a Feliciano advocating for them in oral argument and a Panganiban "advocating" for them within the SC. Instead, it would be fair to infer (alliteration intended) that there was within the SC an "advocate" who relentlessly prodded his colleagues to issue the early TRO last August 4 and also to issue the early denial of the two MRs last November 11. It is interesting to note that the ponente of the Decision of October 14 in this case, Associate Justice Conchita Carpio Morales, was the same ponente of the Decision of January 24, 2004 in the afore-mentioned Mining Act Case. She must have also made sure that reconsideration

[1] Aries Rufo, "A Goliath Win for Mining," Newsbreak, March 28, 2005, pp. 20-22.

history did not repeat itself.

Interestingly also, former Chief Justice Panganiban (who was on opposite sides with Justice Morales in the Mining Act Case) was one of those who had publicly asked the SC to "Decide the MOA issues fully"[2] and who later publicly celebrated the SC Decision as a "Victory for the Constitution."[3] Not coincidentally, he, the mining industry and big business were all on the same side on the MOA-AD issue. And how about media and its investigative journalism sector – will they bother to connect the dots in the MOA Case like they did in the Mining Act Case?

How easy it seems for the SC and its Justices to flip-flop even on constitutional principles when it comes to different issues and interests. In then Justice Panganiban's Epilogue of his 245-page Resolution of December 1, 2004 in the Mining Act Case, he said, among others: "Verily, under the doctrine of separation of powers and due respect [that term again!] for co-equal and coordinate branches of government, this Court must restrain itself from intruding into policy matters and must allow the President and Congress maximum discretion in using the resources of our country and in securing the assistance of foreign groups to eradicate the grinding poverty of our people and answer their cry for viable employment opportunities in the country.... Let the development of the mining industry be the responsibility of the political branches of government. And let not the Court interfere inordinately and unnecessarily." And how about with the development of the peace process to resolve our internal armed conflicts and address their root causes, the context of the MOA-AD Case?

It is so easy for the SC, in its one-page Resolution last November 11 summarily denying the two MRs of its Decision on the proposed MOA-AD, to resort to the hackneyed formula of saying it had already passed on the "basic issues" and that "no substantial arguments were presented to warrant the reversal of the questioned decision." It is clear that the SC and some very strong anti-Bangsamoro and anti-peace forces do not want to be bothered with this matter

[2] Artemio V. Panganiban, "Decide the MOA issues fully," Philippine Daily Inquirer, September 7, 2008, p. A11.

[3] Artemio V. Panganiban, "Victory for the Constitution," Philippine Daily Inquirer, October 19, 2008, p. A11.

any more, and so the quick hammering of the final nail on the coffin of "thinking out of the box" in future peace negotiations. In their haste (to use their own critique about the forging of the MOA-AD) to do this during what should be a reconsideration stage of the case, they have also delivered the clear message that the Bangsamoro have no voice in these judicial proceedings which have truly become an "internal matter" of the Filipino Christian majority.

Granting that the SC had already passed on the "basic issues" and that "no substantial arguments were presented to warrant the reversal of the questioned decision," couldn't it have at least shown more sensitivity to the Bangsamoro by even going through the motions of giving their intervening representatives a fair hearing on their MRs even if eventually these would likewise be struck down like the proposed MOA-AD? But a fair and good enough reading of the two MRs totaling 122 pages of the Bangsamoro civil society organization intervenors will show that, on the contrary, substantial arguments were presented to warrant the reversal of the questioned decision.

The CBCS-BWSF MR argued, among others, that the very logic of the Decision itself, particularly its recognition that the negotiated solutions to an armed conflict may require changes to the Constitution, militates against the wholesale declaration of the proposed MOA-AD as "unconstitutional." It argued that this is not just a matter of executive power and separation of powers but also of constitutional policy, principles and rights which make for a strong constitutional mandate for peace. The MUSLAF MR, on the other hand, argued mainly from the need to resolve the MOA-AD issue through a resort to international law, the generally accepted principles of which are anyway adopted as part of the law of the land under the Constitution. Whether we agree or not with these different lines of argument coming from Bangsamoro representatives, they certainly deserve more than a one-page resolution of summary denial. Be that as it may, the two MRs are there as the Bangsamoro voice of dissent in the case record, for whatever reference need of posterity, including the judgment of history.

In ending, it might be instructive to quote from Justice Morales' own dissent to the new majority Resolution of December 1, 2004 in the Mining Act Case: "The task of reclaiming Filipino control over Philippine natural resources now belongs to another generation." The task of another generation, if we must speak of posterity – that may as well be said too of finding a solution to the

Bangsamoro problem, after the finality of the SC Decision on the proposed MOA-AD, which was moving well toward that solution when stopped dead on its tracks. Despite that final resolution in the MOA-AD Case, it is not good to end on a pessimistic or resigned note. So, I quote the text message of a leading member of the dissolved GRP Peace Panel in reaction to that final resolution: "Disappointing indeed. Am sure though that our vindication and that of the Bangsamoro will come someday. Damn the torpedoes!"

INITIAL NOTES AND COMMENTS ON THE SC DECISION ON THE MOA-AD

By Atty. Soliman M. Santos, Jr. [1]

Quezon City, 15 October 2008 (slightly revised 16 October 2008)

These are initial notes based on the Supreme Court Public Information Office bulletin of October 14, 2008 titled "SC Declares MOA-AD Unconstitutional" and a quick scanning of the 87-page majority Decision of the same date penned by Associate Justice Conchita Carpio Morales based on an **8-7 votedeclaring the MOA-AD "CONTRARY TO LAW AND THE CONSTITUTION."** [2] Those who joined her in the majority were Chief Justice Puno and Associate Justices Santiago, Carpio, Azcuna, Reyes, Quisumbing and Martinez, all of whom except the last two wrote separate concurring opinions. Those who voted to dismiss the petitions were Associate Justices Tinga, Nazario, Velasco, Nachura, De Castro, Brion and Corona, all of whom except the last wrote separate dissenting opinions. (All these separate opinions are not with me as of this writing.) Being initial notes, we limit ourselves to main points on the key thrusts of the Decision and their implications.

The aforesaid majority declaration is based on t**wo substantive issues**: [1] that the respondents GRP Peace Panel and Presidential Adviser on the Peace Process (PAPP) violated constitutional and statutory provisions on public consultation and the right to information when they negotiated

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[2]The lead petition of "The Province of North Cotabato, et al. vs. The GRP Peace Panel, et al." was filed on 23 July 2008 and docketed in the Supreme Court as G.R. No. 183591.

and later initialed the MOA-AD; and [2] that the contents of the MOA-AD violate the Constitution and the laws. [p. 36] "MOA-AD" actually refers to the final draft of the "Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001."

The Decision also finds **"grave abuse of discretion"** in respondents exceeding their authority by agreeing to Paragraph 7 under the Governance strand of the MOA-AD that "virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place" which is (as far as amendments to the Constitution are concerned) a "usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves." [p. 87] PAPP Esperon in particular was found to have "committed grave abuse of discretion when he failed to carry out the pertinent consultation process, as mandated" by EO 3, the Local Government Code, and IPRA [p. 86].

The Decision, **in dealing with the contents of the MOA-AD**, summed it up this way: <u>"The MOA-AD cannot be reconciled with the present Constitution and laws.</u> Not only its <u>specific provisions</u> but the very <u>concept underlying them</u>, namely the associative relationship between the GRP and the BJE, are **unconstitutional**, for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence." [p. 86, underscoring and bold face in the original]

The effect of this ruling **would appear to be to confine future peace negotiations** with the MILF, and for that matter other rebel groups, **"within the box"** of existing provisions of the Constitution and national laws. The reported (by the SC PIO) pronouncements of the Chief Justice and others in the majority tend to reinforce this. CJ Puno wrote that "the President as Chief Executive can negotiate peace with the MILF but it is peace that will insure that our laws are faithfully executed… without crossing the parameters of powers marked in the Constitution." He added that "respondents' thesis of violate now, validate later makes a burlesque of the Constitution." Associate Justice Carpio said that in negotiating the MOA-AD, the Executive branch "committed to amend the Constitution to conform to the MOA-AD." These statements reflect a rather conservative judicial view of the MOA-AD negotiation effort that does not augur well for similar efforts.

The SC PIO bulletin says that the Decision "enjoined the respondents and their agents from signing and executing the MOA-AD or *similar agreements*." There appears to be *nothing as explicit as that* in the Decision but that could be the effect. The Decision notes that the MOA-AD, as "a significant part of a series of agreements necessary to carry out the GRP-MILF Tripoli Agreement on Peace" of 2001, "can be renegotiated or another one drawn up that could contain similar or significantly dissimilar [or drastic] provisions compared to the original." [p. 84, see also p. 34] Precisely, because of this **prospect of renegotiation of the MOA-AD** "in another or in any form" to carry out the Ancestral Domain Aspect of the Tripoli Agreement on Peace of 2001, the Court was "minded to render a decision on the merits in the present petitions **to formulate controlling principles to guide the bench, the bar, the public and, most especially, the government in negotiating with the MILF regarding Ancestral Domain."** [p. 34, underscoring and bold face in the original]

Are future peace negotiations now therefore necessarily confined "within the box" of existing provisions of the Constitution and national laws? Not necessarily. Because the Decision itself provides some opening for that, albeit with due regard to non-derogation of separation of powers, particularly the matter of constituent powers in proposing and adopting amendments to the Constitution. In the discussion in pp. 71-73, there are these guidelines: (underscoring and bold face in the original)

> The President may not, of course, unilaterally implement the solutions that she considers viable, but she may not be prevented from submitting them as recommendations to Congress, which could then, if it is minded, act upon them pursuant to the legal procedures for constitutional amendment and revision.
>
> x x x
>
> While the President does not possess constituent powers … she may submit proposals for constitutional change to Congress in a manner that does not involve the arrogation of constituent powers.
>
> x x x
>
> From the foregoing discussion, the principle may be inferred that the

> President – in the course of conducting peace negotiations – may validly consider implementing even those policies that require changes to the Constitution, but she may not unilaterally implement them **without the intervention of Congress, or act in any way as if the assent of that body were assumed as a certainty**.

In other words, these guidelines do not necessarily preclude, but on the contrary inform, any subsequent effort to ***re-frame the GRP-MILF peace negotiations as constitutional negotiations*** – which they should be, in order to settle the relevant constitutional issues once and for all, otherwise the charge of unconstitutionality will always be raised when a better form of self-determination is sought for the Bangsamoro people in order to solve the Bangsamoro problem. The Decision, to its credit, does touch a bit [in p. 69] on peace-building and constitution-making by quoting from an American law journal: "Constitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up rules by which the new democracy will operate." [3]

The SC PIO bulletin's quote from the dissenting opinion of Justice Nazario is what to us is **the right perspective on these negotiations**: "In negotiating for peace, the Executive Department should be given enough leeway and should not be prevented from offering solutions which may be beyond what the present Constitution allows, as long as such solutions are agreed upon subject to the amendment of the Constitution by completely legal means."

The other major legal guideline for any subsequent effort is, of course, that on public consultation and the right to information. This brings us back to the substantive issues that were the basis for the Decision declaring the MOA-AD "contrary to law and the Constitution" as well as ruling the respondents to have "committed grave abuse of discretion." ***These rulings are reconsiderable,*** i.e. can be the subject of a Motion for Reconsideration.

Whatever **violation of constitutional and statutory provisions**

[3] Kirsti Samuels, POST-CONFLICT PEACE-BUILDING AND CONSTITUTION-MAKING, 6 Chi. J. Int'l L. 663 (2006).

on public consultation and the right to information when respondents negotiated and later initialed the MOA-AD is not as sweeping or as grave as has been made to appear. The ***numerous documented consultation and information efforts by respondents*** (including in the local government units of most petitioners), even granting the consultation and information inadequacies during a process of difficult negotiation and hard bargaining, should be made clear on the record, at least for possible reconsideration of the "grave abuse of discretion" ruling. PAPP Esperon in particular is *unfairly* singled out to have "committed grave abuse of discretion when he failed to carry out the pertinent consultation process, as mandated… " [p. 86] But he just got into the job only in June 2008! – at the tail end of the MOA-AD negotiation process of three years and eight months since 2005.

As for respondents supposedly exceeding their authority by agreeing to **Paragraph 7 under the Governance strand of the MOA-AD** that "virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place" [p. 87], this interpretation of Paragraph 7 as a **"guarantee" or "commitment" to the MILF "to amend the Constitution to conform to the MOA-AD"** is highly debatable, to say the least. There is definitely no "usurpation of the constituent powers…" on the part of respondents. The respondents were all along following a recommendatory mode vis-à-vis their principal, the GRP – along the lines in the above-quoted paragraphs of the Decision. As stated in the "Supplement to the Memorandum for Intervenors *Consortium of Bangsamoro Civil Society and Bangsamoro Women Solidarity Forum, Inc."* dated 28 September 2008 in support of respondents [at pp. 47-48]:

> Such needed constitutional amendments, as well as needed administrative action and new legislation, in pursuit of reforms aimed at addressing the root causes of the armed conflict, are well within the authority, mandate and parameters of the GRP Peace Panel to submit by way of recommendations to the Executive as a result of long discussions and eventual consensus at the negotiating table. Thereafter, the Executive may consider these for appropriate action by itself, or coordination with and referral to the Legislature that may then take the necessary legislative and constitutional processes.

As also argued in that CBCS-BWSF Supplement [at pp. 54, 78], Paragraph

7 under the Governance strand of the MOA-AD should not be seen negatively as "making the Constitution conform to the MOA" but rather as ***a matter of good faith implementation of peace agreements through constitutional processes*** that may include any necessary amendments or revisions of the Constitution, as would be the approach too with certain international obligations.

In the context of recommendatory amendments to the Constitution to pursue reforms aimed at addressing the root causes of the Moro armed struggle, it is unfair to the MOA-AD negotiation effort and the whole GRP-MILF peace negotiations to prematurely shoot down a mere preliminary (to a final) peace agreement just because the Decision finds that, on its face, "The MOA-AD **cannot be reconciled with the present Constitution and laws**. Not only its specific provisions but the very concept [associative relationship] underlying them." [p. 86] ***This early shooting down preempts and prejudices the whole peace process effort***.

For the Decision to say that "the concept [of associative relationship] presupposes that **the associated entity is a state and implies that the same is on its way to independence**" [p. 87] is again highly debatable. There are states and there are states, including constituent states in a federal republic and associated states. But these said states are ***not sovereign independent states***. There is nothing in the MOA-AD about a grant of independence to the Bangsamoro – even if they have good grounds for this (and maybe the Decision has just reinforced those grounds). In the final analysis, it all depends on the terms of the associative relationship agreed upon – terms which were still to be defined, specified and otherwise determined in an envisioned Comprehensive Compact to be negotiated after the MOA-AD.

These questions of substantive constitutionality of the MOA-AD's key provisions, as well as the numerous documented consultation and information efforts by respondents, were presented and discussed in the ***CBCS-BWSF Supplement*** [pp. 50-52, 56-79, also Annexes 3 & 4], even as these were not presented and discussed in the Memorandum of Office of the Solicitor General. Unfortunately, it appears that the Decision had *not* taken note of that ***CBCS-BWSF Supplement*** and its considerable set of Annexes, including especially information materials on the ancestral domain negotiations.

As we said, this is just an initial quick reading and commentary on some

key thrusts in the Supreme Court Decision declaring the MOA-AD "contrary to law and the Constitution." There is no doubt more to be done in terms of deeper and more thorough reading and study of the Decision, as well as the separate concurring and dissenting opinions, including their discussions of international law and indigenous peoples rights in relation to the peace negotiations. This is more than an academic exercise, for what really matters are its implications on the fate of the GRP-MILF peace negotiations, which is basically to say the fate of war and peace in Mindanao.

ANALYSES AND COMMENTS ON THE MOA-AD SUPREME COURT DECISION

By Atty. Michael O. Mastura

[Notes:The analyses and comments are meant to provide broad-base analyses and provocative discussions from a unique perspective of an active participant in peace negotiation process and in crafting of the 'treaty' device. Citations/ footnotes are made endnotes to abbreviate the flow of analyses.]

A. Premises Reconsidered

My commentary presents a different view to reconsider the focal point of judicial review about the worriers of Government-MILF peace negotiation, so that it is seen as the "hard barriers" (and necessarily the obstacles) in themselves, apart from the consequences that the arguments may have taken a bit too far from the "fear of the unknown" here (like the boy who called wolf). Overturning the commitment that "virtually guarantees the necessary amendments to the Constitution" has hardly quelled the controversy surrounding the MOA-AD and the armed fighting in Mindanao. The broad interpretations to be kept in the forefront of our negotiation are as follows:

(1) What consultation process fits to account for autonomous existence amid current hysteria to ascertain the meaning at stake going along side the framework of incremental 'treaty' devise crafted into substantive part of the ancestral domain strands Agreement of Peace of Tripoli 2001? Whatever ontological arguments may persist that would be the working arrangements of consensus points or differing positions in exercise of the right to self-determination.

(2) How do negotiators frame contested issues when they take an initial position on the Moro Question within the legal framework (Constitution or statutes or conventions) but without constraining broad range of alternative solutions discussed with facilitation? Whoever sits as

negotiators the common task is to reach a political settlement free of any imposition in order to provide chances of success and open new formulas that permanently respond to the aspirations of the Bangsamoro people for freedom.

(3) Which contents of the framework device and acceptance of the very concept underlying legitimacy (associative ties and tiers) between the Bangsamoro juridical entity (BJE) and the government will have to adhere to the 'basics and constants' as obverse to the constitutional canon? Under the legal maxim of *darurat* ('necessity begets facility'), the application of the term *qanun* (or 'law') for all the arrangements is consistent with incremental gradualism in Islamic legislation. If acceptance of a 'treaty' device is political, a proposal, which leads to 'ratification', has to be a political question.

Answers to these questions would comprise movements to justify the 'seamless web' in jurisprudence similar to theoretical justification for the "Brandeis amicus brief" to resolve conflict between formal "rules" and substantive "justice". Abstract legal rhetoric can obscure a number of dilemmas deep at the core of constitutionalism as a source of legitimacy. Yet, in our understanding of sociological interactions, in this country—we"outlaw" heinous crime such as plunder because "it inflicts palpable harm on actual people." Consider that the Court of last resort strikes down a constitutional challenge because it confronts us with a "continuing harm or a substantial potential of harm" viewed in scrutiny of "mootness" as "the doctrine of standing set in a time frame." Next, this Court of last resort resolves "to deny with finality" as a matter of practice and policy. Nullity, as in American judicature, can be seen to be a mistake in the MOA-AD decision if we take it to be botched or rendered incomplete otherwise the Court would be resolving between two competing conceptions of political morality. But we do not agree that the Court already has passed upon the "basic issues" and that "no substantial arguments were presented to warrant the reversal of the questioned decision" on the basis of two motions for reconsideration.

At the core of good offices of the Prime Minister of Malaysia is tendered in all good faith the act of maintaining contact with both the conflicting parties and providing both the means of negotiation and pacific settlement. There is no coercion or forceful carrying out of one's will in facilitation. So it is crucial to

recognize in the first place that the Court looked at the development of events amid current war hysteria and the 'big picture' myopia of digital and print media that put the impetus:

> "'Mootness' is sometimes viewed as "the doctrine of standing set in a time frame: The requisite personal interest must exist at the commencement of the litigation and must continue throughout its existence. Stated otherwise, an actual controversy must be extant at all stages of judicial review, not merely at the time the complaint is filed." [Separate opinion, Puno, J. at 12)

What sense of justice puts personal interest above the obligation to respect dignity, personality, privacy and peace of mind defined in the Civil Code for human relations with neighbors and others? To fill in the void, the chief magistrate could have returned to his well-written treatise on balancing vexed 'peace of mind' and legal foundations by analogy to meet novel problems as herein. At the onset of the controversy some lawyer crackpot burned the flag of the Federation of Malaysia in front of the office of the IMT office in Cotabato City. Not unlike the constitution the flag is 'a powerful symbol of a particular set of sentiments and ideas' and thus both must be placed in a higher realm of existence than the material. Here the significant ontological point is not 'the misuse or desecration of the emblem' but that its use is a protected speech. Both the flag and the constitution convey emotive message: "just as forcefully as in a dozen different ways"—toborrow Rehnquist's phraseology. As an equation, the pretext for the discretion of what the flag represents Justice Brennan's remark is instructive in an important footnote: these assertions "sit uneasily". By analogous reasoning the place of "consultation" to give effect to "the right to information" elevated to a constitutional right in the 1987 Constitution cannot be equated with same universal status as liberty or freedom of speech or of the press, or the right of the people peaceably to assemble and petition for redress of grievances.

