COMMENT:

A CRITICAL VIEW OF THE SUPREME COURT DECISION ON THE MOA-AD FROM THE PERSPECTIVE OF THE MINDANAO PEACE PROCESS*

Soliman M. Santos, Jr.[**]

I. PREFATORY REMARKS

> *"You have stopped the Memorandum of Agreement on Ancestral Domain (MOA-AD) before the Supreme Court but not the armed conflict in Mindanao."*[1]

If only there could also be a Temporary Restraining Order (TRO) on that armed conflict in Mindanao, but it seems that the judicial process which has been applied to the peace negotiations cannot or will not be applied to military operations. It was the prestigious International Crisis Group (ICG), and not the Moro Islamic Liberation Front (MILF), that had on 23 October 2008 come out with its briefing on the Philippines entitled "The Collapse of Peace in Mindanao" with its lead paragraph reading thus: "A new Supreme Court ruling has ended hope of a peaceful resolution in the near future to the decades the old conflict between the MILF and the Philippine government."[2] Whether this dire prognosis will indeed come to pass, as the months since then seemed to indicate, remains to be finally seen.

The Supreme Court (SC) majority unfortunately did not listen to muffled voices of the aggrieved Bangsamoro, whether inside or outside the case, when it declared in *Province of North Cotabato v. Republic of the Philippines*

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[1] MILF to Senator Mar Roxas on Oct. 19, 2008 in the MILF website: www.luwaran.net.

[2] International Crisis Group, *The Collapse of Peace in Mindanao*, Oct. 23, 2008, *available at* www.crisisgroup.org.

Peace Panel on Ancestral Domain (hereinafter "Decision")[3] that the initialed but unsigned Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 (MOA-AD) between the peace panels of the Government of the Republic of the Philippines (GRP) and the MILF as "contrary to law and the Constitution". Never mind the MILF itself, whose "non-joinder" was considered "fatal" by Justice Presbiterio Velasco, Jr. in his dissent.[4] 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 the Consortium of Bangsamoro Civil Society (CBCS)-Bangsamoro Women Solidarity Forum, Inc. (BWSF), were not (allowed to be) heard during any of the three oral argument hearings. Their Memoranda (including a major Supplement by CBCS-BWSF) and arguments were not even referred to in the Decision, showing that these were probably not even read. The only two and separate Motions for Reconsideration filed by MUSLAF and CBCS-BWSF were summarily denied barely a week after by a one-page *pro forma* Resolution without discussion.

This article seeks to let those muffled voices be heard at least by Filipino lawyers, judges, law professors and students, and draws mainly from the Motion for Reconsideration of CBCS-BWSF and secondarily from the Supplement to their Memorandum.[5] We shall proceed to argue and show that the SC Decision's declaration of the MOA-AD as "contrary to law and the Constitution" is too sweeping as well as unnecessary, 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.

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[3] Province of North Cotabato v. Republic of the Philippines Peace Panel on Ancestral Domain (GRP), G.R. No. 183591, 568 SCRA 402, Oct. 14, 2008 (Carpio-Morales, J.) (hereinafter "North Cotabato").

[4] *Id.* at 663 (Velasco, J., *dissenting*).

[5] The author had the main hand in drafting the said Motion for Reconsideration and Supplement to the Memorandum of CBCS-BWSF in cooperation with their Bangsamoro counsels of record, Atty. Raissa H. Jajurie of Sentro ng Alternatibong Lingap Panligal (SALIGAN) and Atty. Laisa Masahud Alamia of the Bangsamoro Lawyers' Network (BLN).

- 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 overstated, 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, we hope to further illumine the issues by devoting the rest of the discussion 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 mandate for peace. Still under constitutional parameters, we deal specially with the principles of sovereignty and self-determination, which are most relevant to the GRP and MILF, respectively. Our final remarks shall include an explanation of a warranted "Deviation from the MNLF Model of Pursuing Peace with Rebels."[6]

We shall no longer belabor the issues of mootness, prematurity/ripeness, and justiciability. This does not, however, mean that we are conceding these issues. For on the contrary, we fully support the seven (7) dissenting votes for dismissal of the petitions and petitions-in-intervention. We note with favor in particular Justice Antonio Nachura's remark in his *dissent* that "grave abuse of discretion can characterize only consummated acts (or omissions), not an 'almost (but not quite) consummated act'."[7] Also of note is Justice Presbiterio Velasco's dissenting statement that "the challenged agreement is an unsigned document... As an unsigned writing, it cannot be declared unconstitutional, as some of my colleagues are wont to do."[8] Will this now apply to all draft peace documents? The MOA-AD at issue was a *merely initialed* but unsigned final *draft* of a *mere memorandum* of agreement on consensus points on *merely one aspect* of an *unfinished* peace negotiation.

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[6] North Cotabato, at 576.
[7] *Id.* at 697.
[8] *Id.* at 670-71

II. SUBSTANTIVE CONSTITUTIONALITY

A. Peace Agreements and Constitution-Making

The Decision, to its credit, 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:

> As the experience of nations which have similarly gone through internal armed conflict will show, however, peace is rarely attained by simply pursuing a military solution. Oftentimes, changes as far-reaching as a fundamental reconfiguration of the nation's constitutional structure is required...
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> In the same vein, Professor Christine Bell, in her article on the nature and legal status of peace agreements, observed that the typical way that peace agreements establish or confirm mechanisms for demilitarization and demobilization is by linking them to **new constitutional structures** addressing governance, elections, and legal and human rights institutions.
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> ... If the President is to be expected to find means for bringing this conflict to an end and to achieve lasting peace in Mindanao, then she must be given the leeway to explore, in the course of peace negotiations, solutions that may require changes to the Constitution for their implementation. Being uniquely vested with the power to conduct peace negotiations with rebel groups, the President is in a singular position to know the precise nature of their grievances which, if resolved, may bring an end to hostilities.
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> 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....
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> 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.

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> 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**.[9]

In other words, 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. The Separate Dissenting Opinion of Justice Minita Chico-Nazario best appreciates this kind of "thinking outside the box":

> ...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.
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> Peace negotiations are never simple. If neither party in such negotiations thinks outside the box, all they would arrive at is a constant impasse....
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> It must be noted that the Constitution has been in force for three decades now, yet, peace in Mindanao still remained to be elusive under its present terms. There is the possibility that the solution to the peace problem in the Southern Philippines lies beyond the present Constitution. Exploring this possibility and considering the necessary amendment of the Constitution are not *per se* unconstitutional. The Constitution itself implicitly allows for its own amendment by describing, under Article XVII, the means and requirements therefor....[10]

The Decision, again to its credit, touches on peace-building and constitution-making by quoting from an American law journal article:

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[9] *Id.* at 502-06.
[10] *Id.* at 659-61.

> "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."[11]

And to perhaps highlight that the "unthinkable" is "not (necessarily constitutionally) impossible" (to use the words of Justice Adolfo Azcuna during the oral argument of 15 August 2008), the Decision states 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...."[12] In other words, the constituent power of the sovereign people trumps even the sacrosanct constitutional principle of territorial integrity.

We have taken pains to lay down the foregoing discourse because it 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 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. The two levels are related because they must be handled basically consistent with each other, either way – meaning either "thinking outside the box" or "thinking within the box."

Regarding the first strategic level of not "boxing in" future peace negotiations, this might not be as clear as indicated in the afore-quoted discourse because of the Decision'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" indicated in the afore-quoted discourse. Stated otherwise, the dispositive portion is "incongruous" (with apologies to Justice Dante Tinga) with that crucial discussion in the Decision.[13] The whole lengthy discussion in the Decision on the second substantive issue of the proposed MOA-AD's content "being inconsistent with the Constitution and laws" also goes against that grain, but we shall address the said issue subsequently.

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[11] *Id.* at 503, *citing* Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663 (2006).

[12] *Id.* at 518.

[13] *See id.* at 502-06.

