

# THE LEGAL SIGNIFICANCE OF THE MOA ON THE BANGSAMORO ANCESTRAL DOMAIN\*

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## I. INTRODUCTION

No other official document perhaps has excited as intensely or as emotionally as many people as the MOA on the Bangsamoro Ancestral Domain. Some thought it is a sellout of a portion of the Philippine territory, others a move on the sly to open the door for charter change, including extension of the President's term, while still others thought it is part of America's strategic planning in the face of China's growing influence in the region.

Those advocating signing of the MOA, on the other hand, say it is nothing but a piece of paper requiring approval in a plebiscite of the affected areas in Southern Philippines (Mindanao, Palawan, and Sulu) and until signed and submitted for approval should not alarm or unduly concern anyone.

## II. MUCH ADO ABOUT NOTHING?

Depending on their perception and perspective, the MOA is either a proposed treaty, a proposed amendment to the law<sup>1</sup> creating the Autonomous Region in Muslim Mindanao, or a proposed amendment to the Constitution, or an attempt on the part of a foreign power to strengthen its position in Southeast Asian geopolitics.

Whatever it is, if it is any of these, the MOA certainly cannot just be ignored as a piece of paper containing a list of what the parties intend to do. I cannot imagine any person, much less the government, to agree to take part in an idle ceremony of signing a mere list of things wished for, to be

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<sup>1</sup> Rep. Act No. 6734, as amended by R.A. No. 9054.

done with all the solemnity of signing a treaty in a foreign country with the attendance of the Secretary of Foreign Affairs of the Philippines and the Minister of Foreign Affairs of Malaysia, the host country. The fact is that the MOA is a contract, where the "parties bind themselves to agree to give something or to render some service."<sup>2</sup>

One does not make a contract, even one that needs the ratification of one's principal for it to be binding and effective, if one has no intention to be bound by it since it is the underlying presumption is that the parties, upon agreeing to the terms of their agreement, have every intention to carry out the provisions of the agreement irrespective of the issue of whether or not the MOA is any legally recognizable form or instrument. In other words, the MOA is something, and excitement about it is not about nothing but about something, something that is important.

First, if the MOA is a proposed treaty, the question is, is the government negotiating a treaty with an independent state that has "the capacity to be bearer of rights and duties under international law"?<sup>3</sup> Is the "Bangsamoro nation," called the Bangsamoro Juridical Entity in the MOA, being recognized as a body politic possessing the attributes of a sovereign state? If so, then the assumption is that the BJE is a state, which is perhaps semi-independent, and therefore the MOA, as any other treaty, must be ratified by the President of the Philippines and concurred in by 2/3 vote of all the members of the Senate in accordance with the Constitution.<sup>4</sup> The problem is that this is not provided in the MOA. What the MOA provides is that our "legal framework,"<sup>5</sup> assuming that that means the Constitution, should be amended instead to make it conform to the provisions of the MOA and the Constitution or organic act of the BJE, called the "Comprehensive Compact."<sup>6</sup>

Second, if the MOA is a proposed amendment to the Organic Act for the ARMM, it must be enacted into law after appropriate consultation with the local government units and be approved by a majority of the constituent units in accordance with the Constitution.<sup>7</sup> However, this is not

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<sup>2</sup> CIV. CODE, art. 1350

<sup>3</sup> A manual in international law, 6<sup>th</sup> Ed., 1976 p. 53

<sup>4</sup> CONST. art. VII, § 21.

<sup>5</sup> Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement to as the "Parties" to this Agreement (hereinafter "MOA"), Governance ¶ 7.

<sup>6</sup> *Id.*

<sup>7</sup> CONST. art. X, § 18.

provided either in the MOA. In fact the Constitution is not even mentioned in the MOA.<sup>8</sup>

Third, if the MOA is an agreement to submit a proposed amendment or revision of the Constitution either to Congress, acting as a constituent assembly,<sup>9</sup> or to a constitutional convention called by Congress,<sup>10</sup> and then submit the proposed amendment to a plebiscite held throughout the country and not only in the constituent local government units,<sup>11</sup> again, this is not provided in the MOA.