Certain factors explain why the High Court should not get embroiled in a "culture war" when faced with ambiguity about cynical manipulation of patriotic symbols to appeal to passions initiated by some Mindanao local government executives-petitioners. True enough the Constitution is a powerful abstraction—in which not only a "legalese process" but also a cognitive belligerence embroiled in a "war of culture" can be easily read into it—because it is profoundly offensive

to the majority of the people. No matter what excuses of "with due respect" those who sit in ivory towers may get it right; yet, there is a high level of anticipatory regret, if the decision does not transpire as expected. A magistrate who tips the balance sometimes has expressed regret years later that one had voted the way he or she did with cultural overtones.

I respectfully submit in such event lies the endowment of human life and safety marked by the pursuit of peace of mind. Overlapping with the foundation for independent legal concept of speech through "self-evident truths" for redress of grievances is never about passion for reason. Whose preference shall govern? Dean Raul Pangalangan's point about 'warmongering' and 'rebels and constitutionalism rhetoric' is correct analysis but he has misapplied this enlightened attitude to institutional failings from powerful countervailing skeptics: the forces of self (ego), ambition, narrowness, ignorance, prejudice, and misunderstanding. Seen as episodes of democratic behavior, consensus building and conflict resolution one cannot find "the conditional language of earlier agreements" in the furtive MOA-AD precisely because our negotiating formulation embodies the very nature itself of 'conditional' or 'provisional' or 'earned' sovereignty via transitional process. Transitory provisions of the 1987 Constitution are basic examples, if one accepts the skeptical premise of political decision as simply a matter of whose preference shall govern: from private armies to political dynasties to inadequate remedies for reversion to the State of all lands of the public domain and real rights arising therein.

Judicial intrusive scrutiny has boiled down to repudiating not merely the MOA-AD because the Supreme Court also refused to consider the "public policy" argument. The Chief Justice opening is curt: "Any search for peace that undercuts the Constitution must be struck down," run the next two lines in his separate concurring opinion with the majority. The majority looked up to the grandeur of the Constitution preceded by considerations of the duty of government to seek enduring peace. Puno's jurisprudence holds the premise: "Peace in breach of the Constitution is worse than worthless" [See concurring opinion at p. 1]. The influence of this ruling as a value judgment can undercut public confidence in conflict resolution through preventive diplomacy. Constitutionalism means limiting executive 'pre-decisional' deliberative action that outweighs the object of MOA-AD for domestic tranquility and peaceful dispute settlement to guide judicial decision-making in special cases. And yet the Court acknowledges that

"the President is in a singular position to know the precise nature of their [MILF] grievances which, if resolved may bring an end to hostilities."

I have come to ask whether the pursuit of domestic tranquility of the country is tolerably repugnant to constitutional supremacy. This is a tricky proposition enunciated in *Marcos v. Manglapus* on "unstated residual powers" and residual executive privilege. The framing of this hypothesis is lifted from political beliefs and discourses of the legal realist school, which precludes the "excesses of democracy." Something like a "political tilt" of the separation-of-powers favors the status quo substantive goals. The argument from democracy asks that those in political power 'be invited to be the sole judge of their own decisions.' Yet I need hardly add what it is to be humanitarian (and necessarily human dignity) is obscured like the sort of public reasons that are ascribed in "hard cases" just to discover some underlying principles and possibilities.

B. Critique: The Threshold of Legitimacy

We submit that a more progressive realistic jurisprudence is to break the legitimacy issue into two components. Fundamental to common understandings is the concept of legitimacy in a normative sense. It means no more than the task of working out arrangements for coming to terms with permissible aims and methods of diplomacy (negotiation). Thus, it implies Government-MILF reciprocal acceptance of the legal framework about constitutional and international order. The acceptance aspect is preoccupied with the form of legitimacy; whereas, the content aspect is concerned more with results than with methods (process). In a period of legitimacy, the principles of obligation are taken for granted as in the instant case, but during a revolutionary situation principles are crucial so they get to be talked about: i.e. public opinion 'as arbiter of political life on an intimate footing' with the principle of sovereignty itself. There is much talk about the GRP duty to honor the MOA and willingness to be bound to avoid legitimacy deficit.

Herein it is equally important that we do not confuse legitimacy with justice, applied to problems of peace and security. Justice requires political structures (like the BJE) that allow people to make collective, binding decisions. Social dominance theory argues that underlying major conflicts and profound differences there is a grammar of social power shared by all societies. The content

aspect of legitimacy is about what kind of domestic social orders are legitimate—such as the political and social institutions upon which the state is based. We can say here (unlike in revolutionary diplomacy) when the MILF could organically construct system of Islamic norms, values, beliefs and definitions to pose challenges to the Government's national consensus precisely political legitimacy becomes imperative. The Court and judges cannot refuse to listen to protesters who put in doubt a de facto support for the regime yet engage in negotiations (which is not really concerned with acceptance or explicit principles).

Contrariwise it is less misleading to sketch the broader themes of the MOA-AD as a predicative template rather than a "furtive process" juxtaposed against the general contours of the fundamental law. The stage is set for the public litigation model that displays a new approach to judicial action and the judicial role.

The Supreme Court has just rubbed metaphorically 'fresh salt' in the "wounds of the all-out war" with its decision truncating the Government-MILF peace deal. To read the decision is to become aware of the veil of ignorance in culture-driven war about the historic claims and legitimate grievances of the Bangsamoro people. One argument that purports to test here the ground on which to anchor a motion for reconsideration is simply to ask, "Have you read the memorandum of agreement on which the Supreme Court ruled on?" If so, then, the lack of consultation argument has undermined the veil of ignorance with unintended effect to cover for deep-seated prejudice. Nowadays even pro bono work requires attorney's training and competence such that even paralegals are involved in it. I have personified the BJE like the response to the naïve view of corporate formality in support of arguments to portray it as a person. Similarly the battle against the naïve view of BJE and BDA imagery has nearly been won on the conceptual naiveté fronts but striving continues on the empirical naiveté collective activities.

C. The Constitutional Metes and Bounds

From the 1986 bloodless end of martial rule under the Marcos dictatorship to the 2000 political morality fall of the Estrada presidency in 2000 are frenzied extra-constitutional upheavals means to check power. The aftermaths are lessons learned in 'people power' but such direct populist act sounds paradoxical rather

than pathological. Consideration also of the impeachment proceedings has had profound bearing on the readiness of the Respondents to proffer the mootness and academic argument to predict removal from office of the President for culpable violation of the Constitution. This is why the case logic of *David v. Arroyo* while "not a magical formula that automatically dissuades courts in resolving cases" fed back on the question of the right to intervene linked to the question of status standi to initiate litigation. The minority opposing views did not bear much analysis for predictability. What judicial restraint does in practice is to qualify the broad constitutional doctrines by allowing the decisions of the Executive and of Congress to stand, even if it would not please political conservatives, or it is repugnant to the judges' own sense of principles.

1. Legislative investigating power as tools for scrutiny of executive secrecy and accountability reduces the executive privilege into "dubious doctrine."

The claim that judicial review is undemocratic has led to the notion that activism fails its own test. No one has yet discovered how to balance the right to information and governmental secrecy. What legal scholars argue about is: That the mainstay of legal coherence was once the "unbuttoned discretion" enjoyed by the legislators in the presidential system akin to the supremacy of parliament. But in the resolution of the dilemma of executive branch secrecy and power the blurring of boundaries actually cuts across "dubious" doctrinal lines. Under the 1987 Constitution both the legislative and executive branches have become somewhat enfeebled in its residium of authority whereas the 'political tilt' of separation-of-powers leans toward the judicial branch for strict interpretation of the Constitution.

At the very outset, I underscore the foundational role of separation-of-powers, competing norms, substantive norms and procedure as servants of justice. Should the Court reverse itself or modify its ruling? Considered herein, as arguments of principle and policy for justification of the correctness of the adjudication, is the constitutionally protected right to information. On this point, I want to say a word about the merit of this way of reviewing the initialed MOA-AD to suggest a decision procedure that can withstand public examination and the duty of disclosure. It demands that the transformative process of conflict resolution continues until the final premise upon which constitutional adjudication stands and draws claim for legitimacy and acceptance to bring about the best

result for the parties in the negotiating panel.

Political aspirations for compact union of the BJE that will receive the sovereign's assent become possible under the theory of 'earned' sovereignty. But an ontological point is made in all the opinions in the case at bench: en banc power is in the Constitution and you cannot violate it. It cannot be done. And so, Chief Justice Reynato S. Puno devotes some pages to explicating the rule of law.

> MR. CHIEF JUSTICE PUNO, in Separate Concurring Opinion, writes:
>
> "It is crystal clear that the initialing of the MOA-AD is but the evidence of the government peace negotiating panel's assent to the terms contained therein. If the MOA-AD is constitutionality infirm, it is because the conduct of the peace process itself is flawed. It is the constitutional duty of the Court to determining whether there has been a grave cause of discretion amounting to lack or excess of jurisdiction on the part of the government peace-negotiating panel in the conduct of the peace negotiations with the MILF. The Court should not restrict its review on the validity of the MOA-AD which is but the end product of the flawed conduct of the peace negotiation with the MILF." [Puno, CJ. at p. 8]

xxxx

"In sum, there is no power nor is there any right to violate the Constitution on the part of any official of government. No one can claim he has a blank check to violate the Constitution in advance and the privilege to cure the violation later through amendment of its provisions. Respondents' thesis of violate now, validate later makes a burlesque of the Constitution." [Puno, CJ, at p. 22.]

The Puno Court's jurisprudential effort to shift the key issue from the question of procedure to the question of constitutional duty is to check the potential abuse of power through the use of onerous legalistic constraints. Such an understanding of the factual antecedents rather begins with the search for near absolutes than to unravel the complexities of conduct of peace negotiations with the MILF. It is our contention that crippling the unshared duty of presidential

negotiating position on the needs of diplomatic negotiations on account of the 'right to know' in the case at bench can open the way for endless legal assaults on the arena of treaty negotiations. The ground for TRO as would probably work injustice to the petitioner local executives representing LGUs against the act of the Presidency (in this instance the signing of MOA-AD) is quiet unprecedented because as a rule it is not designed to protect contingent or future rights. In this American-inspired jurisprudence model the criteria of legal validity incorporates principles of justice or substance in which the statutes may be a mere legal shell.

There is a preclusive effect combined with a few incumbent lawmakers' application for special civil action of certiorari, prohibition and mandamus so as to intervene. And, therefore, it is quite inconsistent with the 'impermissible collateral attack' doctrine. By analogy, legal scholars have documented the direct influence of injunctions in altering the course of labor or protest movement which we can proffer to explain the collateral bar rule in cases (where TRO is disobeyed without first challenging it in court). This is a case of procedure used to support particular substantive results as building blocks for justice. Needless to say, the Congress has the constitutional means to satisfy the right to know as a matter of sovereign prerogative under truly extraordinary circumstances.

The search for constitutional absolutes herein misstates the potential stalemate that results from withholding information. Certainly the end is not secrecy as to the end product—the template agreement. But it is confidentiality as to negotiation that lead up to the MOA-AD to prevent compromising flexibility of presidential negotiating positions. Admittedly broad public dissemination must subject the MOA-AD to fullest public scrutiny. Did framing the rights analysis for judicial review make any difference in this petition in the strategy of deference or strategy of craft?

What the Puno Court contemptuously plays out in the MOA-AD is the Respondent's thesis "*violate now, validate later* makes a burlesque of the Constitution [italics mine]" turns process into substance. Such dire prediction of unworthy purpose does not demonstrate in-depth split in intellectual attitudes of the Court towards right to know and the freedom to associate. For one, the majority opinion is notable for this passion. But the dissenters reserve theirs for liberal legality in the sense that law is autonomous and above the play of politics. I shall say more

of this later as to why it was difficult to seek the Court's unanimity among its own members. For another, the majority opinion has logic too. In breadth, the chief judge argues for a decision on the merit. What is more, the Chief of the highest court rules, that the constitutionality of the conduct of the entire peace process and not just the MOA-AD should go "under the scalpel of judicial scrutiny."This criterion expects the citizens to accept the worst in wedge issues, but if convictions are too deep, we cannot assume the Constitution is always what the Supreme Court says it is.

When citizens pause to consider the 'caricatures' of burlesque imagery, it is what a dissenter might precisely want to challenge with exalted language. Litigation of MOA-AD aligns the chief justiceship of Puno towards more intellectually satisfying opinions to deploy constitutionalist interpretation. Writing in dissent, Associate Justice Dante O. Tinga takes an unambiguous position to register his corrective vote an example of conservative activism before the Solicitor General backed down. No, the correct course of action for the Court is to dismiss the petition; but he deemed it impolitic to simply vote without further discourse. Here the gist of the causal judgment that may have developed is of bare utilitarian value in point of the position of the MILF that the MOA-AD is a 'done deal'.

MR. JUSTICE TINGA, Dissenting in Separate Opinion, writes:

> "There is the danger that if the petitions were dismissed for mootness without argument that the intrinsic validity of the MOA-AD provisions has been tacitly affirmed by the Court. Moreover, the unqualified dismissal of the petitions for mootness will not preclude the MILF from presenting the claim that the MOA-AD has indeed already been signed and is therefore binding on the Philippine government. These concerns would especially be critical if either argument is later presented before an international tribunal that would look to the present ruling of this Court as the main authority on the status of the MOA-AD under Philippine internal law. [Tinga, J. at p. 9]

Cast at the center of the controversy was, one, an agreement and, two, a party to it that is neither a state nor an international legal person that was not impleaded. Justice Tinga characterizes the role of the 'unimpleaded party' as

instance of cases that are "laden with international law underpinnings or analogies which it may capitalize on to serve adverse epiphenomenal consequences" [at p. 2]. My take is (worth noting in parenthesis) that I originally used such conception-laden clauses in analytical constructs and 'real' entities to tell us most about any given event or derivative epiphenomenon before *Kusog Mindanaw* consultations. In the same interpretive sense, Chief Justice Puno asserts the MOA-AD is heavy-laden with self-executing components. This has in mind the duty to perform and carry out obligations in which a State cannot plead that it is waiting for its lawmakers to legislate or that it may need to be given some effect in domestic law. Precisely, there is no sure method for determining whether a treaty is or is not self-executing. This has to be decided in each case by the courts so there should be less regard to text and more to the intention of the parties. For this reason, the Court must give weight to an interpretation given by the negotiating panel of Government in amicus curiae briefs.

Now we come to my question: Is the law's concern just to bring the MILF as party litigant in the instant case? Then, the non-joinder of MILF is a fatal flaw, if we follow the dissenting opinion of Justice Presbitero J. Velasco, Jr. [at p. 2]. But if we turn to the argument from democracy to establish rights demonstrated by a process of history, an expanded reading of the MOA-AD makes a summary restatement of the theory of antecedent right. It calls for the justness of the original position. The program of judicial activism could hold it out as earned sovereign authority traced to the suzerainty of the sultanate of the Bangsamoro people. Constitutionalism can little progress until we focus the problem of Moro collective rights against the unitary state to make that problematic part of its own agenda. In crafting the MOA-AD, we used 'Bangsamoro people' and 'Indigenous peoples' to signify that conceptual framework as distinguished from political states as traditionally conceived, with powers of sovereignty included in (positive) international law, because the aims of politics are not part of the theory of war in pursuit of politics by other means.

Overall, the MOA-AD was meant to be an instrument that is engaged politically to draw the totality of relationships into focus for an associative arrangement. Its theory of law combines descriptive with prescriptive elements and presupposes a conception of self-determination and freedom, although it is far from clear whetherthe MOA-AD is binding under international law because it lacks the arena of institutional articulation. And the litigation of MOA-AD

as a framework 'treaty' device may prospectively require national legislation. What is now clear is that our peace negotiation stratagem works to clarify the common misconception that "ratification" is a constitutional process. What is often overlooked is that the "consent to be bound" carried out at "international plane" is quite a different process in diplomacy.

2. The Constitution as a conservative document eschews progressive thinking of the formalist "unitary" executive position.

The rise of non-state actors in international law has generated a number of possibilities the courts could attribute actor meanings and social meanings to the grammar of social power shared by all societies. We can think of the society as a wider territorial entity and the state as an organizational entity in which at the deepest level the basic values concern how the political relation is to be understood. Consistently our MILF negotiating position has contended that the Constitution is too narrow a legal framework to seek a negotiated political settlement of the Bangsamoro problem. It may be said conceptual 'furtive framework' provides the transition process a function to entrench associative ties (function) and tiers (structure) as well as shared authority for the Bangsamoro juridical entity. Whereas, in the ponencia's catch phrase, it emerges as "the furtive process by which the MOA-AD was designed and crafted" turning an executive pre-decisional deliberative process into substance in constitutional litigation.

The Court's majority ruling has followed a program of deference approach to legislative process but rested its decision on inconsistency between agreed-on texts of the MOA-AD and the Constitution. With due respect, the ponencia utterly fails even to correlate contextually the MOA, in particular, the principles and concepts (par. 7) with that of resources (para. 9). But, first of all, the design does not establish the point that the agreement would vest ownership of a vast territory to the Bangsamoro people, which could "result to the diaspora or displacement" of a great number of inhabitants [See Decision, at p. 45]. There are a lot of skepticisms exploiting anti-Moro prejudice in cartoons and op-editorials. With background culture, distrust and irrational belief in public reason to sway the discourse of the Justices distort the factual antecedent that "vested rights" are to continue or operate unless otherwise expired, reviewed, or canceled by the BJE. My corrective account of the MOA-AD 'treaty framework' proceeds to extend that conception to frame BJE institutions in a way as to motivate decent people

to honor these terms, and not for its own bureaucratic ambitions, or to protect "large interests veiled from public knowledge" almost free from accountability.

Here again the ponencia mixed up the categories of territorial land base of the BJE with land grants under the policy of land tenure leftover of the regalian doctrine. Land struggles without a governing base are not national struggles.By this argument, interactions are played out within the parameters of civil rights actions and property rights premised on individual actions. There is no more MILF justifiable argument for patchwork pattern of geographical partition as the frame of reference for self-determination. The deployment of the Spanish politico-military districts of Mindanao served as a pivot around which the partition of "the southern tier of islands" into the Moro Province originated with American policy. Mapping a narrative on to a land base and internal waters for BJE is predicated on the official intention of all the mandates (legal frameworks) that geographic discourses depict guidance toward self-rule. There is no need for MILF to espouse the two-nation theory in Mindanao to project that Moros who do not fit neatly or willingly into the Filipino nation as imagined—perhaps preferred by Lumad nationalists—are the ones massacred in land grabbing of genocidal proportions.

The thrust of the separate concurring opinion of Justice Carpio is a perceived violation of constitutional rights of Lumads. Has the Executive branch erased their identity as separate and distinct indigenous peoples in the MOA-AD? It would be a stretch to think of it as having to do with the means lobbyist hobble with the politics of law on big business. If we kept in mind the ways TRO distorts our democracy the bench and bar might gain a deeper understanding into various national discontents. But if we kept due respect a little less to Carpio, J. for a scatting statement of "cultural genocide" in his opinion of officially identifying Indigenous peoples as "Bangsamoros" in the MOA-AD, we might weigh in more respect for ourselves as he signed on to the agenda of "culture war". The erasure of indigenous identity conceived by legal expert-knowledge takes place in the narrow epistemology of the written word that comes into historical being with the powerful abstraction of the nation and the state.

As in all constructs, the framing of the MILF background culture assumes that the conflict has deep root tangled with assimilationist bias or integrationist policy seen in reductive social statistics. Mindful of this, judicial reasoning must

go beyond the sovereignty dilemma and doctrinal tensions. One, Moros and Lumads under the legacy of bureau of non-Christian tribes were not native "born baboons" or "risen apes" bound to a social compact that generated in dependency thinking. Two, decolonization works in stages with a long generational process in the whole area of mind to act as constitutive element of identity formation. The Court ruling that Article X, Section 3 of Organic Act of ARMM is a bar to the adoption of the definition of "Bangsamoro people" used in the MOA-AD is erroneous. The MOA-AD restores the essential elements of the definition of "Bangsamoro people" carefully couched in R.A. No. 6734 of 1989 and "regarded as indigenous on account of their descent from the populations that inhabited the country or a distinct geographical area at the time of conquest or colonization" [Sec. 3 (2) of Article XI]. It denotes the ancestral land of birth identity as I originally crafted it, which was adopted as status neutral. As redefined, it now denotes a civic criterion of religious identity: "citizens who are believers in Islam" [R.A. No. 9054 of 2001]. The original version adheres to ILO Convention No. 169, and the UN Declaration on the Rights of the Indigenous Peoples in context. As defined in the Muslim Code, a "Muslim" is a person who testifies to the oneness of God and the Prophethood of Muhammad and professes Islam [Art. 7 (g), P.D No. 1083 of 1977].