There are also some separate opinions which take a "thinking within the box" tenor which are not in accord with the afore-quoted discourse of the Decision. For example, Justice Ruben Reyes in his Separate Concurring Opinion notably admonishes: "Negotiate within the Constitutional bounds.... any negotiation it enters into, even in the name of peace, should be within the parameters of the Constitution."[14] Of similar tenor is the Chief Justice Reynato Puno's Separate Concurring Opinion: "In other words, the President as Chief Executive can negotiate peace with the MILF but it is peace that will ensure that our laws are faithfully executed.... While a considerable degree of flexibility and breadth is accorded to the peace negotiating panel, the latitude has its limits – the Constitution."[15]

At this point, we are reminded of the relevant advice from University of the Philippines Sociology Professor and Supreme Court Centenary Lecturer Randy David, the same lead petitioner in *David vs. Macapagal Arroyo*,[16] which is perhaps the most oft-cited jurisprudence in the Decision and the Separate Opinions. He had written, on two different occasions:

> The process of decisively correcting a historic injustice might begin however with a firm resolve by the Philippine government to recognize the Moro people's right to determine their own path to development. This means, in the first instance, the readiness on the part of government to allow a wide latitude for institutional experimentation in the region, instead of the constant invocation of constitutional limits as a warning against insolent initiatives.[17]

> ....constitutional obstacles that that have needlessly prevented the exploration of more creative approaches to the Mindanao problem... constitutional pragmatism reminds me of John Dewey's insight: "The belief in political fixity, of the sanctity of some form of state consecrated by the efforts of our fathers and hallowed by tradition, is one of the stumbling blocks in the way of orderly and directed change; it is an invitation to revolt and revolution."[18]

We respectfully submit that those words of wisdom from Prof. Randy David have more important bearing on these cases at bar than the ruling on exceptions to the moot and academic principle in the *David* Decision. We hope that such thoughts like David's can find resonance in

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[14] *Id.* at 631-32 (Reyes, J., *concurring*).
[15] *Id.* at 583 (Puno, C.J., *concurring*).
[16] G.R. No. 171396, 489 SCRA 160, May 3, 2006.
[17] Randolf David, *The Quest for Difference*, PHIL. DAILY INQUIRER, Jan. 29, 1999, at 7.
[18] Randolf David, *Robin Padilla and the Mindanao Question*, PHIL. DAILY INQUIRER, Apr. 2, 2000, at 7.

the Court's careful study of and deliberation on the Motions for Reconsideration.

To return to the thread of our discussion, the Separate Concurring Opinion of Justice Consuelo Ynares-Santiago appears to be most particularly keen on prohibiting and permanently enjoining "any similar instrument" to the aborted MOA-AD, or "negotiating, executing and entering into a peace agreement with terms similar to the MOA-AD."[19] In effect, "similar" here would be anything that "thinks out of the box" of existing provisions of the Constitution and national laws.

In contrast to that form of "boxing in" is the "keeping options open" view in the Separate Dissenting Opinion of Justice Chico-Nazario:

> Moreover, I deem it beyond the power of this Court to enjoin the Executive Department from entering into agreements similar to the MOA in the future, as what petitioners and other opponents of the MOA pray for... A decree granting the same, without the Court having seen or considered the actual agreement and its terms, would not only be premature, but also too general to make at this point. It will perilously tie the hands of the Executive Department and limits its options in negotiating peace for Mindanao.[20]

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 problem, like the highly centralized unitary structure of government, among other constitutional obstacles to better Bangsamoro self-determination. **Unfortunately, the Decision does not make this crucial point clearer in the face of its own mixed or even wrong signals.** In ruling that respondents "may not preempt" the sovereign people or for that matter Congress in exercising constituent powers,[21] *neither should the Court pre-empt the latter from acting on constitutional proposals as may arise from peace negotiations.*

B. The Proposed MOA-AD's Contents vis-à-vis the Constitution

Given the foregoing discussion showing that the Decision itself recognizes that peace negotiations with rebel groups to resolve armed conflict may require solutions going beyond the present Constitution, the

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[19] North Cotabato, at 601 (Ynares-Santiago, J., *concurring*).
[20] *Id.* at 658 (Chico-Nazario, J., *dissenting*).
[21] *Id.* at 518.

fact that the proposed MOA-AD's contents 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," or more precisely their respective "boxes."

Unless "thinking outside 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 MOA-AD as "unconstitutional." This is actually the logic of the foregoing afore-quoted discourse in the Decision[22] which it should follow to a logical conclusion but which it does not when it disposes of the MOA-AD as "unconstitutional." This deviation from that logical course can be traced to the Decision's framing of the second substantive issue: "Do the contents of the MOA-AD violate the Constitution and the laws?"[23] This actually begs the question, and is certainly loaded. It then becomes a matter of simply comparing the "outside the box" contents of the (merely proposed) MOA-AD vis-à-vis the Constitution and the laws, and then because of palpable "inconsistency" or "irreconcilability," concluding that there is "violation" and therefore "unconstitutionality."

This is what has been done in at least two Separate Concurring Opinions, that of Justice Antonio Carpio who lists 36 affected constitutional provisions,[24] and of Associate Justice Ynares-Santiago who lists 15 affected constitutional and statutory provisions.[25] The Decision points out the "irreconcilability" with the present Constitution and laws of the proposed MOA-AD – "*not only* its specific provisions but the very concept underlying them, namely the associative relationship envisioned between the GRP and the BJE."[26]

But other than the form taken by the proposed MOA-AD, something similar might be pointed out too as regards Senate Joint Resolution No. 10 (SJR 10)[27] of Senator Aquilino Pimentel, Jr. to Convene the Congress into a Constituent Assembly for the Purpose of Revising the Constitution to Establish a Federal System of Government. SJR 10

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[22] *See id.* at 502-06.

[23] *Id.* at 465.

[24] *Id.* at 529-43 (Carpio, J., *concurring*).

[25] *Id.* at 589-94 (Ynares-Santiago, J., *concurring*).

[26] *Id.* at 521.

[27] Joint Resolution to Convene the Congress into a Constituent Assembly for the Purpose of Revising the Constitution to Establish a Federal System of Government, Apr. 23, 2008.

purports to be "the ultimate solution" not only to the problematic unitary system but also to the Bangsamoro problem. In fact, SJR 10 would entail an even more drastic revision a total of no less than 154 revisions/amendments -- of the Constitution than would the proposed MOA-AD -- but no one is calling SJR 10 "unconstitutional."

The difference lies perhaps in at least two areas. One, is that the proposed MOA-AD deals only with solving the Bangsamoro problem, and therefore tends to generate an anti-Moro bias against it. Second, is that the proposed MOA-AD does not use the Constitution as a starting point or even as a stated term of reference in solving the Bangsamoro problem, and instead presents unfamiliar language and concepts. Thus, to its oppositors the MOA-AD's proposals are "unthinkable" – even if they are "not impossible" (to again use the words of Associate Justice Azcuna).

In other words, it is not the contents *per se* of whatever document that envisions or entails constitutional change – whether for an associative relationship, or for a federal system, or for possible secession like Quebec – which makes it unconstitutional, but rather, the form of or stipulations in that document which amount to a usurpation of constituent power. But we shall discuss this latter matter subsequently in another section insofar as it is an issue against the proposed MOA-AD. For now, we would just make the point of asking: if the contents of the proposed MOA-AD were placed in another Senate Joint Resolution, would it be declared "unconstitutional"?

One must not lose sight of the forest by seeing only the trees. Instead of nit-picking on each and every proposed MOA-AD provision allegedly violating the Constitution, one must first of all look at the proposed MOA-AD as a package whereby the parties seek to balance their respective claims of Philippine sovereignty and Bangsamoro self-determination. In grasping this essence of the proposed MOA-AD and some of its key concepts, it can actually be shown that it does *not* violate the "immutable" principles of sovereignty, territorial integrity and national unity of the Republic of the Philippines.

The proposed MOA-AD's underlying concept of associative relationship has been struck down by the Decision as "**unconstitutional**, for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence."[28] The Decision unfortunately cannot seem to suspend disbelief when it comes to exploring new solutions

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[28] North Cotabato, at 521.

to the Bangsamoro problem, a problem which in its historical roots predates the Constitution and the Republic by several centuries. At the same time, it is the Decision itself which indicates that even drastic solutions (as are needed for drastic problems) should not be preempted: "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... Respondents, however, may not preempt it in that decision."[29] And neither should the Court, as we said.