The irony is that while the government panel is talking of a document that is incomplete and not effective for both sides until ratified or approved in accordance with its constitutional processes,<sup>12</sup> the MILF panel is talking of a completed document that is already effective once signed although still to be ratified in accordance with the "internal processes" of the government.<sup>13</sup> The MILF specifically points out to "the reference of one Justice that things that are unconstitutional per se would not immediately be said as incapable of being implemented because the Constitution does have Article 17 which allows itself to be amended."<sup>14</sup> It seems the two panels are talking on totally different wavelengths, thus preventing a meeting of their minds!<sup>15</sup>

So what do I think the MOA is?

### III. THE MOA IS AN INSTRUMENT OF RECOGNITION CUM TREATY

Two-in-one the MOA is an instrument of recognition and a proposed treaty. As an instrument of recognition of the Bangsamoro as a semi-independent state, the MOA has instant effect once signed by the parties, although arguably the initials of the chairmen of the two panels, representing the two parties, might be considered as fully effective as their full signatures. The state recognized may be likened to the Philippines under

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<sup>8</sup> Supra note 5.

<sup>9</sup> CONST. art. XVII, § 1

<sup>10</sup> CONST. art. XVII, § 1

<sup>11</sup> CONST. art. XVII, § 4 ¶ 1

<sup>12</sup> Amita Legaspi, Negotiator's initials could bind gov't to honor MOA with MILF available at <http://www.gmanews.tv/story/115521/Negotiator-initials-could-bind-govt-to-honor-MOA-with-MILF> August 22, 2008.

<sup>13</sup> Johanna Sisante, GRP, MILF Panel members say Charter must be amend available at <http://www.gmanews.tv/story/115002/GRP-MILF-panel-members-say-Charter-must-be-amended> Aug. 10, 2008.

<sup>14</sup> *Id.*

<sup>15</sup> CIV. CODE, art. 1315 provides: Contracts are perfected by mere consent, and from that moment the parties are bound not only to the fulfillment of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law.

the Commonwealth regime,<sup>16</sup> which belonged to the United States of America as an unincorporated territory<sup>17</sup> and subject to its sovereignty and control<sup>18</sup> although allowed limited freedom to enter into relations with other counties.<sup>19</sup>

The BJE is contemplated, at least for now, to be part of the Philippine territory,<sup>20</sup> entitled as such to the protection of the Philippine government.<sup>21</sup> In that sense, what Stanley Karnow said to describe Philippine autonomy during the Commonwealth era applies to the BJE's independence: "dependent independence."<sup>22</sup> Or the Bangsamoro may be likened to what it claims to be its former status was as a state under the suzerainty of the sultanates which were "nation-states in the modern sense,"<sup>23</sup> according to the MOA.

The premise of the MOA is that the BJE is a semi-independent state. That is the reason the MOA does not purport to be made in accord with the Constitution or the Organic Act for the ARMM.<sup>24</sup> Any contrariety between the Constitution and the MOA – and there are many – must be removed by amending the Constitution and the laws to bring them in conformity with the MOA.<sup>25</sup> Talk of the Constitution – that does not apply to this document. This view is reinforced by the fact that the MOA was set for the signing "in the presence of" the Secretary of Foreign Affairs and the Minister of foreign Affairs of Malaysia where the ceremony was to be held on August 5, 2008 attended by representatives of other countries.

Let me now consider the provisions of the MOA.

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<sup>16</sup> The Philippine Independence Act (Tydings – Mcduffie Act of 1934).

<sup>17</sup> *Id.* at sec. 6 ¶ 3.

<sup>18</sup> *Id.* at sec. 7.

<sup>19</sup> *Id.*

<sup>20</sup> MOA, Concepts and Principles ¶ 6.

<sup>21</sup> *Id.*

<sup>22</sup> IN OUR IMAGE 323 (1989).

<sup>23</sup> MOA, Concepts and Principles ¶ 4

<sup>24</sup> While the formation of the BJE has some reference to the existing legal framework, it remains silent as to which framework it refers to. As a whole, it refrains from mentioning the constitution or the existing law establishing the ARMM.

<sup>25</sup> MOA, Governance ¶ 7.

#### IV. SALIENT FEATURES OF THE MOA

(1) The MOA deals with three subjects: territory, resources, and governance. I will discuss the salient provisions concerning each and their underlying “Concepts and Principles.”