Certain factual situations created in the MOA-AD revalidate Moro statutory status and a definitional component of Bangsamoro identity to recognize one another as compatriots. Struggles for recognition are primarily played out in contested sites between perceived sovereign rights and rights of indigenous peoples. The MOA-AD declares it is a birthright x x x to identify with and be accepted as "Bangsamoros" as a counterpoint where it is interpreted with Public reason to obtain general acceptance. If we follow John Rawls the idea of public reason applies more to judges than others, especially in the discourse of those in a supreme court. To be realists about importance or unimportance of identity, we are right to claim some kind of entity is not well signified/ represented, or ways of existence/ identity with justification for that public reason. Consider first the barest sketch of constitutive reductionist view that from birth indigenous people's identity just consists in the existence of a group of people. So officially the "Bangsamoros" are not the same as that ethnic group, or that territory. Consider next what we can call eliminative reductionist view that is sometimes a response to arguments against the Identifying view. Whereas the "freedom of choice" arises from a conception of citizenship in a constitutional democracy, for

indigenous affinity within the basic structure of closed society, we only enter by birth. From such discursive dimensions, it is politically incorrect to hold that the freedom of choice given to Lumads is "an empty formality" culling from the view of Carpio, J. (at p. 16)

When we take the wide view of public political culture, while some legitimate concerns in to respect the freedom of choice of the indigenous peoples is tied in the MOA-AD, the ultimate objective is to entrench them into a geographic territorial space:

> "The ultimate objective of entrenching the Bangsamoro homeland as a territorial space is to secure their identity and posterity, to protect their property rights and resources as well as to establish a system of governance suitable and acceptable to them as a distinct dominant people. The Parties respect the freedom of choice of the indigenous peoples. " [Par. 2 of Governance, MOA-AD]

To comprehend the steps by which indigenous peoples reach their choice we must understand that they rejected all ideas of hierarchical organization except under customary law (or adat). Authority, as in the compact, is conferred or emanated by virtue of the fact of association.

3. Traditional forms of collectivity under contemporary indigenous struggle for global justice are done through treaty settlement models.

New mechanisms in international law also involves process for contestation over language and meaning in relation to indigenous peoples 'lands' and 'territories' problematized by the power and control over resources. In a separate opinion in the *IPRA case*, Panganiban J. (at p. 27) has cited that based on ethnographic surveys the ancestral domains cover 80 percent of our mineral resources and between 8 and 10 million hectares of the 30 million hectares of land in the country. Despite reliance on the regalian doctrine, he leans towards this view:

> "Similarly, the Bangsa Moro people's claim to their ancestral land is not based on compounded or consolidated title, but 'on a collective strake

> to the right to claim what their forefathers secured for them when they first set foot on out country.' They trace their right to occupy what they deem to be their ancestral lands way back to their ancient sultans and datus, who had settled in many islands that have become part of Mindanao. This long history of occupation is the basis of their claim to their ancestral lands." [Citing Human Rights Agenda, vol. 5, issue No. 7, 2000]

The conceptual framework treaty device of the MOA-AD is not a "lever for concessions" within the constitutional framework. There was therefore a need for it to include a dynamic element. Asymmetrical associative relationship to the metropole authority is a fail-safe mode from pre-emption with room for mutual trust. The judgment of the ICJ and its Advisory Opinion in the *Western Sahara* case heard in 1975 saw that Court ruling: RSD is applicable to all non-self governing territories and that it is a moral and legal right that accrues to all peoples.

The Supreme Court's failure to grasp our craftsmanship does not affect the argument I have advanced for the initialed text of MOA-AD. This is not 'a simple and naïve return to past principles' but an intersecting form of "governmentality" arising from global new politico/ economic global structure. For one thing, there is a shift toward a new meaning of governance and the transition mechanism by which power is exercised. A central feature is its restyling of basic principles in ways that accommodate exigencies. Working drafts were submitted to various forums on very different terms. Much principled or 'constant' thinking about 'equality of peoples' versus 'equality before the law' loomed large in our attitudes. Between appealing to "social contract" theory and demanding from judicial decisions "neutral" substantive principles, it is in our mind not a political morality choice or preference. By parsing foundations of indivisible concepts our peace negotiators conceptualized the 'constants' as birthright sense of "peoplehood" into the pages of the MOA-AD. For brevity, it restored their pride as "First Nation."

Jurists who appeal to substantive principles with a progressive view of separation of powers, wherein the conservative constitutional structure does not impede radical changes, are instructive for peace negotiators. Legal commentators face hardship to specify the constitutive unity of a country similarly provided by the crown. Because the vessel of presidential system contains the

formalist "unitary" executive position, it is a historically contested forum for the Bangsamoro people and the indigenous peoples. There does not appear to be a substantive approach to reconfigure the structure of the Constitution as a compact of the people. Nineteenth century theory of social contract and constitutional structure from 1916 through 1935-1946 to 1973-1987 seem hardly sufficient for the new generation. Judicial recognition of "the Bangsa Moro people's claim to their ancestral" was construed in the IPRA litigation, albeit in Justice Artemio V. Panganiban's separate opinion, thus uploading that status forward to 2000 from the Zamboanga formal declaration of the "Moro Nation" in 1924. The Commonwealth of 1935 was a mercantilist organic form in which Americans enjoyed "parity rights" more than the Bangsamoro people under the post-war Republic of 1946. Beyond the current charter, democratic standards could have changed with the way the Court thinks about constitutional growth points that shape Moro autonomy protected by judicial review.

Litigation of the MOA-AD is illustrative of the signifiers of being "Moro" reclaiming the right to self-determination and changing the legal landscape. The theory of antecedent autonomy missed attention in past constitutional conventions and amendatory projects, which are restated formally by the MOA-AD agreed text. Aspects of the constitutional question dealing with the substance of power relationship and the Islamic theory of rights are less familiar in this jurisdiction. And its jurisprudence is not obvious in the national polity, except in courts of limited jurisdictions. The Court was reluctant to test its assumption in *Abbas v. Commission on Elections*, on the legacy of the Moro treaty-based rights and freedom of religion. Certainly there are other aspects of our Islamic way that are probably shaped by our conception of collective rights. This is culled from the Terms of Reference of MOA-AD as the Court has herein pronounced:

> "It thus appears that the "compact rights entrenchment" emanating from the regime of *dar-ul-mua'hada* and *dar-ul-sulh* simply refers to all other agreements between the MILF and the Philippine government – the Philippines being the land of compact and peace agreement – that partake of the nature of a treaty device, "treaty being broadly defined as "an solemn agreement in writing that sets out understandings, obligations, and benefits for both parties which provides for a framework that elaborates the principles declared in the MOA-AD." [See Par. 10 of TOR, MOA-AD]

That Moro treaty-based rights extant and Muslim rights all antecede the Constitution means our ancestors wrote social compacts. By 1916, a lexicon of the "original understanding" of the American Bill of Rights was introduced as safeguards against state actions, whence the Supreme Court was drawn into this power vacuum. And in it, Chief Justice Puno cites Dean Vicente Sinco (1954) to construe the constitution as a compact modeled on the old social contract theory revocable by no one individual or group less than the majority of the people. And to the extent that this is obligatory on all parties, it justifies why in the process of negotiating peace with the MILF, the Executive cannot commit to do acts which are prohibited by the Constitution and seek their ratification later by its amendment or revision. Can anyone speak of settled law governing the MOA-AD controversy, or of the fixed legal rights of those parties, antedating the finality of judgment of the Supreme Court?

Which arguments of principle and policy may cogently have swayed the Court to attribute willingness to guarantee that Congress and the sovereign Filipino people would give their imprimatur to their solution to the Moro Problem? Surely the unelected Justices of the Supreme Court en banc wield enormous powers that with a stroke of the pen this 'nonmajoritarian' institution vindicated outraged rights with peaceful politics to follow. Arguing this point as a first principle reckons the Lockean logic of liberty that 'we own ourselves and hence we can make etc.' Ownership here is of the classical western type of individuation protected by the Bill of Rights against the State. But, humans cannot own themselves for their relationship to themselves and their bodies is more like one of "sovereignty" which cannot be alienated or foregone, though it can be restricted by contract or treaty. As font for political legitimacy to write sovereignty in constitutional form, and the conflictive dimension of territorial integrity are two discrete phenomena whose separate starting points in time sequence and memory can be dated with some precision.

Yet turn and twist the TOR of the MOA with a TRO upside down cannot open new formulas or nutshell versions of familiar problems. Given the all-or-nothing ponencia's dicta,

> "The MOA-AD cannot be reconciled with the present Constitution and laws. Not only its specific provisions but the very concept underlying them, namely, the associative relationship envisioned between the GRP

> and the BJE, are unconstitutional, for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence. [Morales, J. at 86]
>
> x x x x
>
> While the MOA-AD would not amount to an international agreement or unilateral declaration binding on the Philippines under international law, respondents' act of guaranteeing amendments is, by itself, already a constitutional violation that renders the MOA-AD fatally defective." [Morales, J. at id.]

We, therefore, cannot locate the BJE within the orbit of the Philippine unitary mononational model that remains an open-ended construct, as a republican empirical case, one that avoids the very basic question, about who the Moro people are, and whom decides who they are. Our focus on foundational blocks of the MOA-AD recast constitutional legacy in counterpoint with BJE institutional innovation and change in Philippine legal history that connect linkages between ancestral descent and homeland. The BJE sub-state is not an aberrant political entity but is bound up with an empowering term associative arrangements.

A summary indicates the Court's traditional approach to determine whether MOA is outside the ambit of the Constitution. A key democratic argument is to bring up a problem of reformulation of the basic concept of associative BJE in the conception of the MOA by asking a series of the questions. Was the GRP Panel committed to the MILF to change the Constitution to conform to the MOA-AD? Did the Executive branch usurp the powers of Congress in violation of the doctrine of separation of powers? If the answer to either question is no, the Constitution is inapplicable. Curiously enough, this begs the question "Why is there even no mention of the Constitution?" in the initialed text of the MOA-AD. Our associative ties and tiers model is more than the present autonomy in ARMM but less than independence.

D. MOA-AD Context: Treating the Constitution as Imperfect

The context in which the substantive issues have to be resolved is framed out of the conduct of the GRP-MILF peace negotiation. The MILF has presented

its case as embodied in the manner that the MOA-AD was crafted treating the Constitution as imperfect. The Court framed the substantive issue: Do the contents of the MOA-AD violate the Constitution and the laws? The right to information on matters of public concern being constitutionally protected against the abuse of power is a procedural issue argued by Petitioners-Intervenors. The constitutional compact being argued to protect antecedent rights against government Respondents is a substantive issue favored by Respondents-in-Interventions.

1. Governing law of the MOA-AD to carry out the Ancestral Aspect of the Tripoli Agreement of 2001

In theory, the Constitution is a compact not to be debunked because power is in it ordained with the people's plebiscitary consent. As said in strong American tradition, 'it's something to be preserved, protected, and defended, as the President swears by God to do justice.' Classical theory of social contract leaves room to argue Montesquieu-like discourse when principles or policies intersect; for, the one who resolves the conflict has to take the dimension of weight or importance (as case-law) to the freedom of contract (or association). To recommend that the Mindanao conflict be argued in terms of "so rarefied an abstraction" as constitutional theory is to mistake the national character of constitutional crises. This is what happened to the MNLF in the 1996 Final Peace Agreement. Obviously this is not the way the litigation of the MOA-AD operates for the Bangsamoro people's right to self-determination that has come to hinge upon the interpretation given to the fundamental law.

Constitutional issues are addressed with efforts to balance public concern, involving sovereignty and territorial integrity of the State, and to comport Moro belief in self-determination. Specific provisions of the MOA-AD on the formation and the powers of the BJE are compiled by the intervening respondents CBCS and BWSF. Affected are 36 constitutional provisions per listing of Justice Carpio, whereas 15 constitutional and statutory provisions are on the list of Justice Ynares-Santiago. I take it that "irreconcilability" is the basic essence of the legal myth that law can entirely be predictable. Now in this stress on paradigm shift, if a judge attempts to contrive a new rule would the courts usurp the power of the lawmakers? Do courts always act "unconstitutionally" when after the Decision "the law" was fixed (or reversed)? The judge-made law or case law of the MOA-

AD is that "not only its specific provisions but the very concept underlying them, namely, the associative relationship envisioned between the GRP and the BJE, are unconstitutional, for the associated entity is a state and implies that the same is on its way to independence." [Decision at p. 86]

Simultaneously moves towards peace could not be motivated with loads of publicity. The Government-MILF conflict far from over has claimed its last victim last August 4, 2008 on the issuance of TRO. Did it matter what the MILF view was in the act being challenged? Substantial consolidation of the consensus points into the MOA-AD takes on "preliminary character" in the culture of writing, but its consensual validation as the political embodiment of representation assumes a "mere contemplated steps" toward the formulation of a final peace agreement. Ancestral domain controversy was (it still is) founded and sustained on injustice. Might the option to secede be the broader political context for MILF political violence since the Government including now the Supreme Court erected another obstacle to frustrate sitting down at the negotiating table? I believe the litigation of the MOA-AD has created a singular distinct political reality: that the dominant ideology sustains the "irreformability" of the Constitution with its structurally construed bias against Moro antecedent rights.

Self-evidently the Court majority interprets the MOA-AD in this ruling: That it "virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place…" [Decision at p. 75] This was the template for parsing documents and working drafts to break the impasse in the evolving tension between two responses–rejecting talks on constitutional matters and of welcoming concessions – to secure common positions on key provisions. As couched, the Governance strand reads:

> [Paragraph] "7. The Parties agree that the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively."
>
> "Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of a Comprehensive Compactand upon effecting the necessary changes to the legal framework with due regard to non derogation of prior agreements and within the stipulated timeframe to be contained in the

> Comprehensive Compact." [Par. 7 of Governance, MOA-AD]

Now it is plain that the operative clause is "effecting the necessary changes to the legal framework."Two major elements are contained here: firstly the matter of amendments, and secondly the matter of implementations. Perhaps it is less misleading to say our amendatory mechanisms/ modalities are yet to be spelt out (parsing negotiated and crafted text) in the Comprehensive Compact. It is one thing to "guarantee" and another "commit" or "stipulate". None of these words appear in the text. To push ahead what we are trying to "compromise" in these matters there was misapprehension legislation would water down them. An act to mutually take such step to enable it to occur effectively means implementing this MOA-AD and the Comprehensive Compact. It reads:

> [Paragraph] "6. The modalities for the governance intended to settle the outstanding negotiated political issues are deferred after the signing of theMOA-AD."
>
> The establishment of institutions for governance in a Comprehensive Compact, together with its modalities during the transition period, shall be fully entrenched and established in the basic law of the BJE. The Parties shallfaithfully comply with their commitment to the associative arrangements upon entry into force of the Comprehensive Compact." [Par. 6 of Governance, MOA-AD]
>
> xxxx
>
> Paragraph "2 (d) Without derogating from the requirements of prior agreements, the Government stipulates to conduct and deliver, using all possible legal measures, within twelve (12) months following the signing of the MOA-A, a plebiscite covering the areas as enumerated in the list and depicted in the maps as Category A attached herein (the Annex"). The Annex constitutes an integral part of this framework agreement. Toward this end, the Parties shall endeavor to complete the negotiations and resolve all outstanding issues on the Comprehensive Compact within fifteen (15) months from the signing of the MOA-AD. [Par. 2 (d) ofTerritory, MOA-AD]

The strands of critical legal commentary cover a broad range of transitional arrangements with a timeframe. More generally MILF position is guided by the intertwining policy of irreversibility and incrementality. Justice Carpio is correct to dissect the clause "due regard to non derogation of prior agreements" to signify 'mandatory observance' or 'no deviation'. Thus, by inference, "the 'due regard rule' remains the principal treaty obligation imposed upon States" in contract clauses. Certainly, the GRP credibility was undermined by less than reliable way of complying with the FPA 1996 with the MNLF. That stands to reason out the MOA-AD deviation from the MNLF modality of TP 1976 and FPA 1996 modality 'beyond the metes and bounds' of the Constitution on the results concurred in by Chief Justice Puno. But this interpretation should not distract from the legal power of the Executive to sign an agreement if it breaks its duty from a combination of purposes. Indeed the Court missed this important point in the Respondent-Petitioners in their briefs that observance in good faith can be demonstrated whether in the context of a commercial contract, international treaty or peace agreement.

It is no coincidence, therefore, that the "entry into force" clause of the MOA-AD was tied to the "suspensive" clause, which is a function of the necessary changes to the legal framework (constitution or statute) in order for it to occur with effect. The "abeyance" rule applies to a timeframe stipulated to trench the BJE in the Comprehensive Compact framing the basic law's transitory provision. Such occurrence equally applies to the faithful compliance to establish the BJE under associative arrangement. As said this has been a complex explanatory argument and I want to summarize. Still, we can get a full view of the formulation in support of judicial restraint with argument from democracy. A study of the dynamics of impasse demonstrates that constituency building is important to the peace process; yet it is equally important to bear in mind that identity claim for affirmative action has constructive power to pass the test of "tiers of scrutiny" built in the Supreme Court. In the matrix of some 26 concluded peace agreements all over the world, 14 have undergone charter changes and 16 with some minor revisions.

2. Constitutional arena is an important site for examination of power sharing.

Constitutional controversies however have extra-judicial dimension

to justify particular public preferences. The constitutional arena provides an important site for the examination of power. Is the prerogative to "propose" or "proffer" to amend the Constitution a rule or a principle? To claim that the power to change is "an absolute" is to mistake it as a rule like open public law's access to justice. Or does it merely state a principle, so if a law (or agreement) is seen as contrary to the amendatory process, it is unconstitutional unless the context presents some other policy or principle that in the circumstances is weighty enough to warrant the infringement? Sometimes a rule and a principle can play much the same role (or function).

I have proffered lately amendatory mechanisms in the context of the transitory stage leading to referendum. The statistical argument comes with the policy that it is people who have rights, not territory. (This calls for thinking "out of the box" that the ponencia adverted to). As a practical matter there is an obscure provision of the original U. S. Constitution that was not extended here because a federative structure was not introduced in the country. It provides for "state rights" in order to reduce the unequal representation of the citizens in the Senate via an amending process: "no State, without its consent, shall be deprived of its equal suffrage in the Senate." What if I introduced it to Senate Joint Resolution No. 10 of Petitioner-Intervenor Aquilino Q. Pimentel, Jr. to add to the 154 revisions/ amendments? Truly unpopular decisions will be eroded because of public rejection of an imperfect charter. There is one other little problem: it's unconstitutional! So we leave it there just a thought of *companeros* when we run the risk that Justices of the highest tribunal may make the wrong decisions.

Apart from political and constitutional theory, there are also sociological factors and societal facts that may rise to constitutional status. Ordinarily, in case of ineffective counsel test, courts separate the question of constitutional error from the question of the error's effect on outcomes. It may be 'heretical to hint' that adjudication work back from conclusions to principles where courts turn a blind eye to disparities or 'look the other way' in peace negotiations. It may also be too subtle to compare the MOA-AD peace negotiation and JPEPA diplomatic negotiation on the 'double standard' test. Judicial opinions "work" as ideology by rhetorical process to resolve a lawsuit outcome.

Now a central point to understand is that contract law operates to

conceal what is going in the marketplace. In this, a key social function of the full bench's opinion at oral argument is not in the outcome; it is in the rhetorical structure of the en banc opinion itself. Now and again a total point of law in the *JPEPA* case decision *Akbayan et al. vs Aquino et al.*, is that the Court recognized the confidential nature of diplomacy to construe the scope of executive privilege but the ponencia faltered on the confidentiality case logic in the MOA-AD. I submit that the deep skepticism of Justice Brion (at p. 20) is patently correct: It bears further analysis on the error's effect of the outcome of the ruling rested on *Chavez v. PEA* rule logic which is based on a commercial transaction. This criticism is highlighted in the CBCS and BWSF briefs (at p. 40) of Muslim lawyers Raissa H. Jajurie and Laisa Masuhud Alamia their Motions for Reconsideration. This struggle in constitutional arena may be likened to an "associational jurisprudence" publicly sentencing the MOA-AD without fair trial.