For mainly reasons of space, we shall not deal here any more with each and every proposed MOA-AD provision, key or otherwise, under its four strands of concepts/principles, territory, resources and governance, which were engaged by the SC Decision and the separate opinions as allegedly violating the Constitution. Suffice it here to deal only with what the SC Decision considered to be the proposed MOA-AD's *underlying concept* of associative relationship. A careful reading will show that the SC Decision struck down this underlying concept as "unconstitutional" **not on the basis of the proposed MOA-AD's provisions on associative relationship but on a review of international law and history on "free association" and "associated states."** This is **faultily jumping to conclusions** about the proposed "associative relationship" which actually still had to be fleshed out in a Comprehensive Compact, as provided in the proposed MOA-AD itself. *At the most*, it provided under its "Governance" strand that:

> 4. The *relationship* between the Central Government and the BJE shall be ***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 a Comprehensive Compact.* A period of *transition* shall be established in *a Comprehensive Compact specifying the relationship* between the Central Government and the BJE.
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> 5. 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.* (emphasis supplied)

Shared authority and responsibility connote "shared sovereignty." If sovereignty is to be shared by the Central Government and the Bangsamoro Juridical Entity (BJE), then they are necessarily not independent and

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[29] *Id.* at 518.

separate from each other. The MOA-AD speaks of a transition, presumably to what would be the final political status of the BJE, but what this might be is still subject to negotiations of a Comprehensive Compact. It was therefore a "premature ejaculation" of the Supreme Court to say "that the associated entity is a state and implies that the same is on its way to independence."[30] Stated otherwise, the Court acted on its, and the majoritarian, *fear of shadows.*

All told, the Court should have reconsidered and set aside, or better still, *not* made in the first place, its sweeping declaration of the whole (merely proposed) MOA-AD as "contrary to law and the Constitution" as this connotes that its contents are untenable and untouchable by GRP peace negotiators when this is in fact not the correct guidance indicated in the Decision itself on the validity of "thinking outside the box."

III. NO GUARANTEE AND USURPATION

And so, apart from the consultation issue which shall be tackled subsequently, **the striking down of the proposed MOA-AD as "unconstitutional" boils down to the Decision's justificatory interpretation 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.[31]

The Decision 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

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[30] *Id.* at 521.

[31] *Id.* at 453, *citing* MOA-AD, (Governance) ¶ 7.

> of the amendment process is through an undue influence or interference with that process.
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> ... respondents' act of guaranteeing amendments is, by itself, already a constitutional violation that renders the MOA-AD fatally defective.[32]

Before arguing the contrary, let us assume for the sake of argument, but without granting, that the Decision's interpretation of the afore-quoted crucial paragraph is correct. In this case, given the above discussion, it is only that crucial paragraph that should have been struck down as "unconstitutional," if ever, and not the whole proposed MOA-AD. It is "respondents' act of guaranteeing amendments" which is the "constitutional violation," if at all; why then render the whole proposed MOA-AD as "fatally defective"? In other words, a "separability clause" kind of declaration of unconstitutionality, if at all, should have been made. After all, the conventional wisdom is to throw out the bath water, not the baby with it. It is common sense to save what can be saved, especially for the peace process, where it takes so long and hard to build but is so quick and easy to destroy by various spoilers – as what happened to the initialed final draft of the MOA-AD after three years and eight months of difficult negotiations and hard bargaining.

In other words, theoretically, the Decision could have struck down as "unconstitutional" only the afore-quoted crucial paragraph, not the whole proposed MOA-AD. This would still give the peace negotiators a chance to "correct" that paragraph in a way that there is indubitably no guarantee and usurpation, and still save the bigger and more important framework agreement that the MOA-AD was envisioned to be.

But we would argue now that the Decision's interpretation of the afore-quoted crucial paragraph as a "guarantee" and "usurpation" is, to say the least, 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."[33] With due respect, this phraseology appears to go beyond the bounds of proper checks-and-balance. It is 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.

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[32] *Id.* at 521-22.
[33] *Id.* at 521.

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"[34] 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." Note that the words "guarantee" or "commitment" are not found therein. **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."

The GRP Peace Panel certainly knew that it could not make such "guarantee". This is as simple as knowing that it had no authority over the constitutional bodies or entities with constituent powers to actually "effect the necessary changes to the legal framework." The Panel, which included a lawyer (an Assistant Chief State Prosecutor) and also regularly availed of legal advice from luminaries in the field, was certainly aware that it did not have such powers, nor could it usurp them. As the oft-quoted constitutionalist Fr. Joaquin Bernas, S.J. wrote: "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."[35]

The panel basically adopted the recommendations of the legal review on the draft MOA-AD commissioned by the panel, such as:

> Provisions beyond Constitutional framework are not considered immediately effective upon signing of MOA
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> Said provisions will be deliverable and effective only upon signing of FPA and amendment to Constitution
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> **Addition of provision in AD MOA re GRP legal process, and non-self-executing and prospective nature of AD MOA.**

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[34] *See id.* at 521 (Decision), 561 (Carpio, J., *concurring*).

[35] Joaquin Bernas, S.J., *The MOA-AD Decision*, PHIL. DAILY INQUIRER, Oct. 20, 2008, at A15.

> - **Executive commitment to work for Charter amendments to enable AD MOA provisions that require such** (emphasis supplied)

Note the last recommendation above: an "Executive commitment to work for Charter amendments..." – this is not at all a sure "guarantee" of those amendments. 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 GRP Peace Panel fully appears to have negotiated in good faith. Their 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 it 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.

The Decision finds fault in the afore-quoted crucial paragraph because it "does not bear the marks of a suspensive condition – defined in civil law as a future and uncertain event – but of a term. It is not a question of **whether** the necessary changes to the legal framework will be effected, but **when**. That there is no uncertainty being contemplated is plain..."[36] But why is "uncertainty" being given a high premium here in the context of a peace agreement? Aren't peace agreements in fact supposed to resolve many uncertainties? Why is some certainty, like in the form of a term or "stipulated time frame" or "non-derogation" in the afore-quoted crucial paragraph, being penalized?

Peace agreements should be appreciated for the special documents that they are, agreements which are *sui generis*, as distinct from civil law contracts and international treaties and their respective governing rules. This is in fact one of the main points of Professor Christine Bell's American Law Journal article on the nature and legal status of peace agreements[37] cited by the Decision itself.

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[36] North Cotabato, at 508.

[37] *See* Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373 (2006), *cited in* North Cotabato, at 503.

Unfortunately, the crucial phrase "upon effecting the necessary changes to the legal framework," coupled with the other one on "with due regard to non derogation of prior agreements," has been interpreted, particularly in the Separate Concurring Opinion of Justice Carpio, as "the Executive branch... committed to amend the Constitution to conform to the MOA-AD."[38] Actually, this loaded formulation had already figured early on in the Court's August 14, 2008 Advisory for the August 15, 2008 Oral Arguments with a question on "Whether by signing the MOA, the Government of the Republic of the Philippines would be BINDING itself... to revise or amend the Constitution and existing laws to conform to the MOA?"

It is made out as if the majesty of the law, especially the fundamental law, is being made to bow in humiliation before the MOA-AD. No, this should not be taken negatively that way 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 in fact is the approach too with certain international obligations (without saying that the MOA-AD represents or creates international obligations).

"Non-derogation of prior agreements" is a device which helps ensure sincerity and good faith in negotiations. At the same time, "nothing is final until everything is final"[39] because positions as well as circumstances shift with time in a dynamic, non-static, peace process. Thus, the full formulation is "with due regard to non-derogation of prior agreements" – it is "with due regard to," *not* absolute, non-derogation. We are aware of Justice Carpio's admirable effort in his Separate Concurring Opinion to determine or clarify the precise legal meaning or signification of the said full formulation which to him amounts to "mandatory observance" of "no deviation" of previous agreements.[40] Assuming this is correct, what is so wrong with that? Isn't one supposed to keep one's word, whether in the context of a commercial contract, international treaty or peace agreement? Isn't it the norm that agreements must be observed in good faith? Why is this now being made out to be a "guarantee" that now becomes a straw man, as it were, to be struck down and, with it, the whole proposed MOA-AD?

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[38] North Cotabato, at 561.

[39] An adage in the Northern Ireland Peace Process; *see* G. ADAMS, HOPE AND HISTORY: MAKING PEACE IN IRELAND (2003).

[40] North Cotabato, at 526.

In its discussion of the afore-quoted crucial paragraph, the Decision makes a comparison between the "suspensive clause" of the proposed MOA-AD with a similar provision in the 1996 Final Peace Agreement with the Moro National Liberation Front, or what the Chief Justice calls the "MNLF Model."[41] What should perhaps be looked at also is its "mother agreement," the 1976 Tripoli Agreement, entered into for the GRP by then Defense Undersecretary for Civil Relations Carmelo Barbero. The famous (or infamous, to the MNLF) paragraph 16 there reads: "The Government of the Philippines shall take all necessary constitutional processes for the implementation of the entire Agreement." Now, is this not more of a "guarantee" or "commitment" than the afore-quoted crucial paragraph of the proposed MOA-AD? But neither that paragraph 16 nor the entire Tripoli Agreement had been struck down for being an unconstitutional usurpation of constitutional powers. In fact, the Decision notes that behind the provisions of the Constitution on autonomous regions is the framers' intention to implement the 1976 Tripoli Agreement. But we shall explain later why this "MNLF Model" has to be "deviated" from.