(2) The Moros and indigenous peoples, who are natives or original inhabitants of Mindanao, Palawan, and Sulu at the time of the Spanish conquest and their descendants, constitute a distinct group known as the Bangsamoros.<sup>26</sup>

(3) Their territory embraces the regions of Mindanao, Sulu, and Palawan and is composed of the local government units listed in Annexes A and B of the MOA. Its “core” is the geographic area of the ARMM. This territory consists of ancestral, communal and customary lands, maritime, fluvial and alluvial domains, the aerial domain, the air space above and the natural resources.<sup>27</sup>

(4) This territory is the homeland of the Bangsamoro people. Ownership is “vested exclusively” in them “by virtue of their prior rights of occupation . . . since time immemorial” as the “first politically dominant occupants.”<sup>28</sup> The territory “does not [therefore] form part of the public domain” of the Philippines under Art. XII, Sec. 2 of the Constitution,<sup>29</sup> which belongs to the Philippines pursuant to the Regalian Doctrine.

(5) As owners of the ancestral domain, the Bangsamoro people, organized as the Bangsamoro Juridical Entity, have jurisdiction over the development, utilization, and disposition of all natural resources of the internal waters which extend from the coastline of the BJE up to 15 kilometers of the baselines of the Philippines. With regard to the mineral resources of the territorial sea, which extends beyond the baselines, the jurisdiction and authority of the BJE is concurrent or joint with that of the Philippine government.<sup>30</sup> The profit split from production shall be shared between the government and the BJE 75% to 25% in favor of the BJE “as the party having control within its territorial jurisdiction.”<sup>31</sup>

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<sup>26</sup> MOA, Concepts and Principles ¶ 1.

<sup>27</sup> MOA, Territory ¶ 1; Concepts and Principles ¶ 13

<sup>28</sup> MOA, Concepts and Principles P ¶ 2.

<sup>29</sup> MOA, Concepts and Principles ¶¶ 3-4; Territory ¶ 1.

<sup>30</sup> MOA, Territory ¶ 2 (f)-(g).

<sup>31</sup> MOA, Resources ¶¶ 5-6.

(6) The government undertakes “to conduct and deliver, using all possible legal measures,” to hold a plebiscite in the Bangsamoro territory within 12 months after the signing of the MOA for the approval of enlarged territory consisting of the present ARMM and the additional local government units listed in Annexes A and B of the MOA.<sup>32</sup> This is very vague, if not obfuscating, but it seems to mean in clear language that the government obliges itself to amend the organic act of the ARMM and, if necessary, the Constitution, to suit the MOA.

(7) The Bangsamoro people have a right to “self governance” based on ancestral territoriality exercised by them as protectorates of the sultanates and the “Pat a Pangampong ku Ranaw” which had the attributes of modern nation-states.<sup>33</sup>

(8) As a juridical entity, the Bangsamoro nation has a right to enter into economic cooperation and trade relations with foreign countries, establish trade missions in such countries, and participate in international meetings and events, such as the ASEAN and the specialized agencies of the United Nations.<sup>34</sup> For its part, the government will take steps to ensure the effective exercise of this power of the BJE in foreign trade and economic relations.

(9) The BJE can organize its own institutions, including the civil service, electoral, financial, banking, education, legislation, legal, economic, and police internal security force, judicial system and correctional institution.<sup>35</sup>

## V. THE BJE AS A SEMI INDEPENDENT STATE

As I said before, the MOA is an instrument of recognition of a semi-independent state “the ultimate objective [of which] is to secure the identity and posterity of [the Bangsamoros], 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”<sup>36</sup> to enable them to

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<sup>32</sup> MOA, Territory ¶ 2 (d).

<sup>33</sup> MOA, Concepts & Principles ¶ 4.

<sup>34</sup> MOA, Resources ¶ 4.

<sup>35</sup> MOA, Governance ¶ 8.

<sup>36</sup> MOA, Concepts & Principles ¶4; Governance ¶ 7.

realize their "humanitarian and economic needs as well as their political aspirations."<sup>37</sup>

The entity so recognized is a body politic organized by common consent for mutual defense and mutual safety and to promote the general welfare. The picture presented by the MOA fits into the accepted definition of a state as "a nation, its people occupying a definite territory, politically organized, exercising by means of its government will over the individuals within its territory and maintaining a separate international identity."<sup>38</sup> At the risk of descending into pedantry, it may be said that there is in the Bangsamoro Juridical Entity, or BJE, all the elements of a state, namely, people, territory, sovereignty, and government.<sup>39</sup>