An analysis of the legal obligation—striking down every contract or agreement as unconstitutional—must account for the MOA-AD case-law because this issue may itself be a focus of controversy. Law is supposed to be elevated above politics yet it does invite critics and cynics, too. Going to court in the adversary culture, I strongly argue, is to participate in the judicial process and the reason why groups struggle must not be lost sight of in constitutional adjudication. To understand the tensions which animated the issues on the MOA is to discover the dynamics in identity politics and the politics of law. The full bench resolved the motion for reconsideration to deny with finality the Moro deal. It is made clear that the Muslim Respondent-Petitioners and their Moro constituencies operate from different premises concerning the arenas of conflict. The language of the majority was dismissed from the start. The Supreme Court construed the MOA-AD at certain part of the discourses with copious footnotes on statutes, at certain points, providing arguments for striking down the agreement in the absence of effective contrary policies.

Central to the substantive issues in the case at bench, I submit that the Court revisit sovereignty-based theme of defining the statutory status of the Moros out of line of the original charter. The organic act amendments, and the array of legislation and judicial rulings that define identity politics and gerrymandering-related issues, are in part founding father failures of the constitutional unitary scheme. The Organic Act of the Autonomous Region in Muslim Mindanao is not a negotiated political settlement about the Tripoli Agreement of 1976 but a

product of the 1987 Constitution. Scholars celebrated the Court in *Disomangcop v. Datumanong* for judicial activism to deploy constitutional substantive Muslim autonomy. Thus it is a high point mark setting loose some new conception. Albeit the turnabout tipped in judicial strict scrutiny in *Sema v. Comelec*, it still left the dissenting opinion to point out that judicial ruling making deprived of the power delegated to it by Congress to create provinces. Ambiguity again has set in to douse an enthused autonomous project by the reality of post-MOA-AD litigation.

The negotiation sets on territory covered land base, internal and territorial waters. Government stipulated in the MOA to conduct and deliver, using all possible legal measures, a plebiscite covering the areas listed and depicted on the map as Category A and for Category B to conduct a plebiscite not earlier than twenty-five years from the signing of the Comprehensive Compact. This popular consultation was to take place within 12 months following the signing of the MOA-AD. The idea was to apply pressure where the political decisions would be made in sequence and transitory mechanisms. There was a timeframe of 15 months to complete the negotiations and resolve all outstanding political issues tied to the signing of the MOA-AD as benchmark.

The argument behind 'preparatory work' must make distinction between 'commitment' and 'guarantee' on basis that in the timeframe there is "no uncertainty being contemplated" (Decision at p. 74). It is not unusual to set a deadline but it was not exercised as a choice point for persuasion progression. There is another misconception that once a treaty has been 'ratified' or 'accepted' it is then valid. The manifestation of the Executive Secretary and the Solicitor General to give up signature was a great blunder. The problem for GRP could have been remedied by inserting a provision postponing the entry into force of MOA-AD by ad referendum. Confirmation later will constitute full signature; but unlike 'ratification', confirmation is of the signature, not of the treaty [see Art. 12 (2) (b), Vienna Convention]. It became awkward for the GRP on account of the aborted signing ceremony and worst it closed the door by dissolving its panel and pursuing a military offensive. The weight of authority admits: framework treaties may develop also in other ways that do not involve the creation of legal rights and obligations such as the adoption of guidelines. Diplomatic practice only requires that a state must refrain from signature if it has little intention of ratifying [Art. 14 (1), id., 1969].

Justice Ynares-Santiago summarizes in her separate concurring opinion the envisioned plebiscite to which the GRP committed itself committed to implement this framework agreement on territory. She is correct about the MOA-AD, as intended, to be "the controlling document for the essential terms" of the Comprehensive Compact. And yet, "the details for the effective enforcement of the MOA-AD" [Par. 3 of Governance] cannot be fully appreciated until the outstanding issues are negotiated and embodied in the Comprehensive Compact. By this, in her view, the Compact instrument will simply lay down "the particulars of the parties' final commitments, as expressed in the assailed agreement" (concurring at p. 11). Specifically relevant problems with this position center around: First, what is to ensure "the mechanisms and modalities for the actual implementation" that will be spelt out in Compact instrument "to mutually take such steps to enable it to occur effectively" [Par. 7]. Second, what modalities for governance intended "to settle the outstanding negotiated political issues are deferred" after the signing of the MOA-AD, and "the details of which are to be discussed in the negotiation" of Compact instrument [Par. 6 & 8].

Strident voices and sniffing out the vulnerable points for "the changes in the legal framework" merited Justice Carpio-Morales in the Court's ruling to introduce doctrinal matters. I fully admit that standards in international law are in themselves instructive precepts: unilateral declaration; consent to be bound; preparatory work; due regard or valid for all. Take the formulation effecting the changes "with due regard to non-derogation of prior agreements", it has elicited comment from Ynares-Santiago with critical firmness. Does this imply that the provisions of prior agreement are already final and binding? Instead, she finds an argument that "these serve as take-off points for the necessary changes" (at p. 10) that will be effected to fully implement the MOA-AD. This is hardly surprising since judicial review is limited. There is nothing wrong when Justice Carpio construes "due regard" to mean "mandatory observance" as the phrase (at page) is commonly found international treaties and conventions. A treaty is much closer to a contract in character than national legislation at the constitutional arena.

Most treaties entered into by the GRP are executive agreements in the exercise of Executive power which, as the MOA-AD bears out, is a controversial and ill-defined area. The brief digression into treaty regime clears the way for specialized knowledge need for guideline for intended effect of prior agreements. As the ponencia argues, by the time these changes are put in place, "the MOA-AD

would be counted among the 'prior agreements' from which there could be no derogation" (Decision at p. 74). To argue for "guidelines" thus ignores, first, the history behind the 'treaty framework' device based on legal means of compact. Moreover, it is not argued that the Constitution already provides the modes of the amendatory process but as between the parties the MOA-AD is unaffected. Because the non-derogation clause turns on how this struck on the minds of individual Justices, there do not appear to be a GRP interpretive declaration to object on the part of MILF. In interpreting the MOA-AD, the Justices have applied their own individual value judgments to the material agreed-upon text on review.

No better illustrates what I label the "prescience proviso" than where the complexity of the irreversibility of prior and incremental agreements is concerned. The overriding need for controlling non-derogation clause is introduced in paragraph 2 (d) of Governance. It has a function in regard to the sequence and period of transition to be established in a Comprehensive Compact:

> "In the context of implementing prior and incremental agreements between the GRP and MILF, it is the joint understanding of the Parties that the term "entrenchment" means, for the purposes of giving effect to this transitory provision, the creation of a process of institution building to exercise shared authority over territory and defined functions of associative character." [Par. 5 of Governance, MOA-AD]

One will need to know whether the regime constructed by the MOA-AD comes with territorial extension clauses and trade relations. The BJE participation in the negotiation of border agreements and or protocols bear mutual benefits derived from the Philippine archipelagic status and security. The MOA-AD does not attempt to provide an answer but lays down a residual rule: The homeland of the Bangsamoro people never formed part of the public domain. That it is an intensely felt issue: so historian Rudy Rodil and lawyer Camilo M. Montesa and his counterpart lawyer Musib M. Buat who headed the GRP and MILF technical working committees, respectively, and I all rested the argument on non derogation. I have read the majority and separate opinions in the IPRA litigation in which the Davide Court confirms this under the concept of native title. Lawyers celebrate the *Carino* decision as legacy of the policy "to do justice to the natives" rested on American constitutionalist's concept of "due process". As a pivotal precedent,

the MOA anchored ownership of the Bangsamoro homeland and provision for wealth-sharing of resources on the legal heritage that the Regalian doctrine is all “theory and discourse”.

I have offered the narrative of negotiating the obstacles with the ‘corrosive clarity’ of realism as the true story about the MOA-AD. Yet when we consider the necessity of a spirit of accommodation rather than of appeasement here, too, there is a subtle difference traced to the ‘perpetrator world view’. That the Supreme Court justices would not bend the standards to accommodate changes in Moro status depends upon a tenuous proposition rooted in hierarchical advantage. The separatist group itself has no standing in court to sue; this is a legal dilemma of oppositional identity. Yet Chairman Silvestre Afable, Jr. and his replacement chairman Rodolfo C. Garcia on the GRP side, and Chairman Mohagher Iqbal on the MILF side, all faced impasses, without sound of harsh dissent at the negotiating table. Tipping points on the MOA-AD were conducted by the Malaysian Government facilitator Datuk Othman bin Abdul Razak on two-plus-two negotiation set between Rodolfo Garcia and Sedfrey Candelaria (for GRP) and Mohagher Iqbal and myself (for MILF) to keep the conflict constructive.

One final complication of the prior agreements and non derogation clause set in when President Gloria Macapagl-Arroyo instructed the Government negotiating panel to drop the phrase “for freedom” at the end of this paragraph, viz:

> “1. The recognition and peaceful resolution of the conflict must involve consultations with the Bangsamoro people free of any imposition in order in order to provide changes of success and open new formulas that permanently respond to the aspirations of the Bangsamoro people [Para. 1 of Governance, MOA-AD]

It is a verbatim restatement of paragraph A. 2. Security Aspect of the Tripoli Agreement of Peace of 2001. The two sides became locked into their hard positions as this tangled with the phrase “changes to the legal framework” under paragraph 7 of the Governance. This may explain the paradox that while OPAPP Hermogenes Esperon, Jr. was widely judged to have a better grasp of the “non derogation”, the Court formally ruled: “PAPP Esperon committed grave

abuse of discretion" [See Decision, at p. 43]

Sorting out the standards of the doctrinal reasoning from the MOA-AD litigation we come to the intriguing question of LGUs being subjected to the same problem in the future. Can the present MOA-AD be renegotiated or another one drawn up to carry out the Ancestral Domain Aspect of the Tripoli Agreement? For brevity, through the overruling writs of the Court, the petitioners basically sought to enjoin the Philippine Peace Negotiating Panel, or its equivalent, and necessarily the President, from signing the proposed MOA-AD and from negotiating and executing in the future similar agreements. This led Justice Velasco to account for a total of eight times reference in the MOA-AD to a Comprehensive Compact. Arguing the last paragraph even acknowledges that, before its key provisions come into force, he noted there would still be more consultations and deliberations needed by the parties, viz:

> "Matters concerning the details of the agreed consensus [point] on Governance not covered under this Agreement shall be deferred to, and discussed during, the negotiations of the Comprehensive Compact" [Para. 10 of Governance]

Justice Velasco finds as absurd the spectacle of the executive officials' hands tied lest they agree to something irreconcilable with the Constitution [dissenting opinion at p. 7]. Notwithstanding the finality of the Decision, the need for guidelines from the Supreme Court much depends on doctrinal inventiveness.

3. Defining associative ties between Central Authority and BJE is not a dead-end issue but a done deal.

A brief restatement of the "consensus points" assumes the context of an imperfect unitary system under aegis of existing legal framework. Confronting reality means disaffection from that state itself. The Constitution does not require integration: I dare say it is merely an endless search for antidote to separatism. It can be reasonably argued that constitutional politics is about compact. What might seem to achieve equality of people is by way of revolution rather than law. And yet, whatever choice our people decide in regard to their political status spelt out in the Comprehensive Compact belies this. What are we then to make

of our historic juridical entity? Armed struggle is merely a means to reverse the denial of the right to self determination; it is a social fact of structural bias against the Bangsamoro people's birthright to claim distinct domestic identity. Short of independence, political status a determinant has never been fully resolved by conflating the birth of the Filipino nation. Was the European identity mania resulting in Catholic evangelization through "hispanization" and American "filipinization" project as opposed to Islamic identity process made possible because of the longing for national identity in the modern world? Critically rethinking the evangelization of Philippine unitary state formation, the MOA-AD is not flawed in terms of consultation; it has rather exposed the diocesan limits of things as they are conceived as a Catholic country.

Long before the Iberian invaders gave the "Moros" a name, the Taosug and Magindanaon rulers with their Iranun retinues established port towns as 'safe harbors'. The borders of cultural zones have remained with the idea of "talaingud" (or 'indigenous') or "taimangud" (or 'blood-tie') as a shared common value. A more workable definition of who is a Bangsamoro also has become important because of the policy of "agricultural colonization" and large-scale "ethnic land-grabs" had the effect of populating Mindanao with people from other parts of the country. Like the images with the capitalist culture the privatization of the domain in which the community matters, because, this alone makes society possible becomes the "moment" of legal ideology. But this can also be instance of struggle that unless Moros can be shown to be from somewhere else, the settlers are transformed into the outsiders imposing an 'alien' legal culture. Clearly the 'treaty' device's treatment of the Bangsamoro juridical entity is presented as rooted in the sultanate with its history of separatism. The separatist cause developed into a foundational movement now is recognizable. Still, the duty of the present is to mobilize our Bangsamoro people in the struggle against the oppressive system. Commitment was made in MOA-AD to associative ties and tiers (with no option to secede). Nevertheless it is an asymmetrical substate in relation to the parent state.

Now, some legal commentators infuse social code to embody basic notions of political freedom on a broader doctrinal sequence and contextual roots in constitutionalism. When historic birthright to claim identity is denied, and beliefs are at the root of a political struggle it is hard to compromise the matter through the negotiating table bargaining. It is plausible to argue that by deciding,

as if there have been no peace talks, or as if current political violence is in no way connected to justness of the original position, the law defines separatism out of existence. Yet, in this progressive brief, we argue coherently and not simply the social problems that reformers attribute to the existing systems. As an ideological matter economic interests are divisible—political or religious are not—as humans interact in society on account of interests (market and labor). Of course the Court is not wrong to take judicial notice that the mere concept animating many of the provisions of the MOA-AD already requires for its validity the amendment of constitutional provisions. Nothing in the MOA-AD prevents Congress from amending or reenacting an Organic Act.

Much of the jurisprudence in this jurisdiction springs from progressive realization of uncertainties to write by precedent and for certainties to craft by legislation. There is no rule precisely to predict when the Court verbalizes its verdict in the form of new rule decision or to consider, as exception, to the precedent case logic. How then can equality between distinct demos be constitutionally articulated and negotiated? It cannot be denied that the Moro struggle far antecedes the political dynamics by which the movement came to view the status quo as problematic to the Bangsamoro people's long-term interests. The Code of Muslim Personal Laws with functioning courts and the Islamic investment banking laws are examples of the attempt of legal relations to be observed as part of the "laws of the land". But the extant Magindanaw Luwaran and Sulu codes were much cared for in the formation of a territorially pre-twentieth century Moro rulers and sultanates and in the service of a creating more expansive legal culture.

The thrust of the majority opinion is that the MOA-AD is inconsistent with the Constitution and the ARMM organic act and IPRA as presently worded. Contributing to such argument of Petitioners: powers granted to the BJE exceed those of local government and beyond those of the present ARMM.

> "4. The relationship between the Central Government and the Bangsamoro juridical entity is "associative characterized by shared authority and responsibility with a structure of governance based on executive, legislative, judicial and administrative institutions with defined powers and functions in the Comprehensive Compact" [Para. of Governance, MOA-AD].

Above all they are opposed to the associative concept that links the different provisions of the MOA-AD to block the meaningful exercise of the right to self-determination. Already our lawyers in the MILF Panel Musib M. Buat, Lanang Ali and this writer see that the understanding of BJE is incomplete and is unlikely to be a firm one until outstanding issues are politically settled in the Comprehensive Compact. Independence of the Moros has never been put to the test of a referendum. Fears of uninformed choice and widespread beliefs in divergence of opinion put them at a disadvantage. Typologies are simplifications such as can be gleaned from the MOA-AD litigation:

Firstly, the Court engaged in what looks like dismantling of whatever optimism the 11-year old peace negotiations have projected to the world. Chief Justice Puno divides the commitments made by the government panel under the MOA-AD into:

> (1) those which are self-executory provisions or are immediately effective by the terms of the MOA-AD alone; (2) those with a period or which are to be effective within a stipulated time, and (3) those that are conditional or whose effectivity depends on the outcome of a plebiscite. [Puno, CJ. at 10.]

Secondly, the Court glossed over the significance of the key issue of ownership and control in the context of the contract clause. Because underlying the dominant conceptions of ancestral domain and territory vary from the IPRA, which is based on ILO convention 169 with policy effects on national minorities, women, and child labor, the arguments and discourse suffered from lack of concreteness. Justice Carpio outlines the MOA-AD into two features:

> (1) as an instrument of cession of territory and sovereignty to a new state, the BJE; and (2) as a treaty with the resulting BJE, governing the associative relationship is "to take charge of external defense." [Carpio, J. at 20]

Finally, the Court construed the open texture of the MOA-AD from the strictest scrutiny limits rather the outer bounds of judicial restraints. Factual finding of the MOA-AD provisions indicates that the Parties aimed to vest in the BJE the status of an associated state or, at any rate, a status closely approximating

it. As the Decision puts it in a concept of "association" in international legal context:

> "The BJE is a state in all but name as it meets the criteria of a state laid down inthe Montevideo Convention, namely, a permanent population, a defined territory, a government, a capacity to enter into relations with other states." [Morales, J, ponencia at 50.]

Clearly, the Puno Court advanced the theory of the case to account for "associated state" arrangement used as transitional device of former colonies on their way to full independence. The ponencia did not err in reading the intent to define the associative relationships in the still to be forged Comprehensive Compact. The opinion writer of the majority was on the right track parsing Kirsti Samuels that "the fact remains that a successful political and governance transition must form the core of any post-conflict peace-building mission." Still, succinctly construed:

> "The design of a constitution and its constitution-making process can play an important role in the political and governance transition. Constitution making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate." [Decision quoting Dr. Samuels in 6 Chi. J. Int'l Law., 663 (2006)]

Nonetheless back to our narrative of craftsmanship there exist ways other than de-colonization (ended in 1969) and trust of nongoverning territories (ended in 1996) to connect people with correct associative or federative modality or protectorate status depending on dominant constitutive elements with practical consequences. As said I take the view that even if the reinstatement of New Caledonia in 1986 had no significance for decolonization, it validates our thesis that a unitary State sovereignty can be (un)defined and (de)constructed as it should be constitutionally. Dean Callagan Aquino predicts the conceptual frame less restrictive because 'association' under international law is not a univocal concept [not one meaning only] ergo 'associative status' can be empirically sui generic [a class by itself]. Continuing, he comments that the proposed "BJE

could have been another variant to the already variegated forms of association: An association between a sovereign State, the Republic of the Philippines, and a political entity analogous to, but not quite (nor necessarily 'on the road to') a state."

I think it plain in jurisprudential rule of recognition that the plausibility of the theory of the MOA-AD cannot be grasped on the behavior of the named negotiating officials. Is our peace process an idle game of nonclosure and disclosure? What is thus left unstated is: Government-MILF panel of negotiators in trying to reach a compromise acted not on a single motive but from a combination of purposes. Some puzzles connected with the 'expanded definition' of neglect of duty and grave abuse of discretion are presupposed such that the BJE is spoken of as if that associative relationship is efficacious enough to dismember this "strong" Republic. To grasp the 'treaty' framework anchored on the important distinction between concept of associative ties and conception of as if associative tier (BJE) means factually the entity is stillborn. The two as if suppositions are very closely associated in trying to reach a compromise acted not on a single motive but from a combination of purposes.

Yet, in point of fact, the MOA-AD as crafted results in a reversal of the very notion of repugnancy: constitutional irreformability of the system and military stalemate. This of itself implied that the MILF was prepared to compromise: if politics were to be a continuation of war by other means. Justices of the Supreme Court may have thought of the worst-case scenario but not global justice. Substantively it is the merit of the MOA-AD that – in looking at the law and its practice – there may be other principles or policies arguing in other direction like in modern treaty law and diplomatic practices. The Court probed this point but Justice Adolfo S. Azcuna's separate opinion is a guarded brief statement of international law.