All told, the afore-quoted crucial paragraph can and should be interpreted in a way that treats it as constitutional. It is a well-settled rule of construction that: "When a statute is reasonably susceptible of two constructions, one constitutional and the other unconstitutional, that construction in favor of its constitutionality shall be adopted and the construction that will render it invalid rejected."[42] This can be applied by analogy to the afore-quoted crucial paragraph of the proposed MOA-AD.

Having shown that 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," **there is no more key or main leg for the Decision's sweeping declaration of the whole proposed MOA-AD as "unconstitutional."** This declaration should have been reconsidered and set aside, or better still, not have been made in the first place.

IV. PUBLIC CONSULTATION AND PEACE NEGOTIATIONS

The so-called violations of the constitutional and statutory mandates of public consultation and the right to information have

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[41] *Id.* at 576.

[42] RUBEN AGPALO, STATUTORY CONSTRUCTION 21 (3rd ed. 1995), *cited in* David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 283 n.3, May 3, 2006 (Tinga, J., *dissenting*).

been over-stated, considering 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, an executive process that also has its **inherent confidentiality requirements.**

A. Consultation, Information and Other Facets of the Ancestral Domain Negotiations (2005-2008)

The Decision posits as the first substantive issue whether the respondents violated constitutional and statutory provisions on public consultation, and discusses this extensively.[43] In the Decision's Summary ruling, it then stated:

> 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.[44]

Immediately, it must be pointed out that the Decision singles out the respondent PAPP, with no mention of the respondent GRP Peace Panel, for having "committed grave abuse of discretion when he failed to carry out the pertinent consultation process." In fairness to the PAPP Secretary, Hermogenes Esperon, Jr., it is a matter of public knowledge and record that he **assumed that office only in June 2008**. This was **during the tail end, the hardest bargaining part of the difficult ancestral domain negotiations** of three years and eight months in 2005-2008. **It is simply not fair to single him out for "[failing] to carry out the pertinent consultation process."**[45]

This only underscores that the question of grave abuse of discretion should be reckoned not only from the days leading up to the aborted signing of the final draft of the MOA-AD and from what appears to be unfamiliar or "unthinkable" on its face. *The reckoning should be on the several years of what the Decision calls "[T]he furtive process by which the MOA-AD was designed and*

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[43] *See* North Cotabato, at 465-73.
[44] *Id.* at 521.
[45] *Id.* at 473, 521.

crafted."[46] This was not something capricious, whimsical, arbitrary, despotic, or unreasoning that just came out of the blue. It was *the product of three years and eight months of hard negotiations, study, deliberation, consensus-seeking and consultations* on the ancestral domain aspect from 2005 to 2008. There are records that will show this.

There was an evolution of the consensus points on ancestral domain which eventually got codified into the final draft of the MOA-AD. The general developments and work done in the relevant GRP-MILF Exploratory Talks and Executive Sessions from March 2003 to July 2008 were documented in **Joint Statements which were sent out to the various stakeholders, the media and the general public**. The highlights of these Exploratory Talks and Executive Sessions are tracked in a Matrix that also noted Local Government Unit (LGU) Resolutions and **GRP Panel Consultations from December 2004 to July 2008**. There is also a more detailed matrix of **GRP Peace Panel-Initiated Consultations from November 2005 to November 2007. From 2006 to 2008, there were roughly around 120 consultation-type sessions, including 20 panel-initiated ones, involving various sectors and areas, not limited to affected LGUs.**

But most of the LGUs which were Petitioners or Intervenors in the MOA-AD Cases had been covered by some **consultation on the ancestral domain aspect at one point or another**, e.g.:

North Cotabato

1. LGU officials briefed in situ at least once; some LGU officials also present in other AD-related fora
2. Other stakeholders/residents briefed in situ more than once (Rodil forum)
3. Some congressmen present in some previous briefings in Congress

Zamboanga City

1. LGU officials briefed in situ at least once; some LGU officials also present in other AD-related fora
2. Other stakeholders/residents briefed in situ more than once (Rodil forum)
3. Cong. Fabian and Lobregat were present in some previous briefings in Congress

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[46] *Id.* at 473.

Iligan City

1. LGU officials briefed in situ at least once; some LGU officials also present in other AD-related fora
2. Other stakeholders/residents briefed in situ more than once (Rodil forum)

Zamboanga del Norte

1. Subanen community in Ipil, Zambo Norte were briefed in situ at least once by Prof. Rodil
2. Other stakeholders/residents were present in some fora done in Zamboanga City
3. Some congressmen present in some previous briefings in Congress

Linamon, Lanao del Norte

1. Provincial LGU officials briefed at least once in Tubod; some municipal LGU officials also present in other AD-related fora
2. Other stakeholders/residents briefed in situ more than once (Rodil forum)

Isabela City

1. Other stakeholders/residents briefed in situ more than once (Rodil forum organized by Church officials in Isabela City)
2. Other stakeholders/residents were also present in some fora done in Zamboanga City

Sultan Kudarat

1. Provincial LGU officials briefed in situ at least once; some LGU officials also present in other AD-related fora
2. Other stakeholders/residents briefed in situ more than once (Rodil forum)
3. Some congressmen present in some previous briefings in Congress

Such local consultations, among many others, were conducted by the GRP Peace Panel because these are also in line with the comprehensive

peace process, particularly the second of "The Six Paths to Peace," namely consensus-building and empowerment for peace.[47] At the same time, the Panel had to respect the inherently confidential character and the confidentiality rules of the peace negotiations. This is in fact an indication of requisite *discreetness* in negotiations rather than grave abuse of discretion. At the same time, **local consultations were not the only considerations or inputs** for the studied and informed determination of the barangays, municipalities and cities that may be added to the present ARMM territory for possible inclusion in the Bangsamoro Juridical Entity (BJE) mostly through a plebiscite. According to GRP Peace Panel Vice-Chair Prof. Rudy Rodil, a Mindanao history and ancestral domain expert, there were **at least five criteria used in determining the selection of barangays and other LGUs under Category A** of the draft MOA-AD:

> 1. Historical elements: ethnic occupancy and political dominance
> 2. Population patterns based on census statistics from 1903 to 2000
> 3. Clusters of municipalities that voted "Yes' in the 2001 Expanded ARMM Plebiscite (mainly Muslim/Moro majority municipalities in Christian majority provinces)
> 4. Generally contiguous to the ARMM (referring to Muslim/Moro majority barangays)
> 5. Functionality (such as areas necessary for Bangsamoro access to the sea, staging or ports of call for ships

It can be gleaned that the selection of barangays and other LGUs under Category A, to be subject to a plebiscite, was not done in a capricious, whimsical, arbitrary, despotic, or unreasoning manner. And there was still the inherent and necessary give-and-take on this sensitive matter, such that the original MILF position of 3,900+ barangays and the original GRP position of 613 barangays eventually settled to the agreed 735 barangays in Category A and about 1,459 barangays in Category B. That definitely involved a lot of hard bargaining.

Any inadequacies in consultation during the most difficult phases of hard bargaining which required focused attention certainly do not constitute grave abuse of discretion. The ancestral domain

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[47] Exec. Order No. 3 (hereinafter "E.O. 3"), § 4(b).

negotiations were so difficult that there were **at least three impasses** within just a few years, as the record shows:

> 1. An impasse on territory between the 13th Exploratory Talks on 6-7 September 2006 and the 14th Exploratory Talks on 14-15 November 2006;
> 2. An impasse on constitutional processes around the aborted 15th Exploratory Talks scheduled for 14 December 2007, with a MILF no-show, broken on 31 January 2008 when the Panels agreed on a working draft chapter on Governance; and
> 3. The breakdown of the 16th Exploratory Talks on 24-25 July 2008, with a MILF walk-out, due to disagreement on the timeframe for the plebiscite for Category A areas and other issues, fixed on 27 July 2008 when the MOA-AD was initialed.

The negotiations were practically "touch and go" during these later months.