It is, indeed, true that the BJE is not fully independent or sovereign and indeed it is dependent on the Philippine government for its external defense and only lacks foreign recognition, at least at the present time. Nonetheless, it is a state as the Philippines was a state during the Commonwealth period, which was not a part of the territory of the United States although subject to the latter's sovereignty. As a state, it was a signatory to several treaties and international agreements, such as the Charter of the United Nations of January 1, 1942, and a participant in several conferences such as that held in Bretton Woods, New Hampshire, on July 1-22, 1944, on the GATT. As the U.S. Supreme Court noted in *Hooen & Allison Co. v. Evatt*, the adoption of the 1935 Constitution prepared the way for the complete independence of the Philippines and the government organized under it had been given, in many aspects, by the United States "the status of an independent government which [was] reflected in its relation as such with the outside world."<sup>40</sup> Similarly the Supreme Court of the Philippines held in *Laurel v. Misa* that "the Commonwealth of the Philippines was a sovereign government although not absolute."<sup>41</sup>

Given this description of the BJE as a dominant group with a distinct culture, socio-economic structure, and religion, pursuing their own political aspirations, and occupying a definite territory over which they have exclusive dominion, possessing a government with its own financial and monetary and banking systems, and carrying on foreign trade relations, the

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<sup>37</sup> MOA, Concepts & Principles ¶ 2.

<sup>38</sup> *Collector of Internal Revenue v. Campos Rueda*, 42 SCRA 23 (1971).

<sup>39</sup> See, e.g., VICENTE G. SINCO, *PHILIPPINE POLITICAL LAW* 4 (1962); ENRIQUE M. FERNANDO, *CONSTITUTION OF THE PHILIPPINES* 54 (1978); ISAGANI CRUZ, *PHILIPPINE POLITICAL LAW* 14-18 (1993).

<sup>40</sup> 324 U.S. 652, 676 (1945).

<sup>41</sup> 77 Phil. 856, 863 (1947).

signing of the MOA by the Philippine government could constitute an act of recognition of an independent state.<sup>42</sup> Such recognition would be beyond the power of review of the courts. The MOA, in short, could be the instrument of recognition of the BJE under international law.

## VI. THE MOA AS A TREATY

This is the reason why unlike the 1976 Tripoli Agreement with the MNLF<sup>43</sup> and the Tripoli Agreement of 1996,<sup>44</sup> the MOA makes no pretense at being in accord with the Philippine Constitution. It stands in sharp contrast to the 1976 agreement which provides for the establishment of autonomy in Southern Philippines “within the realm of the sovereignty and territorial integrity of the Republic of the Philippines.”<sup>45</sup> The MOA also stands in sharp to the 1996 peace agreement with the MILF, which provides that “any conflict in the interpretation of this Agreement shall be resolved in the light of the Philippine Constitution and existing laws.”<sup>46</sup>

In contrast, under the MOA, it is the Philippine government which is required to make the necessary changes in its “legal framework” to make it conform to the MOA. The MOA seems to be saying that, as far as the MILF is concerned, everything is done (a “done deal”), and it is all up to the Philippine government to change its Constitution and laws to make them conform to the provisions of the MOA and the “Comprehensive Compact” on the structure of the government of the BJE.

## VII. THE MOA, A NEGATION OF THE SUPREMACY OF THE CONSTITUTION

Speaking of the constitutionality of the MOA, definitely it is unconstitutional even if approved as an amendment to the Organic Act of the ARMM.<sup>47</sup> Mention has been made of the fact that under the MOA the

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<sup>42</sup> SINCO, *supra* note 18 at 298-300; JOVITO R. SALONGA & PEDRO L. YAP, PUBLIC INTERNATIONAL LAW 94-96 (1958).

<sup>43</sup> The Tripoli Agreement of 1976, An Agreement Between the Government of the Philippines and Moro National Liberation Front with the Participation of the Quadripartite Ministerial Commission Members of the Islamic Conference and the Secretary General of the Organization of Islamic Conference.

<sup>44</sup> The Philippine Peace Agreement, The final agreement on the implementation of the 1976 Tripoli Agreement between the Government of the Republic of the Philippines (GRP) and the Moro National Liberation Front (MNLF) with the participation of the Organization of Islamic Conference Ministerial Committee of Six and the Secretary General of the Organization of Islamic Conference.