Mr. Justice Azcuna in a Separate Opinion writes:

> "Finally, precedents are not strictly followed in international law, so that aninternational court may end up formulating a new rule out of the factual situationof our MOA-AD, making a unilateral declaration binding under a new type of situation, where, for instance, the other party is not able to sign a treaty as it is not yet a State, but the declaration

> is made to a "particular recipient" and"witnessed" by a host of sovereign States." [Azcuna, J. at p. 3]

What correct information contemplates on the Comprehensive Compact to be negotiated leading to the contractual bind? The Court decision concluded that the government panel did not draft the instrument with the clear intention of being bound thereby to the international community as a whole or to any State, "but only to the MILF". The Court also completed the logical correlation that "the same instrument may not be considered a unilateral declaration" under international law, but it would have provided a basis for a suit in an international court. This theory makes strict scrutiny of the MOA-AD agreed text yield a narrow conception of the right to self-determination only to restrict such right to a limited people at a fixed date of history in a country at war with itself. But it takes for granted the theory of meaning on which the asymmetric associative ties to the totality of relationships of the abstract "people" employed in modern conceptions of popular sovereignty. The main force of argument ignores a distinction that political commentators in sovereignty-based conflicts have made but lawyers have yet to appreciate about discourses in the scheme of justification to aspire to a different future via a transitional 'framework treaty' device.

4. Argument from contours of the Constitution is applicable to the MOA-AD amendment issue.

It is not in dispute that the implementation of MOA-AD requires "drastic changes" to the Constitution for we thought it deeply flawed. The MILF argument was nuanced to residue of colonialism, which contrived parceling out of their ancestral homeland to settlers. Stereotypes have dominated much editorial space, cartoon caricature and popular understanding of the initialed MOA-AD. If this agreed text is just a documentary means to political ends, the negative image media portrayal of the BJE has not defaced it. The MILF deviation from the MNLF model of pursuing peace with rebels is explicable in the pursuit of the Bangsamoro people's right to self-determination. This condition or state of affairs has continued to prevail to the present day. The MILF understanding articulated by its chairman Al Haj Murad Ebrahim reads:

> "It may be beyond the Constitution but the Constitution can be amended and revised to accommodate the agreement. What is important is

> during the amendment [process] it will not derogate or water down the agreement because we have worked this out for more than 10 years now." [Quoted in Carpio's separate opinion]

Consider the merits of the MOA beyond what the present charter allows but as a recommendation. This entails a judge who has a predictive understanding of the contradictory nature of the Constitution.

I have a counterargument about what critics label 'illusory precedents' once reduced to 'infantile hope' casuistry under judicial restraint. To my mind, one of the worst aspects of rule-fetishism and veneration of the Charter is a judge in writing an opinion aptly called rule-making, at best, becomes an arbiter of legal questions or an adjudicator only to turn into a guarantor of controlling the future. This is a narrow conception from the original constitutional understandings of prescribing legitimate processes in the light of elementary democratic principles. The highest Court of the land in practice circulates a draft ponencia for concurrences and separate opinions not for majoritarian vision but voting for legitimate outcomes.

The judgment that MOA-AD contravenes the Constitution and the laws is an instance of denial of compact functioning as equality of people provisions. It is a reversal of expectations via rhetorical ploys like Rousseau's non-derogability of social contract cited by Chief Justice Puno in his separate opinion. Notably, the Court's majority discerns "a general idea that serves as a unifying link to the different provisions of the MOA-AD, namely, the international law concept of association." Colonial policy underwent various changes and the ideas of self-government exhibited as well variants accorded representation. Such differences in representation provide examples of the practical effects of legal and constitutional issues even in the vexed question of citizenship. In our analysis of the concept of contract obligation we have seen that the charter is vulnerable (if it distorts our democracy) by amending it in ways foreign to its spirit and hostile to its purposes.

Could it be that the idea of a charter change might itself be "unconstitutional" seems to dawn on us also in the factual use of the MOA-AD revision? But the Parties to this Agreement commit themselves to the full and mutual implementation of this framework agreement and there is apprehension

undesirable about results in the future.

Mr. Justice Carpio Concurring in Separate Opinion writes:

> "However, any peace agreement that calls for amendments to the Constitution – whatever the amendments may be, including the creation of the BJE – must be subject to the constitutional and legal processes of the Philippines. The constitutional power of Congress to propose amendments to the Constitution, and the constitutional power of the people to approve or disapprove such amendments, can never be disregarded. The Executive branch cannot usurp such discretionary sovereign powers of Congress and the people, as the Executive branch did when it committed to amend the Constitution to conform to the MOA-AD." [Carpio, J. at p. 30]

One kind of question can provide legal data: Does the plausible theory of compact rights (or form of words) of the MOA-AD conform or run counter to the canonical language of the Constitution? There is an original understanding of governmental organic form articulated in the 1899 Malolos Constitution: "The political association of all the Filipino constitutes a nation, whose state is called the Philippine Republic" [italics supplied]. The eminent Claro M. Recto singled out the plausible innovation in the 1935 Constitution is the Electoral Tribunal with Justices designated as members. This, he justified, is one of the paradoxes of democracy "that the people at times place more confidence in instrumentalities of the State other than those directly chosen by them for the exercise of their direct sovereignty." The framers were wary of partisan scrutiny overly skewed in the direction of the overtly political.

Careful scrutiny indicates that popular demands and political movements by people have resulted in rules governing speech rather than from the canonical language of the Constitution or legacy from the framers. The relevance of the doctrine of prior restraint could have been played out in the MOA-AD litigation because it includes repudiation of judicial or other actions. According to Professor R. Dworkin, what is characteristic of a right is only that it has "a certain threshold weight against collective goals in general." Our submission is the open texture of the MOA-AD can be argued on the contours of the Constitution for "rights may also be less than absolutes; one principle might have to yield to another, or

even to an urgent policy with which it competes on particular facts" for courts to make fresh determination. Might the Puno Court have applied the "implicit in a scheme of ordered liberty" in weighing the liberty of contract vis-à-vis the right to information? I believe that the Constitution can be forced into a "process" mode to redress Bangsamoro grievances. As the counsel for the Government negotiating panel, Sedfrey Candelaria, asserts when the negotiating panels came to the negotiating table, "they were driven by what is possible and not by what is unthinkable."

I had occasion to trace the progeny of the Fourteenth Amendment to found the protection of property right was adopted first in the Philippine Bill of 1902 during the *Lockner* era. Liberals then opposed legislative intrusion into 'natural-law' contracts by advocating judicial restraint on substantive goals or politics. Chief Justice Puno (2006) knows best about the concept of personal liberty and restriction upon the state …Conservatives of today invoke the First Amendment as barrier to representational rights upheld in the Lockner (1905) decisions to provide predictability to 'meeting of minds' or 'will of parties' theory of legal arrangements. Again, the 1973 Constitution canon against abridgment by the State embodies the basic notions of political freedom – speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances; add the right to form associations or societies. Although the 1987 Constitution inserts to form unions; the popular belief in expression; and the right to information came later on doctrinal basis.

Now when the Puno Court construed the MOA-AD might it not be in the guise of "controlling principles" imposing some policy on the parties or intruding into the Executive domain regardless of any supposed intention? The Government negotiating panel embraced the MILF negotiating position that Moros are a territorially concentrated historic people with group 'remedial rights only' for negotiating the legitimate grievances of the Bangsamoro people. The birthright assertion/ choice options for political change (or social alignment of advantage/ affirmative action) were tied by MILF to remedial right to redress specific legitimate grievances. Consider the ideation of social construction in the MOA-AD:

> "5. Both Parties affirm their commitment to mutually respect the right to one's identity and the party of esteem of everyone in the political

> community. The protection of civil rights and religious liberties of individuals underlie the basis of peace and justice of their totality of relations." [Para. 5 of Concepts and Principles, MOA-AD]

What the MOA-AD status was (or is not now) at a given point is a meaningful political act. Status is the etymological antecedent of the term "state" to signify the condition of being: minimalist bounds of the constitutional threshold. In the oral argument Justice Leonardo A. Quisumbing asked the counsel for petitioner-intervenors: "Well, we realize the constitutional constraints of sovereignty, integrity and the like, but isn't there a time that surely will come and the life of our people when they have to transcend even these limitations?" [TNS, oral argument] And this construes also the law's growth points that Justice Minita V. Chico-Nazario in her separate opinion quotes:

> "ASSOCIATE JUSTICE QUISUMBING: Isn't that a very good example of thinking outside the box? That one day even those who are underground may have to think. But frankly now Dean, before I end may I ask, is it possible to meld or modify our Constitutional Order in order to have some room for the newly developing international notions on Associative Governance Regulation Movement and Human Rights?
>
> DEAN AGABIN: Yes, It is possible, Your Honor, with the consent of the people.
>
> Justice Quisumbing did not write an opinion for the swing vote on substantive judicial activism. To my mine, this argues the claim that the organic political process will secure 'the rights of men' more certainly if it is not hindered by intrusion of the courts responding to political pressures."[See TNS, Oral Argument]

D. Task of Constitutional Adjudication

A handful of legal thinkers "off the bench" involved in the GRP-MILF peace process have noted the ignorance of all of us as to how, if at all, can formalist legal framework of constitutional adjudication be effective instrument to settle sovereignty armed disputes? A question that Justice Antonio T. Carpio at the

oral argument raised, "What is the governing law of the MOA-AD?" invites an intriguing clue that law or rule-making is a function of the undisclosed attitudes of magistrates. When it is a question of writing themselves, as herein, the contextual case-law into the MOA-AD, they are trapped in the rule logics that the Constitution is the paramount thing in the law.

1. Ponencia: Strict interpretivism, with its composites of separate opinions plus the copious footnotes, gives us uncertainty

In the case at bench, Associate Justice Conchita Carpio Morales who delivered the majority decision has struck down the MOA-AD sweepingly as contrary to law and the Constitution. Far from focusing on the vital social and constitutional concerns at stake the ponencia proceeds to interrogate the contents of the MOA-AD on strict 'interpretivism'. It is absurd to assign fault if a phenomenon occurs only where certain contingencies are realized, e.g. the respondents' almost consummated act of guaranteeing charter amendments, all these are equally causal elements in bringing them about. At base, what is attributed as object of grave abuse of discretion pertains to the statutory policy of the government's comprehensive peace process as contrary to law. Much the same is to be said about the law's function anent the concurring bent of Justice Ruben T. Reyes to fit the expanded definition of grave abuse of discretion as herein exists that swayed the majority opinion there is a contravention of the Constitution, the law and jurisprudence.

And, if we add legal realities, constitutional adjudication in most cases are worked out backward from conclusion tentatively formulated by exercising a wise discretion with reference to the particular circumstances of the controversy. Thus, if we apply the maxim "hard cases make bad laws," it rests on what Jerome Frank calls "injustice according to law." Yet the Court's reaction to the uniqueness of the factual antecedents is often concealed in "juridical motives" so as to individualize issues as to come within settled rule. As peace negotiators we are motivated by judgments not dissimilar to the courts' "unceasing adjustment and individualization" of the phrasing of rules. In judicial review process, the majority strives to fit the core of their rule logics with the weight of authority but, we know better, the bench and bar usually try to conceal the arbitral function of the magistrates. In negotiation process, the most important analogues are elasticity of procedure and proper perspective between secrecy in deliberation and publicity

in results.

After reading the decision, we have seen that "interpretivist" approach, with its composite of separate opinions plus copious footnotes, rather incomplete yet significant part of a series of agreements necessary to carry out the Tripoli Agreement 2001. The analysis is typically technical, mechanical and unpredictable prospectively on the Puno Court's judicial activism program. Let us revert to our critique: the need to overcome the veil of ignorance is particularly compelling. Our American-modeled practice, in which different parties are encouraged to pursue their own understanding, permits testing relevant hypotheses for purposive interpretation. One further step must be taken. To do this, we must confront the myth that obscures the fact that the Constitution (even if the charter and statutes are deemed status neutral) the legal dynamic is likely to endow equality of peoples with "legitimacy". To obscure the degree to which Court's unstated rules of recognition is perceived as the servant of one class or unequal societies.

Government's commitment must stand. Arguably the approach to constitutional adjudication here is unsatisfactory. Hand's model forestalls premature imposition of label by giving "a sense of common venture" that can be so exercised as to be acceptable in society. More serious objection is the documentary dictation of substantive outcomes or predictive results that might arise from consenting to be bound to MOA-AD. It is akin to the "freedom of contract" clause that serves as a counterpoise to governmental authority for legitimation. Progressivism critiques of its doctrinal progeny in contract disputes say functional arguments are unlikely suited to the courts. The denial essence underlies in what text-writers label "fixed father-controlled" universe; it has found its way as an exception to the moot principle cited in David implying that continuing controversy exists. For then the change result is to formulate controlling principles to guide the bench, the bar, and the public.

But what of it how? If the resemblance is capable of repetition yet evading review as it recurs may stop renegotiation. When cases turn routinely and repetitive, deep case logics tend to be replaced by shallow ones that enhance prospects for negotiated settlements, because, shallow logics allow for less ambiguity. No brief statement can be made on the ways our legal institutions intervene and settle disputes. But courts should decide on the narrowest ground possible. To signify a wider meaning is to distinguish the litigated actual issues

about the MOA-AD from the surrounding legally relevant circumstances of unfair attribution. Obviously there is more to negotiated political settlement that renders the prematurity rule as exception precedent. As for adversary process, political analogy is illustrative enough as a matter of principle and not simply prejudice.

A progressive critique of checks on power requires less abstract focus to link substantive policy with structural process and sociological facts. We turn next to the constitutional adjudication structure to situate the negotiation sets within the legal framework as the substantive goal of an assertive foreign policy. Evidently, this was on Justice Velasco's mind as he composed his dissent thinking of the intersections of the line dividing the negotiation stage and the execution stage. The burden of this counterargument unmistakably relies on the safeguards to the separation of powers entrenched in judicial oversight. If, as Justice Nazaro dissent, it is not the province or even the competence of the judiciary to tell the Executive Department exactly what and what not, how and how not, to negotiate for peace with the insurgents, is it not even more the function of the Constitution to give effect to the principle of checks on power which the legal framework itself has engendered toward "pure" formalistic doctrine? I have put these matters in a guarded way because the Court was not deciding on a hypothetical state of facts in Tan v. Macapagal but ascertaining what justiciable controversy is ripe for adjudication. As matters now stand, the Supreme Court has virtually embroiled itself in the war of culture.

2. Theory of Meaning: Standards, concepts and conceptions, and separation-of-powers

The Presidency of Arroyo does not hold a coherent constitutionalism, despite the elitist nature of the check-and-balances, for bringing justice in keeping the peace. The check on the extent of the powers of the Executive in pursuit of the peace process is put to test on MOA-ADD controversy. The separate opinions devote some discourse on "incoherence assumptions" that are attendant to the "controversies" on the signing of the MOA-AD and the issuance of the TRO. These critical views turn 'threats' to legal legitimacy into 'support' for negotiating the obstacles to reinforce the reach of the legal norms. A shift from a subjective to an objective theory that could create more predictability to legal arrangements may serve to make the point more clearly. The most striking

argument lined up on the dissenting opinion side is non-justiciability which the factual and legal situations warrant for reversal of the disposition – for mootness in the results reached by the majority is obvious by now.

I believe firmly it is the politics of law that renders appreciable movement in immutable legal doctrine. Of course, it is the politics of the Court that assigns magistrates a role they are well known suited to fill circumscribed by what they know, what they mistakenly thought they knew, and what they know best to think posterity. There appears, in the case at bench, to be a principled or sensible reason for setting aside or reversing the dispositive declaration that assails the MOA-AD as "contrary to law" with the result and collective conclusion.

> MS. JUSTICE CARPIO-MORALES, Delivered the Opinion of the Court:
>
> "IN SUM, the Presidential Adviser on the Peace Process committed grave abuseof discretion when he failed to carry out the pertinent consultation process, as mandated [by law]. The furtive process by which the MOA-AD was designed and crafted runs contrary to and in excess of the legal authority, and amounts to a whimsical, capricious, oppressive, arbitrary and despotic exercise thereof. It illustrates a gross evasion of positive duty and a virtual refusal to perform the duty enjoined." [Decision at p. 86]

It is plainly misleading, as Justice Arturo D. Brion points out, to confuse between the duty to inform the public with respect to the peace process in general and the disclosure of the MOA-AD negotiation in particular [Dissenting at p. 22] Given this confusion, in his view, it renders the validity of the ponencia about the violation of the right to information and the government's duty of disclosure highly doubtful. Very few Filipino politicians will admit that the 'whimsy of what is' currently controversial or political subverts peace and freedom. That is theory. So what in practice happens? The general public is skeptical but there is scant response to official lies traced to political ignorance and veil of ignorance. And people of ordinary means have little or no idea how government works, and even if objectively "known" is problematic public information. A great part of the criteria for success of negotiation is the reasonable attitude of the public during peace talks to negate the existence of grave abuse of discretion.

As a doctrinal prism on 'live case' or controversy, my focus is not with the correctness of the present Court's ruling on the applicability of the "capable of repetition but evading review" rule of decision. In my view, the future that the Puno Court seeks to bar from recurring has already begun not to work testing the policy of strict scrutiny and intrusive scrutiny in constitutional law on its own grounds. Although there is only the mention of the word "basic law" no doubt the Constitution will survive. What the Puno Court has done in fact is to rely on precedents by extrapolating the language of former decisions into the MOA-AD agreed-upon text.

For brevity, I contend that the majority opinion is wrong to follow the terrain of contestation before the Panganiban Court, where the Executive similarly backtracked on various attempts to check its power by some form of legislation or amendment, with its supposed program of judicial activism. The majority opinion is not mistaken, because, the ponencia chose the wrong principle (i.e. grave abuse of discretion) that the Court used to decide the case. Rather, it is this Court's task to disengage the "troubled texture" of the MOA-AD from itself as to reengage the difficult facts leading to cause celebre [parsing Nachura, J. Dissenting opinion at p. 7] in other majoritarian institutions.

Nor is the task of constitutional adjudication made easy to account for the case logics and the breadth of the rule of separation of powers (i.e. usurpation of legislative endowment) to pass upon the "troubled" MOA-AD. The dissenting opinion captures the canon of adjudication that an issue assailing the constitutionality of a government act should be avoided whenever possible. The minority takes a different tact with its point of departure that this Court will not decide upon the issue of constitutionality save when that very issue—*lis mota*—of the controversy is absolutely necessary to the final determination of the case. This is uncomfortably abstract. Any apprehension as to the ramifications of a signed MOA-AD it is highly speculative. Anyway, the agreed text of MOA-AD in its present unsigned shape can hardly be the subject of a judicial review, since "the allegation of unconstitutionality are, for now, purely conjectural" [Velasco, J. Concurring and dissenting at p. 4].

3. Rule of Decision: Equitable procedure, with its justification of policy on peace process furnishes criteria resembling "pathological cases"

The justices of the Supreme Court go about deciding "to depoliticize the court" by removing crucial issues from the public agenda. There is a paradoxical twist we can presuppose: How could an activist-cum-populist Supreme Court that aims to sustain domestic tranquility, fail even on its own terms to produce desirable results? This is the position for reconsideration to be examined: Justice Brion is puzzled that the ponencia did not even have an analysis of what the paramount public interest is, [at p. 9] and what would best serve the common good under the failed signing of MOA-AD. Justice Nachura opines it is not the province of this Court to assume facts that do not exist, [at p. 12] and thus an unsigned writing cannot be declared unconstitutional. Justice Velasco opines [at p. 8] the MOA-AD as couched may be constitutionally frail or legally infirm; but being unsigned document is without effect and force whatsoever. Safeguards to national interest criteria must not be bundled with criteria resembling "pathological cases" as rule of exposition rather than justification.

A divided Court by eight-seven majority took history of the Bangsamoro struggle into account and considered the building of peace to be part of its writ. It does seem fair to comment that the ponencia's discourse is highly technical and mechanical without hint of the humanitarian suffering and oblivious to all the human realities that inform the MOA-AD. Those who wrote separate opinions to join the majority agreed that the case presented live controversy. With the hard core Justices Puno, joined by Ynares-Santiago, Carpio, Azcuna, and Reyes concurring, the Court set the threshold for review to the facts extant. This suggests that it could enforce what the Constitution says upon adjusting "vague" clauses to allow for judicial scrutiny. Authoritative rules are supposed to lead judges to proper decisions. This means that ambiguity inherent in rigid abstractions or rule of decision requires justification. Courts must decide clusters of cases on principle of the Moro autonomy question rather than by piecemeal reactive toward political pressure as herein.