The GRP Peace Panel was actually being judicious, prudent and cautious. **In March 2008, it had a legal review done on the draft MOA-AD.** This notably involved former Energy Sec. Raphael Lotilla, once Director of the Institute of International Legal Studies at the U.P. Law Center, who completed his comments on 30 April 2008. Legal consultations with other luminaries like Fr. Joaquin Bernas, S.J., and the Legal Division of the Department of Justice (DOJ) were completed by 30 May 2008. The Panel Chairman, Sec. Garcia, then briefed the Cabinet on 17 June 2008 with a powerpoint presentation on the legal review findings and recommendations on the draft MOA-AD. It is important to highlight some of these because they are relevant to issues in the cases at bar:

> LEGAL REVIEW FINDINGS
>
> - Most provisions consistent with the Constitution / existing laws
> - Several consensus points need amendment of national laws
> - Several consensus points contain Constitutional implications
> - Most provisions are conceptual and prospective which require further discussion on details during Final Peace Agreement stage
>
> SEC. LOTILLA: AD MOA can be signed, provided that:

1. Provisions beyond Constitutional framework are not considered immediately effective upon signing of MOA
2. Said provisions will be deliverable and effective only upon signing of FPA and amendment to Constitution

FURTHER RECOMMENDATIONS

1. Addition of provision in AD MOA re GRP legal process, and non-self-executing and prospective nature of AD MOA
2. Executive commitment to work for Charter amendments to enable AD MOA provisions that require such

CONVERGENCE: FEDERAL OPTION

1. Government Negotiation Track
2. Pimentel Senate Resolution

These legal review recommendations, including that of Sec. Lotilla, *that the MOA-AD can be signed* were eventually adopted. As indicated immediately above and in the draft MOA-AD itself (esp. par. 7 under Governance), **signing the MOA-AD would not by itself bind the GRP to certain commitments which violate or go beyond the existing framework or provisions of the Constitution.** At most, there was merely "Executive commitment to work for Charter amendments to enable AD MOA provisions that require such" *even if the MOA-AD would be signed in the name of the GRP*, which is standard negotiation practice.

Thus came the Executive Secretary's travel authority to the GRP Peace Panel Chairman on 31 July 2008 to participate, as Head of the Government of the Republic of the Philippines Delegation, in the signing of the Memorandum of Agreement on Ancestral Domain. And so, the GRP-MILF peace negotiations were about to culminate their ancestral domain phase of three years and eight months. *This work has to be seen in perspective, that of what went on before and of what was envisioned to lie ahead.*

It had been more than 12 years since the negotiations started at a low level in early 1997, when the MILF had posed its single talking point: "To solve the Bangsamoro problem."[48] Some of the more significant interim agreements since then were enumerated in the Terms of Reference

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[48] *See* the MILF's brief elaboration of its single talking point, "Agenda: To Solve the Bangsamoro Problem" on Feb. 25, 1997.

of the draft MOA-AD. After the "all-out war" of 2000, came the breakthrough framework ***Tripoli Agreement on Peace of 2001***. Two *Implementing Guidelines* followed in relatively quick succession, one *on the Security Aspect* in August 2001 and another *on the Humanitarian, Rehabilitation and Development Aspect* in May 2002.

But from then on, the "long road to peace"[49] would take more than six years, including the "Buliok Offensive" in 2003, to reach the final draft of a Memorandum of Agreement on the Ancestral Domain Aspect of the *Tripoli Agreement on Peace of 2001*. This was supposed to be the penultimate stage of the whole negotiation process, before tackling the political solution in a Comprehensive Compact before 2010. Now, this remains to be seen.

These protracted negotiations of 12 years depended on people. "Negotiations tend to focus on issues, but their success depends on people."[50] During those 12 years, the GRP Peace Panel and its Technical Working Group evolved and changed composition, including representatives from various line agencies. The general level of competence, loyalty and representation in the panel compositions is well illustrated in the last, dissolved Panel in the MOA-AD negotiations. The GRP Peace Panel which we are concerned with was composed of: (1) Retired General and former AFP Vice-Chief of Staff Rodolfo Garcia as Chairman; (2) Mindanao historian, author and Professor Rudy Rodil of Christian settler family background; (3) Secretary of Agrarian Reform Nasser Pangandaman, a Moro; (4) Ms. Sylvia Okinlay-Paraguya, a Lumad whose main work has been with Mindanao development NGOs; and (5) Atty. Leah Tanodra-Armamento, DOJ Assistant Chief State Prosecutor.

Atty. Sedfrey Candelaria was *not* a member of that panel *but* was its chief legal consultant. He is a member of the GRP Peace Panel for negotiations with the NDF, Associate Dean at the Ateneo Law School, long-time Director of the Ateneo Human Rights Center, and Head of the Research and Linkages Office of the Philippine Judicial Academy. Ryan Mark Sullivan was *not* a member of the panel *but* is its secretariat head.

The first thing that has to be said about these people is that it would have been completely out of character for them to commit grave abuse of discretion in their negotiations with the MILF. They just are not the type.

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[49] *See* SALAH JUBAIR, THE LONG ROAD TO PEACE: INSIDE THE GRP-MILF PEACE PROCESS (2007), *cited in* North Cotabato, 434 n.4, 6.

[50] D. BLOOMFIELD, ET AL., *[Chapter] 3. Negotiation Processes, in* DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATORS 63 (Harris & Reilly eds. 1998).

This should count for something because they are, after all, *part of the facts of the MOA-AD Cases* as the respondent GRP Peace Panel.

Civil society organizations, including Bangsamoro ones like CBCS and BWSF, appreciate the premium which the Decision gives to public consultation, including the point about the "splendid symmetry" between the people's right to information and the state policy of full public disclosure.[51] At the same time, civil society peace organizations, as "peace partners" of the Mindanao Peace Process, including the GRP-MILF peace negotiations and both their panels, realize that public consultation cannot be treated like the "be all and end all" of the peace negotiations, to the extent of being practically decisive for their validation or invalidation.

In the matter of the GRP-MILF ancestral domain negotiations from 2005-2008, there were information and media updates as well as numerous documented consultations, dialogues and briefings. Let us say, for the sake of argument, that these were inadequate for whatever reason. **But the Decision itself says that "The Court may not, of course, require the PAPP to conduct the consultation *in a particular way or manner*."[52] 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 Fr. Joaquin 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."[53] In fine, without setting aside the constitutional guidance it has given on the role of public consultation, **the Court should have reconsidered and set aside, or better still, not made in the first place, its ruling on "grave abuse of discretion" by the PAPP for "[failure] 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 years of engagement in the Mindanao Peace Process has taught civil society peace organizations, public consultation is not the "be all and end all" of the peace negotiations. The latter have a

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[51] North Cotabato, at 469, 519.

[52] *Id.* at 473.

[53] Joaquin Bernas, S.J., *That 'Piece of Paper' or Relax 'Lang'!*, PHIL. DAILY INQUIRER, Aug. 18, 2008, at A11.

certain purpose and inherent character, and public consultation is only one – though major – 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, which we now proceed to discuss as relevant to the issues in these cases at bar.

B. Inherent Character and Purpose of the Peace Negotiations

> *"...and no precondition shall be made to negate the inherent character and purpose of the peace negotiations."*[54]

It is important to take note of the inherent character and purpose of peace negotiations with rebel groups because these are key aspects of the **context** of the MOA-AD Cases. And this is in line with the merits of "the **contextual approach** of the coordinacy theory of constitutional interpretation."[55] We deal here with certain specific characteristics of peace negotiations relevant to the main issues in these cases.

It may be easier to start with the **purpose of peace negotiations**. The definition of "international negotiation" in the literature of international dispute resolution is instructive for this: "a process aimed at mutual problem solving and reaching a joint settlement acceptable to all parties."[56] This actually applies just as well to peace negotiations with rebel groups. It is in fact reflected in several peace agreements with Philippine rebel groups. The afore-quoted ***Hague Joint Declaration*** states it this way:

> 1. Formal peace negotiations between the GRP and the NDF shall be held to resolve the armed conflict.
> 2. The common goal of the aforesaid negotiations shall be the attainment of a just and lasting peace.

One of the framework agreements in the second (resumed) phase of the GRP-MILF peace negotiations, this time with Malaysian third-party facilitation, *Agreement on the General Framework for the Resumption of Peace Talks*

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[54] The Hague Joint Declaration, Sep. 1, 1992, ¶ 4.

[55] *See* Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003 (Puno, J., *concurring and dissenting*). "The contextual approach better attends to the specific character of particular constitutional provisions and calibrates deference or restraint accordingly on a case to case basis."

[56] C. CHINKIN, *Chapter 12, Peaceful Settlement of Disputes, in* AUSTRALIAN INTERNATIONAL LAW CASES AND MATERIALS 964 (Reicher ed. 1996).

of 24 March 2001 (the third among the Terms of Reference of the draft MOA-AD), states this premise for the talks:

> ***Recognizing*** **the need** to resume their stalled peace talks in order to end the armed hostilities between them and achieve a **negotiated political settlement** of the conflict in Mindanao and **of the Bangsamoro problem**, thereby promoting peace and stability in this part of the world; (emphasis supplied)

One sees here quite clearly the elements of "mutual problem-solving" and a "joint settlement acceptable to all parties."