<sup>45</sup> *Supra* note 46 at ¶ 15

<sup>46</sup> *Supra* note 47 at ¶ 53

<sup>47</sup> Rep. Act No. 6734, as amended by Rep. Act No. 9054.



BJE is given jurisdiction (control) over the utilization and disposition of the natural resources<sup>48</sup> of the land and the natural resources of the internal waters which extend from the coastline of the BJE up 15 kilometers, and “joint jurisdiction,” with the government over the utilization and disposition of the natural resources of the territorial waters which extend from the outer limits of the internal waters up to the baselines of the Philippines. That is definitely contrary to Article XII, Sec. 2 of the Constitution, which provides that all lands of the public domain, the waters, minerals, coal, petroleum, and other mineral oils, forces of potential energy, fisheries, timber, wild life, flora and fauna and other natural resources and the right to explore, develop, or use them belong to State.

But that is just the point. Under the MOA the government acknowledges that the ancestral domain and ancestral lands belong exclusively to the BJE. In one case,<sup>49</sup> six Justices expressed the view that while the State has sovereignty over the territory of the Philippines, it does not have dominion over all the lands embraced within the territory because ancestral domains and ancestral lands do not form part of the public domain but belong instead to the indigenous people by virtue of native title. The view of the six Justices of course lacked the concurrence of two more Justices to constitute the majority opinion in that case. Now by declaring that the ancestral domain and ancestral lands of the Bangsamoro people do not form part of the public domain, the MOA settles the meaning of the Constitution by fiat.

More significantly, under Article I of the Constitution, the Philippines has sovereignty over the entire territory defined in that Article. That is the absolute power to govern persons and things within its territory, including private lands. Under the MOA, the sovereignty of the State is compromised by declaring that with respect to the Bangsamoro ancestral domain and ancestral lands, the “relationship between the Central Government and the BJE shall be associative characterized by shared authority and responsibility.”<sup>50</sup> That, in international law, is the condominium of two states (the Philippines and the Bangsamoro Juridical Entity) over a territory (the ancestral domain and ancestral lands). Both attributes of the Philippines statehood – its dominium (or ownership) and its imperium (or authority) -- are thus qualified in the MOA.

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<sup>48</sup> MOA, Resources ¶¶ 1-2.

<sup>49</sup> *Cruz v. Secretary of Environment and Natural Resources*, 347 SCRA 18 (2000).

<sup>50</sup> MOA, Governance ¶ 4.

The first thing a student learns in law school is that the Constitution is the supreme law, anything contrary to it being void. This is the principle of the supremacy of the Constitution over official action. Its rationale was explained early in 1803 in *Marbury v. Madison*<sup>51</sup> by the U.S. Supreme Court, through the Chief Justice, thus:

Certainly, all those who have framed constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void.<sup>52</sup>

But, under its terms, the MOA cannot be void for being contrary to the Constitution. It is in fact irrelevant to ask whether the MOA is not unconstitutional. So that it will not be unconstitutional, the terms itself requires that the Constitution be amended so as to harmonize it to the MOA. Adjust the Constitution to accommodate the MOA, not the MOA to make accord with the Constitution. Even the ancient sophists could not have concocted such a theory to go around the doctrine of the supremacy of the Constitution.

## VII. THE SIGNIFICANCE OF RECOGNIZING THE BJE AS A SEMI INDEPENDENT STATE

The only way to save the MOA from invalidity is to consider it an instrument for the recognition and declaration of the independence of the BJE. But are we willing or minded to do that in the name of peace in Mindanao? Once signed, the MOA will immediately be effective, for under our system of government the recognition of a state is the sole prerogative of the President.<sup>53</sup> Its exercise is a political question, which is beyond the power of judicial review. Insistence on review by the courts of the act of the President can only result in a reprise of *Javellana v. Executive Secretary*,<sup>54</sup> in which it was held that whether or not the 1973 Constitution had been effectively ratified by the people in so-called citizens assemblies was a political question, giving the Court no alternative but to dismiss petitions raising this question leaving "no further judicial obstacle"<sup>55</sup> in considering the Constitution in force and effect.

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<sup>51</sup> 1 Cranch (5 U.S.) 137 (1803).

<sup>52</sup> *Id.* at p.180.

<sup>53</sup> Author's opinion

<sup>54</sup> 50 SCRA 30 (1973).

<sup>55</sup> *Id.* at 141.