The common requirement specific to res gestae that a controversy I am concerned with is the information the Court will consider about the negotiation of the MOA-AD. As for the justification for it, in some jurisdiction their courts can give "advisory opinions" unlike here. That is why, both Justices Brion and Velasco warned that continuing to entertain and resolve on the merits these consolidated petitions will constitute a breach against the Sec. of Article 8 of the Constitution. Yet this again is merely an abstraction and the determination will

not have any effect in the "real world". In the light of the threshold of judicial review anything remotely resembling an advisory opinion or a gratuitous judicial utterance respecting the meaning of the Constitution must altogether be avoided in the instant petition.

Finding nothing wrong theoretically with negotiating panel binding commitments to enact charter change undertaken by an agent of government, yet Justice Tinga opined it must be intensely scrutinized. But this Court did not see it that way. Finding "the furtive process" by which the MOA-AD was designed and crafted run contrary to and in excess of the legal authority, the majority ruled duty was the crucial issue. That the resulting assumption of the premises was purely hypothetical raises further the empirical question of citizen participation rather than public consultation. As a descriptive matter, the framing of the hypothesis is affected by what we in the legal profession commonly refer to as motion practice. Dissenting from the ponencia's claim that the petitions have not been mooted, Justice Brion voted to dismiss the consolidated petition and here justification is convincing without recourse to rules at all:

> MR. JUSTICE BRION,in Concurring and Dissenting, writes:
>
> "This kind of history or track record is, unfortunately, not present in the petitions at bar and no effort was ever exerted by the ponencia to explain why the exception should apply. Effectively, the ponencia simply textually lifted the exception from past authorities and superimposed it on the present case without looking at the factual milieu and surrounding circumstances. Thus, it simply assumed that the Executive and ate next negotiating panel, or any panel that may be convened later, will merely duplicate the work of the respondent peace panel."
>
> "This assumption is, in my view, purely hypothetical and has no basis in fact in the way *David v. Macapagal-Arroyo* had, or in the way the exception to mootness as justified in *Roe v. Wade*. As I have earlier discussed, the ponencia's conclusion made on the basis of the GRP-MILF Peace Agreement of June 2001 is mistaken for having been based on the wrong premises. Additionally, the pronouncements of the Executive on the conduct of the GRP negotiating panel and the parameters of

its actions are completely contrary to what the ponencia assumed." [Brion, J., at p. 15.]

That "hard cases" are better settled "out of court" is true, save for those who claim the right for hearing or battle their views in court to secure favorable precedents. I have already alluded to the contract clause characterizing it as an institutional functioning "separation-of-powers" for enclave of decision via contract. Some legal writers apply the term "extragovernmental enclave" because the Court follows the judicial review policy of activism rather than restraint when confronted with hard ethical challenges and political morality in the politics of law. Justice Brion's 'disturbing implication' about going beyond the TRO as could totally scuttle the whole process turned into reality. I dare plead for a theory of just peace for the particular case of the MOA-AD solely significant. Our constitutional adjudication model has to be modified to accommodate this temporal dimension about racial profiling or ethnicity for those instantiated in persons. In doing so, jurists and legal writers must shift the discussion from person, ethnicity or minority discrimination argument to discourses, from identity politics to critical theory.

4. Solicitor General: Shift from 'zealous advocate' to passive posture puts herchief defense lawyer's 'trilemma box rather than thinking 'out of the box'

My reference here is not for want of expert opinions simplify because the Solicitor General manifested disinterestedness in the complete signatures on the MOA-AD "in this form or in any other form." What difference does it make for handling of the case? (I do not mean to ask if it is legally proper for and behalf of the Respondents.) I do want instead to suggest that Government's passive retreat posture was applauded and opposed as the twist and turn under political pressures. From a 'zealous advocate' the State counsel who has ambitions to sit in the Court's next vacancy instead defends the Executive policy shift to disarmament, demobilization and rehabilitation while arguing that the MOA-AD cannot be "obliterated with the declaration of unconstitutionality as it had never come to life and had never come into existence at all." The drama of MOA-AD of an appeal to the symbolic importance of the judiciary opens the constitutional arena through which political struggle can be seen.

The MOA-AD hearings exemplify a "hard case" which is also a story of how the Supreme Court and courts can be mobilized in the service of transformative changes. Not thoroughly scrutinized is whether MOA-AD establishes a legal right in assertion of opposite legal claims susceptible of judicial resolution, which are legally demandable and enforceable. This constitutional rule serves as a first requirement of res gestae and the distinction can be collapsed by construing a standard as a "principle" to determine grave abuse of discretion. Fundamental to legal rights as a function of statutory clause or contract clause is that contradictory arguments can always be adduced in contracting negotiation sets. But legal argument, in hard cases, turns on concept whose nature and function are embedded in the positive rules of law. Let us narrow down the focus to make it less abstract.

As is, in the matter at hand, a nice problem arises out of the Solicitor General's manifestation akin to a motion in limine, which affects the adjudication structure. It becomes apparent that she losses her 'zealous advocacy'. As conscientious attorney, if she cares after all, she is faced with a trilemma—that is, 'the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court.' The caricature is a situation where the (solicitor-turn-defense) counsel might make a motion before trial asking the judge to rule that the loss of a child ("no matter the court decides") is irrelevant and that no evidence relating to it can be mentioned at trial. Judgment and prospects for settlement are dramatically affected by the way the judge rules on such motion ("doctrine of frustration") because a Constitution is about caring. But so is honoring treaty obligation. What effect is there on the MOA-AD as material breach or other relief seemed the least in the mind of the Respondents. The Executive branch waived the defense of executive privilege by complying with the Court's order on August 4, 2008, "without a prayer for the document's disclosure in camera, or without a manifestation that it was complying therewith *ex abundante ad cautelam*" [Decision, at p. 44].

Argument can be right for wrong reason so that the function of constitutional review could have been grounded on a theory of judicial of deference that Justice Quisumbing began to solicit from Dean Pacifico Agabin, the lead counsel for Intervenors. This assumes that citizens do have moral rights against the state beyond what the law expressly grants, but the political institutions other than the courts are responsible for deciding whose preferences are to govern. As

illustrated the negotiation sets find the GRP Respondents botched and boxed in a corner but the Petitioners and Petitioners-in-Intervention come face-to-face instead the Respondents-in-Intervention. As it were the MILF was from the start not impleaded in the case except as an afterthought. In the opinion of Justice Velasco, Jr. the non-joinder of MILF is fatal.

MR. JUSTICE VELASCO, JR.,in a Dissenting Opinion writes:

> "Here, the unimpleaded party is a party to the proposed MOA-AD no less and the prospective agreement sought to be annulled involves ONLY two parties—the impleaded respondent GRP and the MILF. The obvious result is that the Court would not be able to fully adjudicate and legally decide the case agreement. Thereason is simple. The Court cannot nullify a prospective agreement which will affect and legally bind one party without making said decision binding on the other contracting party. Such exercise is not a valid, or at least an effective, exercise of judicial power for it will not peremptorily settle the controversy. It will not, in the normal course of things, write finis to a dispute. Such consequent legal aberration would be the natural result of the non-joinder of MILF. A court should always refrain from rendering a decision that will bring about absurdities or will infringe Section 1, Article 8 of the Constitution which circumscribes the exercise of judicial power." [Velasco, Jr., J. at p.]

At core, the consolidated petitions are case logics of procedure used to support a particular substantive result. Did it make a difference that MILF was not impleaded in the original case, except in G.R. No. 183962 lately filed? MILF was not served a copy of it and could not be asked to comment. In point of fact, the MILF is a real party in interest in the proceedings. This is not a technical matter for the question of standing involves the fundamental participation of interest groups and their role in constitutional processes. Still, it animates lively matters because for its part MILF has considered the MOA-AD a "done deal." As a matter of law, the petitions were mooted by the Government's repudiation of it or failure to sign the challenge the MOA-AD.

E. Summation: Preclusive Effects to Failure to Intervene

Petitioners may not be playing the litigation game that has complicated the peace negotiation at 'intersectionality' but perhaps to delay or bargain beyond the negotiation sets. Yet the MOA-AD also fixed rigid outer legal boundaries to thinkable politico-social change. The banner of the favor rule outcome or 'doctrine of victories' was hoisted through former Chief Justice Panganiban and the Petitioners. But the Puno Court also failed to draw arguments analogizing points of contract law when doctrinally applied to peace agreements. Justification for rights particularly the third-generation collective right to self-determination cannot be dependent on any single comprehensive doctrine made applicable to the MOA-AD. Nor do we have much basis for supposing that Respondent-Intervenors could have tested new grounds to pitch their argument to plea for "equitable decision procedure" rather than intersection of a formalistic stance. It rests on the justness of a decision in such a way as to adjust the formalist "two-level procedure" of justification.

A principal counterargument supports the minority view that the Court should not have struck down the initialed but unsigned MOA-AD because it involves political and moral issues. Has the Supreme Court furthered the goals and values that underlie the peace deal by pronouncing the negotiating authority's action is unconstitutional? As the Court is aware, the 11-year peace deal reflects the power of the parties that does not exclude appeals to temporal majorities. The conduct of the entire peace process requires a deeper-understanding of the armed conflict and political complexities for crisis is an important trigger mechanism for fundamentalism. Social capital—'the vital, focal phenomenon' of the conflict situation in Mindanao—is now subsumed to rigid formalism of manipulable rights and other legal categories. But this formal rationality works only with 'surface symbol' to reproduce the status quo outcome-oriented jurisprudence.

END.

See Cruz, Isagani, and Cynthia Cruz Datu, Res Gestae, a history of the Supreme Court at 260 (2000) for a critical analysis of how the Justices voted for a motion for reconsideration in Imelda Marcos v. Sandiganbayan, 99 SCAD 409.

There appears to be an exceptional treatment on the motion for reconsideration of this case.

On was filed by counsel for Muslim Legal Assistance Foundation, Inc. (MUSLAF) and another filed by counsel for Bangsamoro Civil Society (CBCS) and Bangsamoro Women Solidarity Forum, Inc., (BWSF). The two Muslim women counsels for Intervenors CBCS and BWSF informed me that they were never given a chance to argue orally nor were the Muslim lawyers from MUSLAF allowed to argue orally. Was the basis for discrimination due to their lack of national stature? It is on record that the Solicitor General, Hon. Agnes Devanadera, readily conceded the case for Respondent. Inadequacy of knowledge base or factual basis to determine the intent of the framers accounts for the negative perceptions of the MOA-AD. There was also an overwhelming anti-Moro sentiments generated by opinion makers and opinion editors in the media against the government negotiators.

This suggested mode of discourse makes peace of mind a part of life and limb. To trace the foundation for applying the principles of American-derived independent legal concepts, see Reynato S. Puno, "Legislative Investigations and the Right to Privacy" in IPB Journal at p. 43 (April-June 2006), vol. 32, no. 2. The Court missed to ground the "balance test" on a novel case-law had the same case logic been applied to the MOA-AD in consideration of domestic tranquility.

The declared policy of full public disclosure complements the right to access to information on matters of public concern found in the Bill of Rights is described as a "splendid symmetry" in V Record, Constitutional Commission 26-28 (September 24, 1986).

Raul Pangalangan, "War-mongering civilians" (Philippine Daily Inquirer, posted 09/05/2008) recognizes why the MILF can invoke RSD but draws attention to some "evident truths" such as "when… it becomes necessary for one people to dissolve the political bands…" Likewise in PDI, posted 09/24/2008: "Revolutionaries are indifferent to constitutions… Trying to subject [them] into the strictures of law will only marginalize or distort constitutionalism…" Negative campaigning drive got so ugly by then in the national media which is now an extended tactic for narrow partisan gain come 2010 elections rather than responsiveness to public opinion.

See ponencia at p. 70. The majority perceived the MOA-AD as an attempt of respondents to address the root cause of the armed conflict in Mindanao. The majority grants that Executive Order No. 3 authorized them to "think outside the box", so to speak, which would

thus require new legislation and constitutional amendments (at p. 67).

In Marcos v. Manglapus, 177 SCRA 668, Justice Cortes writing for the majority refined the unstated residual powers which are implied from the grant of executive power for "ensuring domestic tranquility" in times of peace. Such wide discretion "is not in any way diminished by the relative want of an emergency specified in the commander-in-chief provision." Soliman M. Santos who is counsel for Respondent OPPAP head informs us that the Solicitor General in the MOA-AD case did not file a Motion for Reconsideration expressed also his disappointment on the Court's decision who probably did not even bother to read the briefs. A "constancia" is a written manifestation as a matter on record to express continuing concern about the Supreme Court's encroachment into executive power.

The legitimacy deficit theory persists on two major events: the ouster of Estrada at EDSA II by which vehicle Arroyo assumed the presidency and the controversial "Hello Garci" tapes on the presidential election of Arroyo. The public apology of Cory Aquino to Erap Estrada about EDSA II can only mean to downplay it as competing with EDSA I in political significance. This stand to reason why the move of opposition stalwarts to question the constitutionality of MOA-AD was more motivated by an attempt to establish her "culpable violation" of the Constitution as a solid ground for impeachment proceedings.

Far more than exception to mootness on the ground transcendental importance has shifted the focus of the MOA-AD litigation to the factual context of "negotiation or occurrence" from which the action arose. This made it easier to view the set of events giving rise to a range of legal consequences all of which ought to be considered together even if it be political as falling within the jurisdiction of the Court. The question of standing in David v. Macapagal Arroyo, G.R. 171396, May 3, 2006, 489 SCRA 161 merged with the right to particular remedies. The liberal policy responding to pressure to expand the circle of potential litigants in the MOA-AD case should have been matched with the Court to develop sociological and factual materials because of intricate interplay between factual and legal elements, particularly from the Muslim Intervenors.

From the record of pleadings, most petitions pray that the MOA-AD be declared unconstitutional/null and void but only petition is denominated a petition for certiorari. The petition filed by the City of Iligan in G.R. No. 183893 for declaratory relief is outside the original jurisdiction of the SC.

The arguments for exercise of secrecy in favor of executive privilege and for "open" presidencies

are well established. For a good introduction to the dilemma of secrecy and democratic accountability, see Rozell, Mark J. Executive Privilege (University Press of Kansas, 2002).

This phrase originally appeared in the seminal writings of John Rawls on a "theory of justice". Cf. Rawls' latest work, The Law of Peoples, (Harvard University Press, 1999) with the sub-title: "The idea of public reason revisited" discussed
Lawyer Soliman M. Santos, Jr. in his blog, "Disappointing SC denial of MOAtions for reconsideration", exposes 'A tale of two very different cases' to illustrate how vested interests of the mining industry Motion for Reconsideration was supported by an "advocate" within the SC in the Mining Act Case (445 SCRA 1). After all, the mining industry and big business were all on the same side on the MOA-AD issue.

I disagree with the narrow view expressed in Justice Carpio's separate concurring opinion in the matter of Bangsamoro identity leading to "cultural genocide". The current views on global justice for the indigenous peoples with special interest in the contested meanings of nationalism is clearly out of Justice Carpio's purview of the Lumad – a term not even local ethnic groups find unacceptable.

Here we face the question of where to draw the line. See Parfit, Derek. The Unimportance of Identity, also Smith, Anthony D. The Formation of National Identity in Identity, Henry Harris ed., (Oxford University Press, 1995)

International Court of Justice (1975) Western Sahara Advisory Opinion of 16 October 1975. The Hague: IJC Reports at p. 12.
When Thomas Jefferson wrote that all men are endowed by their Creator with the same right to life, liberty, and property, it meant that all must be equal before the law. This is the equality that the Constitution speaks about in the Bill of Rights, but it is not the same as the "equality of all peoples" in the context of the right to self-determination in the Declaration of Human Rights. To craft the MOA-AD, we advanced and elevated the position of the IPs beyond the theorization of the central role of the 'media' in imagined national communities to form the demographic core to that category. It differs in essence of 'rootedness' from the Canadian conception of "first nations"; hence, "freedom of choice" embodies recurrent dimensions of cultural community and identity for global justice. Our great problem is not how Moros came to be called bangsa because it is an undeniable historical fact that they constituted a distinct domestic community established as being the first to organize a proto-state and a trade-ties established in various written treaties of amity and commerce with European nations.

The constitutionality of R.A. No. 8371, the Indigenous Peoples' Rights Act, was contested in Cruz v. NCIP, G.R. No. 135385, December 6, 2000. In Abbas v. Commission on Elections, 179 SCRA 287 (1989), the 1976 Tripoli Agreement and Republic Act No. 6734 was challenged as infringement of the freedom of religion in relation to P.D. 1083, but the Court did inquire into the constitutionality of the peace agreement.

The Muslim Legal Assistance Foundation, inc. (MUSLAF), and the Consortium of Bangsamoro Civil Society (CBCS) was represented by its Chairman Guiamel M. Alim, and Bangsamoro Women Solidarity Forum (BWSF), by its Chair Tarhata M. Maglangit. They prayed for the lifting of the temporary restraining order issued by the Court; to require the Executive Department to fulfill its obligation under the MOA-AD; and to continue with the peace talks with the MILF with the view of forging a Comprehensive Compact. See the Solicitor General's Comment to G.R.183752, pp. 11.

Constitutionalist Joaquin G. Bernas, S.J. writes about "Peace Negotiations" (PDI, Posted 9/1/2008) to comment that the negotiators had "devise a lot of language engineering to satisfy the constitutional requirement of the Republic while at the same time producing something acceptable to an opposing side reluctant to accept the Constitution." I confirm that is exactly what happened: "Even with our constitutional right to information, different phases [required] different degrees of publicity." Thus, the confusion and frustration created by the field of procedure in trying to obtain judicial relief did not reduce the levels of anxieties for the opposite parties to cope with.

G.R. No. 170516, July 16, 2008 was penned by the same ponente Justice Carpio-Morales, but in the case at bench she anchors her decision on Chavez v. Pea, 384 SCRA 152 (2002). This view is shared by legal writer Soliman M. Santos, Jr., counsel for Respondent and human rights activist Zainudin Malang and Nasser A. Marohomsalic.

R.A. No. 6734 as amended by R.A. No. 9054 is a water down compliance with Phase I of the Final Peace Agreement of 1996 between the Government and the MNLF. Although mentioned as a TOR in the MOA-AD we are precisely aware of changes made on the definition of the term "Bangsamoro people"

Disomangcop vs. Datumanong 444 SCRA 203 (2004)G.R. N. 177597 and G.R. No. 178628, July 16, 2008

See Fitzmaurice, M. "Modifications to the Principles of Consent in Relation to Certain

Treaty Obligations", Australian Review of International and European Law (1997), at p. 275. See Carino v. Insular Government of the P.I., 28 Phil. 939 (1914). In his Separate opinion, Associate Justice Puno quotes a passage the Laws of the Indies in which reference to the fact that "titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in the books."

See Adlrich, Robert and John Connell, The Last Colonies (Cambridge University Press, 1998), Chapter 2, on constitutional issues. Statutes can be revised, negotiations reopened, referenda reversed, government removed from office. The cases of French New Caledonia and the Netherlands Antilles have shown in the last ten years, the local populations requested to correct perceived deficiencies or provide greater benefits.

See Presidential Decree No. 1083 (1976). See, R.A. No. 6848 (1990) the charter of Al-Amanah Islamic Bank of the Philippines. These were based on standard Shafi'i texts circulated in Arabic jawi scripts. Translated, as part of Ethnographic Studies, see Saleeby, Najeeb. Studies in Moro History, Law and Religion, Manila (1905). Quoted by the ponencia, see Samuels, Kirsti. Post-Conflict Peace-Building and Constitution-Making, 6 Chi. J. Int'l L. 663 (2006) Quoted in Patricio Diaz and posted in mindanews.

THE MOA-AD DECISION

By Fr. Joaquin G. Bernas, S.J.
From the "Sounding Board" column published by the Philippine Daily Inquirer

MANILA, Philippines - When the 8-7 decision of the Supreme Court declaring the MOA-AD unconstitutional came out, the initial reaction of not a few, myself included, was that the Supreme Court had killed a dead horse with an advisory opinion. After all, the President herself had already announced that the Memorandum, whether in the disputed form or any other form, would not be implemented, and she had even disbanded the negotiating panel which had authored it. Moreover, she had begun to remedy one most glaring defect in the process of formulating the MOA by ordering massive popular consultation.

In effect, the President had either confessed that she had made a mistake or at least that her subordinates had made a grievous mistake and she was going about remedying the mistake as soon as possible even if her action might be seen as making her negotiators the scapegoats.

Eight justices of the Supreme Court, however, most of them with a record of vigorously disagreeing with the President, thought that the President should be told how she should conduct negotiations. Thus the 90-page sermon. On the other hand, seven justices, generally known to be protective of executive power, preferred to see that lessons had been learned and that the executive could be trusted to do better next time.