So, how does one solve a problem like the Bangsamoro problem?[57] How did the parties go about "mutual problem-solving"? One might say that the idea was for the talks to first look at the problem, dissect it to its roots, and see where the discussion would lead in terms of a conclusion on the solution. "The problem is the solution itself." Because parameters can be obstacles, the panels would not talk of parameters but instead focus on the problem and how it can be solved.[58] It is already a matter of public knowledge that the GRP and MILF negotiators had a "gentlemen's agreement" not to respectively raise the Constitution and independence. This was because these are seen by them respectively as deal breakers. In the main, that "gentlemen's agreement" has been followed up to the draft MOA-AD. Keeping to that "gentlemen's agreement" partly accounts for the peace negotiations getting as far as the draft MOA-AD – which represents consensus points on the first major substantive agenda heading of ancestral domain and what developed in the course of discussion to be its four strands of concept, territory, resources and governance.

Only as the consensus points had crystallized and started to be codified into a draft MOA-AD, did it become clear to both panels, but especially to the GRP panel, that some of these consensus points, if subsequently finalized as agreements, particularly in a Comprehensive Compact, may require "amendments to the existing legal framework." And this "existing legal framework" necessarily includes the Constitution, even without mentioning it. *Thus, through this negotiation process, what was seen by one party (the MILF) as part of the Bangsamoro problem, namely the Constitution, eventually could become part of the solution, through constitutional change.* "Effecting

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[57] *See* the MILF's brief elaboration of its single talking point, "Agenda: To Solve the Bangsamoro Problem" on Feb. 25, 1997.

[58] *See* SOLIMAN SANTOS, DYNAMICS AND DIRECTIONS OF THE GRP-MILF PEACE NEGOTIATIONS 15 (2005).

the necessary changes to the legal framework" had apparently already become *acceptable* to the MILF – which in itself is quite significant since it has long considered itself outside that legal framework. Does this not indicate "a process aimed at mutual problem-solving and reaching a joint settlement acceptable to all parties"?

Let us go now to the **inherent character of peace negotiations**. These have many characteristics common to negotiations in general. We can only highlight several which are of particular relevance to issues in the MOA-AD Cases. Inherent in negotiations are, among others, give-and-take or compromise, their sensitive nature, and the corresponding need for confidentiality. In the GRP-MILF peace negotiations, **give-and-take or compromise** is already shown in that afore-mentioned "gentlemen's agreement" between GRP and MILF negotiators not to respectively raise the Constitution and independence. More substantively, the negotiations, particularly on the MOA-AD, have involved a balancing between Philippine sovereignty and Bangsamoro self-determination. Stated otherwise and bluntly, it cannot be the simple imposition of the Constitution on the MILF. Chinkin writes: "Through negotiations, parties may achieve a convergence through gradual identification of interests and a process of concession-making to reach a compromise. Whether a settlement is achieved depends on... the eventual willingness of the parties to balance their claims in a package agreement.[59]

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 negotiations with rebel groups, much like the confidentiality practice in diplomatic negotiations. We will now pay some special attention to this aspect because of the issues raised in the *main Petitions* from certain affected Local Government Units and local officials regarding the right to public information and consultation and the policy of full public disclosure. The

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[59] CHINKIN, *supra* note 56.

literature on negotiation processes describes confidentiality as "*a keystone of negotiation*" which is part of the necessary *confidence building and trust* between the parties. One of the best references on negotiation processes thus states:

> Negotiators need to have confidence in each other and in the process... there must be a degree of mutual trust that permits a basic working relationship... The following are some basic rules of the negotiation game:
>
> **Ensure confidentiality**. A standard ground-rule for negotiation is that what is said is not repeated outside the negotiating room without permission. Each side needs the reassurance in order to discuss serious and sensitive issues with confidence... Confidentiality is a keystone of negotiation.[60]

The same excellent reference also discusses the difficult tension, balancing and oftentimes dilemma between transparency and confidentiality:

> Transparency and confidentiality produce a difficult tension in the negotiating process. But whether proceedings are open or closed, in whole or in part, will depend upon how the parties choose to reconcile the interests of keeping the public informed with that of creating an environment where they can explore options and proposals in a secure and uninhibited way. Public support may be a necessary spur to the momentum of the talks process, or an obstacle that reduces the freedom of parties to engage in serious negotiation. Transparency helps reduce outside suspicion aroused by the confidentiality of the process, and it can be a vital preparation to "selling" the resulting outcome to the population at large.
>
> Where the media is excluded, and the talks held in complete confidentiality, participants are obviously more free to speak openly, and more able to explore positions and outcomes without committing themselves. As long as the end result of the negotiations is agreed by all, confidentiality during the process permits a party to accept a loss on today's agenda item in order to gain on tomorrow's, without any accusations from outside of weakness in concession. One's constituency outside the talks cannot constrain one's freedom of operation.[61]

Thus, the *Agreement on the Rules and Procedures on the Conduct of the Formal Peace Talks Between the GRP and MILF Peace Panels* of 17 December 1999 has an Article V, Section 1 on Confidentiality:

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[60] BLOOMFIELD, ET AL., *supra* note 50, at 63.
[61] *Id.* at 84-85.

> a. The Panel Chairpersons may mutually agree on the confidentiality of sensitive issues under negotiation.
>
> b. Limitations on access to or release of official records of the deliberations and minutes of the meetings shall be mutually agreed upon by the Chairpersons of the two Peace Panels.

And with more reason has confidentiality been upheld upon the entry of Malaysia as third-party facilitator and secretariat in March 2001. Since then, it has been the Malaysian secretariat which has been the authoritative repository of official records of the deliberations and minutes of the meetings.

Similar confidentiality rules also obtained even earlier in the GRP-NDF peace negotiations, as shown in their ***Agreement on the Ground Rules of the Formal Meetings*** dated 26 February 1995 which had this provision: "Limitations on access to or release of such records and minutes shall be mutually agreed upon by the Chairpersons of the two Panels."[62] Also, their ***Joint Agreement on the Formation, Sequence and Operationalization of the Reciprocal Working Committees*** dated 26 June 1995 had this provision: "The proceedings of the RWCs shall be confidential... The Chairpersons of the RWCs concerned may mutually agree to classify specific documents, records and information confidential."[63]

Still, both the GRP and MILF Peace Panels would regularly inform the public, the media and various stakeholders in general terms about the developments in the talks, especially after each round, through the mechanisms of signed joint statements or communiqués, each panel's written updates on the talks for dissemination, and public as well as executive briefings.

In any case, the situation with peace negotiations is not unlike that with diplomatic negotiations, which the Supreme Court quite recently described in ***Akbayan v. Aquino,***[64] better known as the "**JPEPA Case,**" upholding diplomatic negotiations privilege as a form of executive privilege. Even if the latter is not an issue in the MOA-AD cases, the **discussion in the JPEPA Case is instructive – much more so, and more contextually analogous to the MOA-AD Cases, than *Chavez v. Public Estates***

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[62] art. III, § 2.
[63] art. IV, § 4.
[64] G.R. No. 170516, 558 SCRA 468, Jul. 16, 2008 (Carpio-Morales, J.).

Authority (PEA),[65] on which the Decision relies on to apply to the MOA-AD Cases "the right to information [to] include steps and negotiations leading to the consummation of the [executory and commercial] contract."[66] The Concurring and Dissenting Opinion of Justice Arturo Brion precisely critiques the Decision for its reliance on *Chavez* despite its very different context,[67] and likewise makes reference to the JPEPA controversy.[68]

There are at least two quoted passages in the JPEPA Case Decision that are *very relevant to the MOA-AD cases.* One is from the Resolution in ***People's Movement for Press Freedom (PMPF) v. Manglapus***:[69]

> **The nature of diplomacy requires centralization of authority and expedition of decision which are inherent in executive action. Another essential characteristic of diplomacy is its confidential nature....**
>
> x x x
>
> No one who has studied the question believes that such a method of publicity is possible. **In the moment that negotiations are started, pressure groups attempt to "muscle in." An ill-timed speech by one of the parties or a frank declaration of the concessions which are exacted or offered on both sides would quickly lead to widespread propaganda to block negotiations. After a treaty has been drafted and its terms are fully published, there is ample opportunity for discussion before it is approved.**[70]

Part of the factual context of the MOA-AD Cases is "a frank declaration of the concessions which are exacted or offered on both sides would quickly lead to widespread propaganda to block negotiations." These included (intervenor) Franklin Drilon's declarations in the form of full-page paid ads against the proposed MOA-AD on 22-23 August 2008,[71] in the middle of the oral arguments period in the MOA-AD Cases.