Aside from the 90-page main opinion, there are 11 other pieces, some concurring and others dissenting. Going through them one will find that there really is more unanimity than what the 8-7 count might indicate. There is a clear majority which would agree that there are provisions in the MOA-AD which depart from the present Constitution. The most notable of these would be the powers envisioned for the Bangsamoro Juridical Entity (BJE). The powers envisioned go beyond those possessed by local governments and even by the Autonomous Region in Muslim Mindanao. The MOA-AD speaks of the relationship between the BJE and the Philippine government as "associative," thus

implying an international relationship and therefore suggesting an autonomous state. This goes beyond what the present Constitution has set up. Clearly, the MOA-AD authors were willing to try untested approaches and to operate "out of the box" as other peace negotiators in other places have done.

If one sees that the signing of the aborted MOA-AD would have had the effect of making it a "done deal," a finalized MOA-AD would indeed have been unconstitutional. It would, however, be unconstitutional not necessarily because it contained provisions which departed from the current Constitution but because these provisions would have been given life without following the constitutional provisions for achieving change in the Constitution. Thus the underlying assumption in the majority decision seems to be that, if the draft had been signed, it would have disastrously contained government commitments which, even if not self-executing, would have disastrous implications.

Thus it was that eight justices of the Court felt impelled to send a stern directive to an executive department which they could not trust. The message of distrust is embodied in the majority's conviction that the MOA-AD was "capable of repetition in the future." Nay more, the MOA-AD was implicitly judged to be in real danger of being repeated by the current administration.

I do not envy the President. She seems to be swimming in a whirlpool of distrust. The past strong challenges of some justices to "executive privilege" are affirmations of distrust. Investigations in the Senate are strong signals of distrust. The resurgence of impeachment moves is an active translation of distrust. And now the decision of the Court to flagellate the carcass of a decommissioned horse is another sign of distrust. Moreover, surveys do not show a public approval rating the President can be proud of. Where will all this end?

But back to the Court's decision. Does the decision say that peace negotiators may not be authorized to propose amendments to the Constitution? Or, since peace negotiators are the President's men, does the President's oath, cited by the Court, to "preserve and defend" the Constitution prevent her from working for changes in the Constitution if needed to achieve peace?

The decision does not say that. After all, the President's oath binds her not just to "preserve and defend" the Constitution but also to "do justice to every

man." Doing justice to every man may require her to work "out of the box." Jurisprudence recognizes that the powers of the President are more than just those which are specifically enumerated in the Constitution.

What I read the decision to be "advising" the President is that she should not make commitments which she cannot deliver on her own. Thus, if she must seek changes in the Constitution, she should do it through Congress which has the constituent power to initiate constitutional change.

One could agree with the content of such advice, even if one believes that it is not the business of the Court to give advice. But in my contacts with members of the negotiating panel, I never got the impression that they wanted to by-pass Congress and to formulate self-executing provisions.

Admittedly, however, the document they produced lacks clarity. In their sincere effort to produce language acceptable to people who do not accept our Constitution, their language engineering did not succeed in crafting a document free of ambiguity. But it is just as well that the horse is dead, even if the MOA decision will not rank among the Ten Best of 2008.

PEACE NEGOTIATIONS

By Fr. Joaquin G. Bernas, S.J.

From the "Sounding Board" column published by the Philippine Daily Inquirer

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MANILA, Philippines - Can you really have a peace negotiation that is totally closed to any change in the fundamental law? Perhaps you can, in an ideal world. But we are not there.

In the past two decades there has been a flurry of peace agreements. A characteristic common to some of them is direct negotiations between governments and internal armed groups who for this limited purpose were treated as equals. These were departures from earlier negotiations which where state to state. And the result common to some of these were ceasefire agreements linked to a modification of political and legal arrangements. The results were generally embodied in formal documents written, signed, publicized and witnessed by international participants.

Sad to say, a good number of them failed after five years and more after 10 years. But trial and error continue for the sake of peace. And lessons learned have already opened up an embryonic development in law called lex pacificatoria.

The GRP-MILF MOA, we are told, is dead, or is at least comatose. And as I said in my column last Monday, I would not favor signing the MOA in its present form.

If it had been signed or if it should be signed, would the document be equivalent to a unilateral declaration that could bind the Philippines to some radical constitutional changes even including dismemberment of the archipelago? I do not think so. The little that I know about binding unilateral declarations in international law, principally from the unilateral commitment France made to discontinue nuclear tests in the vicinity of Australia and New Zealand, I would say that the MOA does not have the characteristics of a binding unilateral declaration.

At least three characteristics of the French commitment led the International Court of Justice to conclude that France had incurred a binding obligation. The commitment was very specific; there was a clear intent to be bound; and the commitment was restrictive. It would be hard to convince the ICJ that signing the MOA, even by an authorized agent, would satisfy these characteristics.

Besides, there would be need to defend the MOA before the ICJ only if the Philippines consented to be brought to the ICJ. But we know that the ICJ is not an ordinary court to which one can be unwillingly dragged. ICJ rules require consent to be a party.

At any rate, if these issues came up at all during oral arguments last Friday, I believe that they did merely by way of exploratory probe to determine perhaps if the solicitor general had done her homework! If I remember right, she was a student of one of the justices.

But back to the comatose MOA. I join those who say that we must continue the effort to achieve an agreement that can lead to lasting peace in Mindanao.

What should be the mandate of the negotiators? As I understand it, the mandate of the negotiators who produced the MOA was to work toward the formulation of an agreement that could lead to peace within the parameters of the Constitution. Should such a mandate be understood as a command not to agree to anything which might be a departure from the Constitution? I do not believe so. If that were the mandate, in the context of the current conflict, it would have manacled the negotiators severely.

The Constitution, after all, has two aspects—the substantive aspect and the procedural aspect. I understand the mandate to mean that the negotiators could explore and weigh possible changes in substantive provisions of the Constitution but always on the understanding that substantive changes could be finalized only according to the procedure prescribed by Article XVII of the Constitution.

The negotiators ventured into substantive changes. They have been vilified for these. But these were not changes that were self-executing but changes that

could take place only after the constitutional process is finished.

I must admit that the language of the MOA does not succeed in causing the need for a constitutional process to jump out of the text. For that reason it is seen by some as a done deal. But it is not. The need for process is there even if not in the language we can easily understand. The negotiators had to devise a lot of language engineering to satisfy the constitutional requirement of the Republic while at the same time producing something acceptable to an opposing side reluctant to accept the Constitution.

Critics of the MOA, if they are willing to be the negotiators, must also be willing to navigate in stormy negotiating seas. Hopefully they can be more skillful!

Peace agreements have at least three stages. First is the pre-negotiation agreement which tries to fix the participants and the agenda. Next is the substantive or framework agreement which identifies the root causes of the conflict and proposes how to halt violence more permanently. The last phase is the implementation agreement which seeks to advance the framework and flesh out the details. Before we reach this third stage, it is generally premature to talk of unconstitutionality.

I believe that at the moment we are still at both the first and second stage. Everyone should help to make the efforts in these stages successful so we can go on to the implementing stage and finally achieve peace in Mindanao.

But what of transparency?

The necessity or even wisdom of making the contents of these phases public may differ from stage to stage. It has been pointed out, for instance, that the successful negotiations achieved by South Africa's Mandela began with secret talks with De Klerk. Even with our constitutional right to information, different phases will require different degrees of publicity.

"POSTSCRIPT TO THE SUPREME COURT MOA-AD JUDGMENT: NO OTHER WAY BUT TO MOVE FORWARD"

By SEDFREY M. CANDELARIA
Associate Dean, Ateneo Law School
GRP Panel Member for Peace Talks with the CPP-NPA-NDF
Former Chief Legal Consultant to the GRP Panel for Talks with the MILF

INTRODUCTION

The recent Supreme Court judgment in the *Province of North Cotabato, et al v. The GRP Peace Panel on Ancestral Domain, et al*, G.R. Nos. 183591, 183752, 183893, 183951 & 183962, October 14, 2008, would be remembered as one of the most controversial cases in Philippine constitutional jurisprudence.

Peace advocates who have judiciously monitored the GRP-MILF peace negotiations will be better advised to examine more closely the implications of the judgment despite the tremendous frustration they experienced after the Supreme Court aborted the signing of the MOA-AD and eventually declared it as unconstitutional.

In light of the objective of this Conference to see the peace process move forward, the presentor would like to pose the following fundamental questions which could clarify the implications of the judgment for the peace process:

a. *Did the judgment bar future peace negotiations?*

b. *What guidelines have been set by the Supreme Court for purposes of future peace negotiations?*

c. *Are the principles contained in the MOA-AD capable of re-affirmation in some other form in the course of peace negotiations?*

FUTURE PEACE NEGOTIATIONS

The decision of the Court to proceed with entertaining the full ventilation of procedural and substantive issues, through the exercise of the power of judicial review over acts of the Executive in the conduct of peace negotiations, is a case of first impression. One legal scholar points out the predicament that domestic courts would grapple with in relation to an inquiry into a peace agreement

"Domestic courts, too, often end up examining the political and legal question at the heart of the agreement…To be sure, in many situations the role of courts and tribunals will be marginal to an agreement's success or failure: courts and tribunals are likely to be ineffective in sustaining an agreement in the face of fundamental and violent dissenter. However, marginal relevance is not the same as irrelevance. Courts and tribunals have the capacity to extend and develop the agreement's meaning where they find it to be part of the legal framework. More negatively, they have the capacity to terminate the operation of an agreement even in the face of political chances to sustain it."

The Court acknowledged that the petitions before it were not confined to the terms and provisions of the MOA-AD, but to other on-going and future negotiations and agreements necessary for its realization. This was an occasion for the Court to lay down a uniform framework for the different government negotiating panels.

It emphasized that surely the MOA-AD can be renegotiated or another will be drawn-up, prompting the Court to decide on substantive matters aside from the purely procedural concern.

In closing its discussion of the issues, the Court expressed with caution that

> "(t)he sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any way it wants, so long as the change is not inconsistent with what, in international law, is known as jus cogens…"

This pronouncement stands as a retort to the oppositors' view that any changes in the Constitution as a consequence of the peace negotiations is unthinkable or impossible. The doors leading to charter change to accommodate a negotiated political settlement were definitely not closed by the Court.

GUIDELINES FOR NEGOTIATORS

In an attempt to set guidelines for GRP peace negotiators, the Court reviewed the extent of the powers and mandate of the President in the conduct of peace negotiations through her Chief Executive function and in her capacity as Commander-in-Chief of all the armed forces.

The Court did not invalidate the existing executive issuances outlining the mandate of the GRP Panels negotiating with various organized armed groups.

Executive Order (EO) No. 125 of 1993 and EO 3 of 2001 recognize that the comprehensive peace process may require administrative action, new legislation or even constitutional amendments.

However, the judgment pointed out that EO 3 requires not just the conduct of plebiscite but regular dialogues with the National Peace Forum and other partners. It is unfortunate that the Court failed to give sufficient weight to the 112 or so consultations that the GRP Panel secretariat submitted for consideration. A serious and incisive examination of the documented consultative fora, resolutions of local government units and position papers reveals consistency with the EO 3.

On the otherhand, the Court admitted that it may not require the Presidential Adviser on the Peace Process to conduct consultation in a particular way or manner but may require him to comply with the law and discharge the functions within the authority granted by the President. The threshold of a constitutionally compliant consultative process, however, is not clearly defined in the judgment. This is where peace negotiators and advocates may contribute in crystallizing the limits of compliance with the corresponding respect for the integrity of the confidential character of crucial stages of peace negotiations.

REAFFIRMATION OF THE MOA-AD PRINCIPLES

The GRP Panel prayed before the Court that there was no need to inquire into the constitutionality of the MOA-AD on account of its non-self-executing character, as it will be effective only upon the signing of the Comprehensive Compact as the GRP and MILF Panels intended in the following questioned provision:

"The Parties agree that the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively.

Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of the Comprehensive Compact and upon effecting the necessary changes to the legal framework with due regard to the non derogation of prior agreements and within the stipulated time frame to be contained in the Comprehensive Compact."

It is of interest to note that there is unanimity among the members of the Court, including some dissenters, that the MOA-AD cannot all be accommodated under the present Constitution and laws. However, the Court differed from the GRP Panel in its interpretation of the commitment to amend the existing legal framework in that the Court concluded that the commitment of the GRP Panel constituted a guarantee and, in fact, encroached upon the constituent powers of the Legislature, a co-equal branch of the government.

The present writer considers the interpretations made by the Court on various provisions of the MOA-AD as having been derived from domestic and international case law with marginal application to the unique characteristics and context of the MOA-AD.

Notwithstanding these interpretations, it is the presentor's considered view that these provisions are capable of resurrecting in the course of future peace negotiations in light of the earlier discussion that the Court did not discount the possibility that the sovereign people may go to the extent of changing the fundamental law in any way it wants.

CONCLUDING OBSERVATIONS

The judgment of the Court was premised on three assumptions:

1. The MOA-AD is akin to an ordinary contract in civil law.
2. The Executive Orders and Memorandum of Instructions are valid.
3. The inference that a State has been created by the MOA-AD.

It bears emphasizing that the contract theory in civil law may not necessarily apply to peace agreements as experienced in most peace negotiations. Peace agreement is "sui generis" in character – a class by itself.

The Court recognized that proposals to amend existing laws and the Constitution can be made arising out of peace negotiations, including the possibility of new arrangements with certain groups or communities presently engaged in armed conflict with the Philippine Government, provided the appropriate constitutional processes are followed.

HOW TO MAKE THE GRP-MILF PEACE PROCESS WORK

By Amina Rasul

From the Durian column published by The Manila Times

On July 28, 2009, talks between the Philippine government and the Moro Islamic Liberation Front (MILF) resumed after a successful meeting in Kuala Lumpur. The joint statement, signed by Rafael Seguis (government) and Mohaqher Iqbal (MILF), affirmed both sides' commitment to sustain the suspension of military operations (SOMO) that both parties declared last week to make the way smooth for a final peace agreement.

After a year of fighting, which has left at least 700,000 refugees in its wake, will both sides find a way to restore trust and confidence in each other and resume the stalled peace negotiations? After years of no hostilities and continuing negotiations, fighting between the MILF and the government resumed in August 2008 after the Supreme Court stopped the signing of the memorandum of agreement on ancestral domain (MOA-AD), which had been initialed by both government and MILF after over four years of negotiations.

The memorandum sought the expansion of geographic coverage of the Autonomous Region in Muslim Mindanao (ARMM) under a Bang-samoro Juridical Entity (BJE). The memorandum would also empower ARMM-BJE to set up its own courts, security, trade, education and elections and give it the right to explore and develop natural resources in its territory.

The July 28 communique seems reassuring. It acknowledges the memorandum as an initialed but unsigned document and commits both parties to reframe the consensus points and move toward a final peace agreement.

Further, according to Atty. Camilo Montesa of the Office of the President's Adviser on the Peace Process, both parties have agreed to work for frameworks that will establish a mechanism designed to protect noncombatants in armed conflict and establish an International Contact Group (ICG) of states

and nonstate organizations that would accompany and mobilize international support for the peace process.

Sadly, the news over the past week about fighting with Bangsamoro insurgents has brought doubt as to the future of the peace talks. In Palawan, the military engaged Moro National Liberation Front (MNLF) troops while in Basilan, fighting broke out between the military and the MILF. What is the future of peace talks?

Constitutional constraints

When the Supreme Court judged the memorandum of agreement on ancestral domain to be unconstitutional on October 14, Chief Justice Reynato Puno wrote, "Any search for peace that undercuts the Constitution must be struck down." He opined that such peace is worse than worthless. The Supreme Court has effectively boxed official peace processes to what the present Constitution allows. Where does that leave the peace process? After all, as many Bangsamoro lawyers note, the Philippine Constitution is a key policy instrument that maintains the dominance of the majority over minority communities such as the Bangsamoro.

MNLF Experience

In 1976, the Tripoli Agreement between government and the Moro National Liberation Front (MNLF) granted effective autonomy in lieu of independence for the Bangsamoro. However, the 1987 Constitution provided only limited autonomy for the cultural communities, which effectively weakened the 1976 Tripoli Agreement. The 1987 Constitution instructed Congress to pass an Organic Act for the Autonomous Region in Muslim Mindanao (ARMM), subject to the provision of the Constitution and national laws. An independent Regional Consultative Commission for Muslim Mindanao (RCC), created by Republic Act 6649, was tasked to assist Congress in the formulation of the charter of autonomy for Muslim Mindanao.

The commission's draft reflected the region's Islamic nature and included Islamic systems for economic and finance matters, and an Islamic ethical system. Unfortunately, Congress watered it down. For instance, the RCC's inoffensive proposal for the adoption of a regional flag for ARMM was stricken down by

Congress. Congress allowed only a regional banner, downgrading the Autonomous Region in Muslim Mindanao to a civic organization, according to lawyer Nasser Marohomsalic.

A Christian dominant Congress, not well versed in Islam, felt competent to change the proposal for the application of Shari'ah, or Islamic law, limiting the sources of Shari'ah from the traditional eight—the Qur'an, Hadith, Quiyas, Ijma, Aadat (customs), Attalfeq, Al Taqleed (traditional) and Al Ijtihad—to only four—the Qur'an, Sunnah, Quiyas and Ijma. Where did they obtain the wisdom to make such a choice?

Congress emasculated the proposed measures even more on the issues that they did understand, such as the power over natural resources. Congress decided not to adopt the RCC's proposal on the rights of the indigenous cultural communities over their ancestral domain which included prior right to exploit natural resources within the ancestral domain and to "reclaim lands within the ancestral domain acquired illegally by any individual person or persons, corporations, partnerships and similar entities including but not limited to government reservations."

Congress even showed partiality to the Christian dominant indigenous peoples in the Cordilleras. In the case of strategic mineral resources, control, exploitation and development of natural resources for ARMM did not include "uranium, coal, petroleum and other fossil fuels, mineral oils, all sources of potential energy, as well as national reserves and aquatic parks, forest and watershed reservations as may be delimited by national law." The Cordillerans, however, could develop all these resources—except uranium—on its own.

Thus, the MNLF rejected Republic Act 6734.

On September 2, 1996, the MNLF signed a Final Peace Agreement (FPA), with the national government. Government committed to amend the Autonomy Act to strengthen it. Unfortunately, the powers were weakened even more.

Republic Act 9054, "An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao," passed in 2001, was rejected

by the MNLF. According to the MNLF, R.A. 9054 "unilaterally arrogated to itself the power to define strategic mines and minerals, which violated Paragraphs 146 and 147 of 1996 FPA."

The experience of the MNLF in negotiating with the Philippine government has not been positive. Decrying the violation of the 1996 FPA, fighting resumed between government and MNLF troops in November 2001 leading to the arrest of MNLF Chairman Nur Misuari. Careful not to admit that the peace agreement had indeed been violated and thus broken, government propaganda labeled all encounters with the MNLF as military operations against "rogue MNLF" or against the Abu Sayyaf. Misuari, under house arrest, was replaced by a Malacañang-backed MNLF "Council of 15."

Unfortunately, the Council of 15 was unable to take over the helm of the MNLF. Thus, Misuari had to be wooed again. During the 10th anniversary of the 1996 Final Peace Agreement, MNLF stated that the agreement had to be "exhumed" before it could be implemented. Since last year, the 1996 FPA has been the subject of tripartite review, under the auspices of the Organization of the Islamic Conference (OIC). The technical reviews have been completed, and await official action by the parties concerned.

Conclusion: MILF and the peace process

In spite of the MNLF's negative experience with government processes, the MILF committed itself to peace talks. The first agreement signed by the government and the MILF was for cessation of hostilities in 1997. A significant feature of the agreement was the establishment of the OIC Monitoring Team, which later became the Malaysian-led International Monitoring Team (IMT). The monitoring team would observe and monitor the implementation of all GRP-MILF agreements, and coordinate its monitoring activities with the CCCH of both parties through their panels. Its Terms of Reference were signed in September 2004.

The second agreement entrusted to the existing GRP and MILF Coordinating Committees on Cessation of Hostilities (CCCH), which regularly hold Joint Meetings, the supervision and monitoring of the Implementing Guidelines on the Security Aspect of the Tripoli Peace Agreement.

The third was on Local Monitoring Teams (LMTs), which would conduct fact-finding inquiries into matters referred to it by either CCCH. The LMT at the provincial or municipal level was composed of five representatives from the local government unit (LGU), the MILF Political Committee, NGOs nominated by the GRP, NGOs nominated by the MILF and the religious sector chosen under mutual agreement.

Fourth, a GRP-MILF Ad Hoc Joint Action Group (AHJAG) against criminal elements would work in tandem with their respective coordinating committees and establish a quick coordination system.

The successful implementation of the GRP-MILF agreements on cessation of hostilities resulted in a tremendous drop in armed conflicts between government troops and the MILF: from almost 700 in 2002 to only seven incidents in 2008.

Thus, the conflagration that resulted as a result of the non-signing of the MOA-AD last year caught all the parties flat-footed, as developments had been proceeding steadily, if not always smoothly, toward a peaceful resolution of conflict.

How to make peace process work

In spite of the resurgence of armed conflicts, the July 28 Communique still reassures. Both parties have agreed to work for frameworks that will establish a mechanism designed to protect non-combatants in armed conflict and establish an International Contact Group (ICG) of states and non-state organizations that would accompany and mobilize international support for the peace process. These are crucial to restoring faith and confidence in both sides.

However, can there truly be an effective political settlement within the present legal framework, given the experience of the MNLF and the MILF? Genuine autonomy and lasting peace cannot be attained unless the central government divests itself of substantial powers and invest the same in local communities and allow them to chart their own destiny.

First, the GRP and MILF panels have to think outside the box of Philippine

legal framework. This is a precondition to successful negotiations. Is this possible given the Supreme Court decision on the MOA-AD? Clearly, the process of law needs to be followed. But the peace panels must be allowed flexibility to negotiate, allowing for the possibility of constitutional amendment.

Second, the government must accept that military strategies cannot resolve the Mindanao conflict. Government must resolve, not just manage, the Mindanao conflict. It should not allow the peace process to be hijacked by political posturing and opportunism.

Third, the peace process—not necessarily the official peace negotiations—must be inclusive. All stakeholders, including religious leaders like the Ulama as well as civil society organizations, should be involved in the process. This will give the process the legitimacy and the critical political constituency it needs to succeed.

The peace process between the government and the MILF is a necessity, as proved by the calamitous series of armed conflicts that we experienced this last year that resulted in hundreds killed, close to a million civilians rendered homeless, economic losses exceeding billions of pesos. The question is how the Arroyo administration can manage the process, assuming that this is the President's last year in office? The best scenario I can see draws from the favorite Filipino sport, basketball: The Arroyo team just has to dribble the ball until the next administration steps in. The critical strategy is to ensure that the ball does not go out of bounds.

FORGING AHEAD POST MOA AD

By Fr. Eliseo "Jun" Mercado, OMI
From the Policy Forum published by the Institute for Autonomy and Governance

Introduction

There are three basic over-arching issues that need to be addressed as we forge ahead. These are the following:

1. The issue of "historical" injustice" and the "pauperization" of the Bangsamoro vis-à-vis the pursuit of "dream" and "aspiration" for self-determination;

2. The issue of the decision of the Supreme Court that includes among others, the CONTENT OF MOA AD IS UNCONSTITUTIONAL, the PROCESS OF MOA AD IS DEFECTIVE and UNCONSTITUTIONAL, and the CONCEPT OF ASSOCIATIVE RELATION IN THE MOA AD IS UNCONSTITUTIONAL; and

3. The issue of social capital and the credibility of the Arroyo Government that is practically nil.

The above three issues set the conditions and the climate in the move forward post MOA-AD fiasco. Media projections tell us that GRP and MILF are entrenched in their post MOA-AD positions. Is this simply acoustic positions addressed to their particular constituency or statements of "immovable" conditions for the resumption of talks? I am an optimist by nature and I have seen through the years that "on and off" modes in peace talks are not immovable granite. Thus I believe in the former.

I also believe that though the formal talks are suspended, the lines of communications between the GRP and the MILF continue to be open in the usual "Pinoy style" now popularly known as the "back channel" negotiation. The continuing "back channel" communications, I believe, would pave the way for any resumption of formal peace talks. I will begin my presentation by drawing seven

(7) lessons from the fiasco of the MOAAD and then move to the third phase, that is, charting the road map for a forward peace agenda.

The **first lesson** is the fact that any governments wishing to undertake a peace process with rebel or liberation front needs a lot of social capital and a high credibility rating. In the final analysis, people accept or reject both the process and the content of the peace process on the basis of the social capital and trustworthiness of government. The same holds true for the constitutional or charter change. It can also be said that any government with no trust rating and an almost bankrupt social capital must NOT undertake a "terminal" or "final" comprehensive peace process or any attempt to change charter. Resulting "peace agreement" from a "dubious" or "suspect" government would NOT be sustainable in the long term, in fact, it would be a divisive venture notwithstanding the "goodwill" and best content of an agreement.

The **second lesson** is the imperative that the process must be inclusive of the major stakeholders of the negotiated peace - they must be on board. It does not mean numbers or quantity of participants but significant persons or quality of stakeholders that would "create" the groundswell of support to both the process as well as the substance of any agreement. These significant persons coming from LGUs, Congress, Civil Society and the Private Sector (Business) act as sort of "guarantors" that the process is not only inclusive but also transparent and accountable.

The **third lesson** tells us that there are many and varied voices and representation within the Bangsamoro. There is NO "unified" voice and representation that speak for and in behalf of the entire Bangsamoro. At best, we have one or two Liberation Fronts negotiating peace with government… and these two fronts are dealt separately notwithstanding that each one claims to represent the same people and the same homeland or ancestral domain. There must be a better way and a more realistic approach to peacemaking that is INCLUSIVE OF ALL MAJOR STAKEHOLDERS IN THE BANGSAMORO. I have always opined that there are four major "gate keepers" in the Bangsamoro that must be on board in any peacemaking regardless where each sits at the negating table. These "gate keepers" are the following: the (1) "Traditional" Leaders who now control practically the entire LGUs within the ARMM, (2) the Moro National Liberation Front or the MNLF that has signed a "Final peace Agreement" with

the government in 1996, (3) the Moro Islamic Liberation Front that has engaged the government since 1997 notwithstanding the on and off wars in 2000 and 2002, and (4) the '*Ulama* that define, ultimately, what is Islamic and non-Islamic in the custom and practices of the Bangsamoro. All four (4) "gate keepers" must establish a modicum or working unity for any sustainable peace process with the Bangsamoro.

The **fourth lesson** comes from the clamor of the Indigenous Peoples who were included in the Bangsamoro category yet clearly articulating that they form a separate and distinct identity with prior claim to their ancestral domain and with equal aspiration for selfdetermination within the said ancestral domain in their local affairs. When government negotiates peace on the basis of historical injustice, the Indigenous Peoples and the Bangsamoro have equal claims and aspirations. It would be morally and legally infirm if the process and the agreement are undertaken on the basis of might and not on the rightness and morality of the claim and aspiration. In fact, any agreement not based on morality and justice would NOT be sustainable.

The **fifth lesson** flows from the very recent rulings of the Supreme Court. The Supreme Court is telling us that the process and the substance of the peace process must be negotiated within the purview of the Constitution. This is negotiation within the "box". Anything beyond the parameters set by the Constitution is deemed "unconstitutional". This simply indicates that any "out of the box" settlement would require a prior amendment of the Constitution. This brings us back to lesson one. A Constitutional amendment (not revision) is NOT difficult for a government with good social capital and high credibility. In fact, this is the way done in most countries that have successfully negotiated peace agreements.

The **sixth lesson** lays on the "personality" of peace mediators or "brokers". We speak here not only of the impartiality of the mediators but also on their capacity to hold *Forging Ahead Post MOA AD* [3] parties to the process on the basis of their commitments and good will to attain lasting peace. With the peace process between the GRP and the MNLF, we have the Organization of Islamic Conference or OIC that cannot hold any party (either the Philippine Government or the MNLF) to the commitments and goodwill made as specified in the Peace Agreement. Weak brokers make agreements equally weak!

The **seventh lesson** is our capacity to generate international support to the process. The international cooperation, specifically the major political players, makes or breaks any agreement. In fact, their presence and cooperation should not only happen in the post conflict reconstruction but right at the very beginning of the process serving as guarantors of whatever agreement that the protagonists would sign. It is high time to take cognizance that peacemaking is NOT local and simply domestic affairs. In the era of globalization, wars as well as peace are global issues and we are all stakeholders! Where do we proceed given the three (3) over arching issues and the seven (7) lessons drawn from the MOA AD fiasco? I am a "scholastics" by training and school, thus I will present the possible forward agenda by giving you "thesis" for discussion or in the Latin original – called thesis *ad disputandum*.

First Thesis: I believe that any further negotiations or pronouncements in the remaining 15 or so months under the Arroyo administration should be deemed as *"ad interim"* and should no longer aim at a sustainable and enduring peace and development in Southern Philippines.

Second Thesis: That *ad interim* peace agenda should focus on supporting initiatives that will (i) sustain political peace efforts beyond this administration, (ii) address the issue of lawlessness that continue to terrorize communities, (iii) facilitate the return and rehabilitation of the IDPs, and (iv) address some of the glaring inequities in fundamental human development outcomes and standards of living in the ARMM.

Third Thesis: We all need to go back to the drawing board and begin mending the structures, institutions and relationship that were destroyed by corruption, ambitions and the recent but tragic events following the "non-signing" of the MOA-AD. This is the time to rebuild the social capital of both the national and local governments, specifically the ARMM government and to strengthen the much needed social cohesion between and among the various and differing stakeholders to peace. The peace we ardently seek is an enduring peace and development across faiths, cultures and geographical boundaries. In the appropriate time, we shall draw from that wealth of social capital to establish the national consensus required in any peacemaking.

Fourth Thesis: There is life after MOA-AD! I do not believe in beating a dead horse. With the re-constitution of the Philippine Peace Panel now under USEC Rafael Seguis as Chair, I do not see any major obstacle in the resumption of the peace talks since the MILF seems to be open to a new round of peace talks. There is an unfolding blueprint which I believe can serve as a new platform to launch that life after the fiasco of MOA AD. Atty. Camilo Montesa of OPAPP has recently articulated the possible substantive issues that the two panels may tackle in the event of the resumption of the GRP-MILF [4] *Policy Forum* peace Talks. These are the following: the possibility of expanding the peace facilitation, the possibility of discussing all matters together and move towards a comprehensive agreement, the substantive issues must include among others – (1) shared security; (2) actual social and political infrastructures on the ground (ARMM); (3) the economic integration and livelihood development of the region; and (4) the over-arching issue of "Philippine citizenship".

Fifth Thesis: I will posit the possibility of a "united" MNLF-MILF "Negotiating Front" in the renewed peace talks thereby "coinciding" the two trajectories: the Tripartite Review on the Implementation of the 1996 Final peace Agreement and GRP-MILF Peace Process. This will generate a lot of promise and a lot of hope for Southern Philippines. I always believe that the Traditional leaders would sit with the GRP panel and the Ulama would be present as well through the Fronts or within the rank of the Traditional leaders Is this possible…? Well, as a peace advocate for more than 30 years, my hope still springs eternal and I also believe in miracles as well as in magic…!

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GETTING THE BANGSAMORO PEACE PROCESS BACK ON TRACK

From the Philippine Council for Islam and Democracy Roundtable Discussions

After the non-signing of the Memorandum of Agreement on Ancestral Domains (MOA-AD), the Philippine Council for Islam and Democracy (PCID) organized a series of roundtable discussions aimed at understanding the issues arising from the MOA-AD and going beyond the political rhetoric that attended the debates. The first was held at the Linden Suites in Ortigas Center sponsored by The Asia Foundation (TAF) while the Konrad Adenauer Stiftung (KAS) supported the next three RTDs. The RTDs gathered the various stakeholders in Mindanao---civil society, government, the military, peace advocates, the indigenous people, and the academe---in an honest discussion of the possibilities of forging ahead with the peace process in Mindanao given the controversies that erupted as a result of the non-signing of the MOA-AD.

1. After years of difficult negotiations, the peace panels of the Government of the Republic of the Philippines (GRP) and the Moro Islamic Liberation Front (MILF) were set to sign on August 5, 2008 an historic Memorandum of Agreement on Ancestral Domain (MOA-AD). The MOA-AD[1] contained general principles concerning, among others, Bangsamoro identity and rights, the establishment of a genuine self-governance system---Bangsamoro Juridical Entity (BJE), the areas to be placed under the BJE, and the protection and utilization of resources found therein. Those who have invested so much in the peace process including civil society organizations, community leaders as well as the international donor community expressed optimism that the signing would pave the way for the achievement of a just peace in Mindanao. That optimism dissipated when the Philippine Supreme Court issued a temporary restraining order (TRO) against the signing of the MOA-AD on the basis of petitions from some local government officials and a number of national politicians.

[1] "MOA-AD" refers to the final draft of the "Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001."

2. The TRO ignited a national debate on the MOA-AD with some linking it to the "devious" machinations of the Arroyo administration. Sadly, the non-signing of the MOA-AD also set off a series of unfortunate events that led to the outbreak of conflict in Mindanao. Since then, more than 500,000 have been displaced, more than 100 persons killed, and over P130 million damage to infrastructure and agriculture.[2]

3. On October 14, 2008 the Supreme Court issued an 87-page majority decision penned by Associate Justice Conchita Carpio Morales based on an 8-7 vote declaring the MOA-AD "contrary to law and the Constitution." The decision focused on two key issues: (1) that the GRP Peace Panel and Presidential Adviser on the Peace Process (PAPP) violated constitutional and statutory provisions on public consultation and the right to information when they negotiated and later initialed the MOA-AD; and (2) that the contents of the MOA-AD violated the Constitution and the laws.

4. The SC decision also found "grave abuse of discretion" in the government exceeding their authority by agreeing to Paragraph 7 under the Governance strand of the MOA-AD that "virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place" which is (as far as amendments to the Constitution are concerned) a "usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves."

5. Despite the creation of a new peace panel and the appointment of a new peace advisor, recent events do not seem to bode well for peace in Mindanao. With an administration that may be running out of time to effectively put forward an agenda for peace, with both sides seemingly trapped in intractable political positions, and with the Supreme Court declaring the provisions of the MOA-AD contrary to the constitution, it seems that the peace process has been stopped dead on its track. But civil society in Mindanao remains hopeful despite the understandable frustrations. Forums and roundtable discussions participated in by peace advocates continue to produce ideas and proposals to revive the peace process. Some of them are discussed in the following

[2] According to the December 2008 report of the National Disaster Coordinating Council (NDCC).

points.

6. As trust and confidence building measure, the GRP and MILF must return to the negotiating table without any preconditions. Both sides must approach the negotiating table with sincerity and with no hidden agenda. The only agenda is to find a lasting solution to the Moro struggle in Mindanao. Despite fears that nothing substantive can be achieved under the current administration, which to many analysts is just trying to run down the clock (as its term is to end in 2010), peace advocates argue that some minimum deliverables can still be pursued. This includes the cessation of military offensive to allow the displaced and dislocated population to return back to their respective communities. The mechanisms for the ceasefire must also be strengthened and put into place.

7. Several civil society organizations have also suggested the enlistment of the active and direct participation of the United Nations, ASEAN, European Union, the United States, United Kingdom, Australia and other countries, as partners of the Organization of Islamic Conference in facilitating the resumption of negotiations and also to serve as guarantors to any agreement entered into by both sides. This is crucial considering the fact that the MILF, in particular has stated that the Supreme Court decision has made them less inclined to talk to government, as they do not have any guarantee that it will not renege on its commitments again. International guarantors can address this doubt.

8. PresidentGloria Macapagal Arroyo has invited former UK Prime Minister Blair to be an "advisor to the peace process" in Mindanao because of his experience in peace processes. However, Mindanao peace advocates have noted Blair's role in the Iraq war. Blair has, early this year, spoken at forums in Manila and Mindanao. He has commented that we must look at the "larger point" about the Mideast crisis. "There is essentially one battle going on, and it is a battle about Islam," he said noting that there are "two elements in Islam – one which wants to work with the West, and one that does not". Blair said we must "partner with the modernizing andmoderate element" and "make sure those guys win."

9. Drawing from the lessons of past peace negotiations, it was suggested that discussions on the future of peace in Mindanao should include meetings with both houses of the Philippine Congress. Some participants also supported the involvement of representatives from both Chambers of Congress as observers

and/or consultants in future negotiations. It was noted that when there is a need to enact any legislative measure in support for the implementation of any Agreement reached, the executive would have the support of Congress.

10. It is also important for Mindanao, despite its vast diversity, to discover its one voice. There has to be consensus among the people of Mindanao on the direction the peace process needs to take. For this reason civil society organizations are calling for a Mindanao-wide Congress of concerned leaders from socio-civic, religious and political leaders to purposely formulate a comprehensive action plan for the resumption of the peace talks between the GRP and the MILF. During the conduct of the Mindanao Peace Initiative Summit, concerned countries from the OIC, Asia, Europe and the United States as represented by their Embassies must be invited to witness the conference and to mobilize for their support in every way.

11. In relation to the previous suggestion, some peace advocates have called for the creation of a forum where the MNLF and MILF can discuss the possibility of forging a united front in the struggle for a political settlement to the conflict.

12. Several peace advocates have also argued that the national police should play an important role in the pursuit of peace in Mindanao. PCID has been advocating for strengthening the police for the past 5 years. In the face of growing militarization in the region, the Philippine National Police must assert its role in securing the peace in the region including counter-terrorism operations, which is currently being performed by the military. As the police are civilian in character they are in a better position to gather local intelligence and hence provide for peace and order. The military should be left to its role in ensuring external defense instead of doing local police work. While it should be admitted that the PNP lacks the efficiency and the capacity at this point, one participant suggested that this should in fact be the focus of Balikatan exercises with the US. Instead of concentrating on the military---something that has always invited public criticisms---these exercises should be intended to increase the capacity of the police to address internal security concerns.

13. Reflecting on the mishandling of the MOA-AD, many have suggested the use of a more effective social marketing strategy to increase the peace constituency. Activities aimed at promoting peace must be directed to non-

Mindanao residents too. It is in this sense that the idea of an all-Mindanawon peace panel need to be reconsidered. It is important to engage, even in the peace process itself, peace advocates outside of Mindanao to ensure that others are on board once an agreement has been reached. The peace panel, in fact, should bear in mind that they have to reach out to the traditional and prospective oppositors of the peace agreement. Based on past experiences, the panel must meet the oppositors head on and clarify points of disagreement. This has to be done early on so as not to sabotage the gains of the peace negotiations. In the same vein, it has to be clarified that consultations should not mean agreeing with those being consulted. Some have the employed the standard that they are consulted only when the consultations agree with their opinions. Consultations are democratic mechanisms to ensure that all sectors have substantively participated in the process; it is not a mechanism for policy paralysis.

SPECIFIC RECOMMENDATIONS FROM MKFI AND PCID:

1. One of the critical lessons of the past peace processes is that achieving a political settlement with armed groups, while an important element in reducing the conflict, cannot solve the root causes of conflict in the Southern Philippines. Government as well as development partners must focus on empowering the people of Mindanao, specifically the Ulama and Aleemat as well as civil society organizations.

2. This has been the cornerstone of the advocacies of the Philippine Council for Islam and Democracy and the Magbassa Kita Foundation, Inc. PCID and MKFI have endeavored to help achieve peace and development in Mindanao within the context of genuine democracy. Development partners should increasingly focus their support towards civil society organizations that seek to empower the people of Mindanao. In the past two years, for instance, PCID has successfully provided a platform for Muslim religious leaders (the Ulama) to unite and come up with an organization that is envisioned to realize their potential as catalyst for reforms in Muslim communities. What needs to be done now is to help these efforts in terms of sustainability and provide assistance to these key sectors in terms of capacity building in democratization, human rights advocacy and protection, electoral reforms, and development advocacies. Based on this success, PCID is now preparing to

organize the women. And in particular the Muslim women religious leaders (the Aleemat). Both the Ulama and the Aleemat can become important partners in peace and democracy in Mindanao.

3. There is also a need to provide a venue for the strengthening of the voice of the marginalized. For this purpose, PCID is set to put up a fellows program intended to provide support for Muslim intellectuals and scholars that will allow them to articulate the perspective of the Muslims within the national discourse. The war against terror cannot be won simply on the battlefield but in the fierce clash for the minds of Muslims. This is one of the reasons why PCID is increasingly being seen as, and is in fact moving towards becoming, a think tank. Through research and advocacy, PCID hopes to demonstrate that democracy can work in areas like the Southern Philippines and that it is the people that can make that democracy work.

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