The second relevant quoted passage in the JPEPA Case Decision is this, from the *apropos* observations of Benjamin Duval, Jr.:

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[65] G.R. No. 133250, 384 SCRA 152, Jul. 9, 2002.
[66] North Cotabato, at 468.
[67] *Id.* at 722 (Brion, J., *concurring and dissenting*).
[68] *Id.* at 724
[69] G.R. No. 84642, Sept. 13, 1988 (*En Banc* Resolution).
[70] Akbayan v. Aquino, G.R. No. 170516, 558 SCRA 468, 515, Jul. 16, 2008.
[71] *See* PHIL. DAILY INQUIRER, Aug. 22, 2008, at A17, and Aug. 23, 2008, at A15.

> x x x **[T]hose involved in the practice of negotiations appear to be in agreement that publicity leads to "grandstanding," tends to freeze negotiating positions, and inhibits the give-and-take essential to successful negotiation.** As Sissela Bok points out, if "negotiators have more to gain from being approved by their own sides than by making a reasoned agreement with competitors or adversaries, then they are inclined to 'play to the gallery...'" In fact, **the public reaction may leave them little option.** It would be a brave, or foolish, Arab leader who expressed publicly a willingness for peace with Israel that did not involve the return of the entire West Bank, or Israeli leader who stated publicly a willingness to remove Israel's existing settlements from Judea and Samaria in return for peace.[72]

The reference in this quote to the Palestinian-Israeli peace negotiations shows *how similar in character and factual context peace negotiations are to diplomatic negotiations.* Thus, one might even extend the "privileged character of diplomatic negotiations" to peace negotiations.

A local pundit, *Philippine Daily Inquirer* analyst Amando Doronila, who decried the alleged lack of transparency in the negotiation of the MOA-AD, once defended the confidentiality of peace negotiations in the context of the GRP-MNLF "Davao Points of Consensus" in July 1996 during the Ramos administration:

> In a negotiation, it is a recipe for chaos to open talks to the public and refer each point agreed at the end of the day for public reaction. Negotiation is never done that way. If you allow the public to breathe down your neck at the conference table and to snoop into your every point, you will never get anywhere. Mature democracies debate settlements after a framework has been completed – not before. So it is nonsense to say that transparency includes giving the public access to the negotiating table.[73]

Ironically, it will be recalled that it was the *Inquirer* which had then obtained a leaked copy of the "Davao Points of Consensus" and published it, in the process raising the first public alarm against those consensus points. It seems that this history has repeated itself with the draft MOA-AD, but this time successfully blocking negotiations. The unprecedented front-page banner headline ("Only SC can stop deal now") and editorial ("Don't sign – yet") of the *Inquirer* on 4 August 2008 practically asked the

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[72] Benjamin Duval, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, *cited in* Akbayan, 558 SCRA at 517.

[73] Amando Doronila, PHIL. DAILY INQUIRER, Jul. 22, 1996, at 9.

Supreme Court for the issuance of the TRO against the MOA-AD signing scheduled just the next day – and it was granted.

In hindsight, our first above-quoted *Inquirer* columnist, Randy David, said in drawing lessons from the MOA-AD debacle: "... while peace talks are best conducted in quiet surroundings, shielded from the pressures of the mass media and agitated communities, we should never underestimate the value of regular media updates and consultations with stakeholders on crucial points. Such talks are so sensitive that they require a constant balancing between discreteness and transparency."[74] Still another *Inquirer* columnist, constitutionalist Fr. Bernas deals with the question of transparency in relation to the different stages of peace agreements in this way: "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."[75]

The Separate Concurring and Dissenting Opinion of Justice Brion made an important "last point on a dead issue" when he insightfully pointed out the need to:

> "distinguish... 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.**"[76] (emphasis supplied)

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 and consultation – perhaps more with the political branches of government than

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[74] Randolf David, *Peace Premises*, PHIL. DAILY INQUIRER, Aug. 23, 2008, at A12.
[75] Joaquin Bernas, S.J., *Peace Negotiations*, PHIL. DAILY INQUIRER, Sep. 1, 2008, at A15.
[76] North Cotabato, at 724-25 (Brion, J., *concurring and dissenting*).

with the judiciary and the military because of the nature of the work involved. Each has its specific characteristics, including rules of confidentiality. For example, bills are accessible by the public but draft court decisions are (or should) not, not even by the parties to the case. For another example, were the Central Mindanao communities now affected by military operations consulted before these were launched in their areas?

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 with every draft having to be served up to the public. **The Court's 4 August 2008 Resolution requiring the submission to the petitioners of "the final *draft* of the MOA" *still unsigned*, should be treated as a special requirement only for the MOA-AD Cases and not as a precedent or guideline for this and other peace negotiations.** To treat such as a precedent or guideline for this and other peace negotiations would gravely abuse or prejudice their integrity as executive, and therefore constitutional, processes. This would "negate the inherent character and purpose of the peace negotiations."

V. AUTHORITY, MANDATES, AND PARAMETERS FOR THE PEACE NEGOTIATORS

A. Under Executive Order No. 3 and the Memorandum of Instructions from the President

The established guiding documents of the GRP Peace Panel and the Presidential Adviser on the Peace Process (PAPP) which are *of general relevance to the GRP-MILF peace negotiations, including the negotiation of the MOA-AD*, are (1) the President's Executive Order No. 3[77] [hereinafter "E.O. 3"], and (2) the Confidential Memorandum of Instructions from the President on "Revised General Guidelines on the Peace Talks with the MILF" dated 2 September 2003 [hereinafter "MOI"].

E.O. 3, particularly in its Section 4, envisions a comprehensive peace process with component processes called "The Six Paths to Peace." These component processes are "interrelated and... pursued simultaneously in a

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[77] Defining Policy and Administrative Structure for Government's Comprehensive Peace Efforts, Feb. 28, 2001.

coordinated and integrated fashion."[78] We highlight the two of these "Six Paths" which are most relevant to the GRP-MILF peace negotiations up to the MOA-AD:

> a. PURSUIT OF SOCIAL, ECONOMIC AND POLITICAL REFORMS. This component involves the vigorous implementation of various policies, reforms, programs and projects aimed at addressing the root causes of internal armed conflicts and social unrest. **This may require** administrative action, new legislation, or **even constitutional amendments**.
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> x x x
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> c. PEACEFUL, NEGOTIATED SETTLEMENT WITH THE DIFFERENT REBEL GROUPS. This component involves the conduct of face-to-face negotiations to reach peaceful settlement with the different rebel groups. It also involves the effective implementation of peace agreements.[79] (emphasis supplied)

It bears noting that the latter provision was cited by the SC Decision on the MOA-AD, to the Court's credit, in this way:

> It bears noting that the GRP Peace Panel, in exploring lasting solutions to the Moro Problem through its negotiations with the MILF, was not restricted by E.O. No. 3 only to those options available under the laws as they presently stand...
>
> The MOA-AD, therefore, may reasonably be perceived as an attempt of respondents to address, pursuant to this provision of E.O. No. 3, the root causes of armed conflict in Mindanao. **The E.O. authorized them to 'think out of the box,' so to speak.** Hence, they negotiated and were set on signing the MOA-AD that included various social, economic, and political reforms which cannot, however, all be accommodated within the present legal framework, and which thus would require new legislation and constitutional amendments.[80] (emphasis supplied)

This to us is an affirmation, in addition to other afore-cited crucial passages of the SC Decision, that the GRP Peace Panel is authorized to "think outside the box," including up to proposed constitutional amendments.

Usually or oftentimes, the agenda of the peace negotiations of the "Third Path" are about socio-economic and political reforms of the "First Path." Thus, in the case of the GRP-NDF peace negotiations, it was

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[78] E.O. No. 3, § 4.
[79] § 4(a) & 4(c).
[80] North Cotabato, at 500-01.

indicated in the framework agreement for this that "The substantive agenda of the formal peace negotiations shall include human rights and international humanitarian law, socio-economic reforms, political **and constitutional reforms**, end of hostilities and disposition of forces."[81] (emphasis supplied)

But the mention of "constitutional reforms" there, or of "constitutional amendments" in E.O. 3, Sec. 4(a), does not mean that it is the GRP Peace Panel which actually undertakes the constitutional process for such constitutional reforms and amendments. Yet, this is what is implied in the Decision when it states that "it must be asked whether the President herself may exercise the power delegated to the GRP Peace Panel under E.O. No. 3, Sec. 4(a). The President cannot delegate a power that she herself does not possess."[82] **There is therefore in the Decision a wrong premise that, in E.O. 3, Sec. 4(a), the President delegates constituent powers to the GRP Peace Panel.** But a fair reading of E.O. 3, Sec. 4(a) will show that (1) it does not delegate constituent powers, (2) it merely speaks of the *possible necessity ("may require")* of constitutional amendments in pursuit of reforms to address the root causes of rebellion, and (3) it addresses itself (meaning the whole E.O.) to the whole government (operationally, the Executive Department, but which the Legislative and Judicial Departments can also take notice of), of which government the GRP Peace Panel is just one body of an administrative structure for carrying out the comprehensive peace process defined as policy in the E.O.

For *if* indeed the President delegated constituent powers, which she herself does not possess, to the GRP Peace Panel under E.O. No. 3, Sec. 4(a), then the Decision should have struck down as "unconstitutional" not only the proposed MOA-AD but also E.O. 3, or at least, its Sec. 4(a). But it did not. Be that as it may, the Decision's wrong premise that, in E.O. 3, Sec. 4(a), the President delegates constituent powers to the GRP Peace Panel, raises doubts about the premises of the Decision in declaring the proposed MOA-AD "unconstitutional." Speaking of **wrong premises**, we cannot help but take note of Associate Justice Brion's opinion that the *ponencia*'s conclusion, made on the basis of the GRP-MILF [Tripoli] Peace Agreement of June 2001, is mistaken for having been based on the wrong premises.[83]

Under E.O. 3's Section 5 on Administrative Structure, "There shall be established Government Peace Negotiating Panels (GPNPs) for

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[81] Joint Declaration, 1 September 1992, The Hague, The Netherlands, signed by GRP and NDF representatives.

[82] North Cotabato, at 501.

[83] *Id.* at 707 (Brion, J., *concurring and dissenting*).

negotiations with different rebel groups, to be composed of a Chair and four (4) members who shall be appointed by the President as her official emissaries to conduct negotiations, dialogues, and face-to-face discussions with rebel groups."[84] Herein is *the authority for the GRP Peace Panel to conduct peace negotiations with the MILF.*

On the other hand, the PAPP "shall be charged with the management and supervision of the comprehensive peace process.... Shall have the authority to coordinate and integrate, in behalf of the President, all existing peace efforts."[85] Among his functions and responsibilities, is to "Recommend to the President policies, programs and actions to implement the comprehensive peace process."[86] Also, he supervises, among others, the GPNPs.[87]

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, are 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.

This *recommendatory mode* of the GRP Peace Negotiating Panels was illustrated earlier in the GRP-NDF Peace Negotiations when the GRP Panel reaffirmed its position on constitutional processes vis-à-vis the NDF's objection to this as the imposition of the Constitution as the framework for the peace talks. We refer to the remarkable GRP Panel statement incorporated into paragraph 7 of the ***Breukelen Joint Statement*** of 14 June 1994:[88]

> The GRP Panel reaffirms its position that the GRP commitment to Constitutional processes... does [not] mean that it will cite the GRP Constitution as a basis for rejecting what otherwise would be just and valid proposals for reforms in society. If it is shown in fact

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[84] E.O. 3, § 5(c).
[85] § 5(b).
[86] § 5(b)(2).
[87] § 5(b)(4).
[88] This was signed for the GRP by, among others, Amb. Howard Q. Dee as GRP Panel Chairman, Rep. Jose V. Yap, Silvestre H. Bello III, then Rep. Jesus G. Dureza, and then DOJ State Counsel Teresita L. de Castro, who now sits as an Associate Justice of the Supreme Court.

> that certain provisions of the GRP Constitution hinder the attainment of genuine reforms, the GRP Panel is willing to **recommend to GRP authorities** amendments thereto. In this context, it is clear that the GRP's adherence to constitutional processes does not constitute the imposition of the GRP Constitution as framework for the peace talks. (emphasis supplied)

Note that, under E.O. 3, the PAPP supervises the GRP Peace Panel[89] which conducts the peace negotiations with rebel groups,[90] and also **recommends** to the President policies, programs and actions to implement the comprehensive peace process,[91] which includes the pursuit of social, economic and political reforms, which may require administrative action, new legislation or even constitutional amendments.[92]

The MOI provides certain other general mandates and parameters for the GRP Peace Panel and the PAPP regarding the GRP-MILF peace negotiations:

> 1. The negotiations shall be conducted in accordance with the mandates of the Philippine Constitution, the rule of Law, and the principles of sovereignty, territorial integrity and national unity of the Republic of the Philippines.
>
> 2. The negotiation process shall be pursued in line with the National Comprehensive Peace Process, and shall seek a principled and peaceful resolution of the armed conflict, with neither blame nor surrender, but with dignity for all concerned.

We shall show that the GRP Peace Panel and the PAPP did not violate these mandates and parameters in performing their authority to conduct peace negotiations with the MILF. And that on the contrary, they did justice to the spirit, if not letter, of these mandates and parameters *in the context of* conducting authorized negotiations to reach a peaceful settlement with the MILF.

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."[93] And this is precisely what the

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[89] *See* E.O. 3, § 5(b)(4).
[90] § 5(c).
[91] § 5(b)(2).
[92] § 4(a).
[93] CHINKIN, *supra* note 56.

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).

It has been standard practice in the Philippines (and elsewhere) that peace negotiations with rebel groups (and for that matter diplomatic negotiations) are conducted *in the name of and in behalf of the Government*, thus "Government of the Republic of the Philippines (GRP)" or "Government of the Philippines (GOP)" as negotiating party – *not* the "Executive Department," "Office of the President," "GRP Peace Panel," "Department of Foreign Affairs," or whatever particular executive instrumentality or agency. It is of course understood, at least by the GRP side, that the negotiated peace agreements, treaties or executive agreements, as the case may be, would or could still be governed by or subject to certain corresponding or respective internal governmental and constitutional processes (e.g. ratification in the case of treaties, necessary implementing legislation, and even constitutionality litigation like the MOA-AD Cases).

But this may not be too clear, and can be a cause for consternation, to the GRP's negotiating counterpart rebel group. The MILF Peace Panel Chair, Mohagher Iqbal, was reported in the MILF website to have said it is akin to compelling the MILF to negotiate with the three branches of government.[94] One contributor to the MILF website's guest section wrote sarcastically: "With whom shall the MILF negotiate – the Arroyo regime, Congress, Supreme Court, the Church, the Big Business power blocs, the AFP or Piñol and the Filipino colons in Mindanao?"[95] This sounds absurd but, in effect, this is what has happened or is happening, assuming there will be further negotiations. *But is this really the way negotiations of this sort should be conducted?*

If we take the case of *executive agreements*, as distinguished from treaties, the former may be validly entered into by the Executive Department without the concurrence of the Senate which is required for

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[94] *MILF to Government: Honor Your Agreements*, Aug. 11, 2008, *available at* www.luwaran.com.

[95] Ibrahim Canana, *Reality Check*, *available at* www.luwaran.com.

treaties.[96] In other words, the Executive Department can already conclusively bind the GRP or GOP when it enters into executive agreements, without requirement of any further constitutional process. If the Executive Department can do that with executive agreements in certain matters of *foreign* affairs or *international* relations, then can it not do the same with peace agreements with *domestic* rebel groups? For example, if we take the 1996 Final Peace Agreement entered into by the Executive Department with the MNLF (the "MNLF Model"), is this not considered already conclusively binding on the GRP? Is this not considered a peace agreement *entered into by the GRP and not just its Executive Department?* Should this not be the presumption until it is overturned by Congress or the Supreme Court? These are still uncharted waters that the SC Decision on the MOA-AD has not addressed.

This brings us to executive power and duties as well as other mandates and parameters of the Constitution with bearing on peace negotiations and agreements with rebel groups.

B. Under the Constitution: Strong Mandates for Peace

As the Decision affirms, the conduct of negotiations to reach peaceful settlement with the different rebel groups is clearly the realm of the Executive Department or the President, even if "not explicitly mentioned in the Constitution."[97] 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 we shall discuss further below, **this is not the only constitutional prism, perspective or "angle of vision"[98] to view and validate the executive exercise of peace negotiations.**

In the absence of a specific constitutional provision mandating the Executive Department to conduct peace negotiations, one can always fall back on the well-established even if "**unstated residual powers**... which are necessary for [the President] to comply with her duties under the Constitution."[99] (emphasis supplied) In this connection, the relevant

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[96] *See* Comm'r of Internal Revenue v. John Gotamco & Sons, Inc., G.R. No. 31092, 148 SCRA 36, Feb. 27, 1987; Comm'r of Customs v. Eastern Sea Trading, G.R. No. 14279, 3 SCRA 351, Oct. 31, 1961; USAFFE Veterans Association, Inc. v. Treasurer of the Phil., No. 10500, 105 Phil. 1030, Jun. 30, 1959.

[97] North Cotabato, at 501.

[98] *See id.* at 695 (Nachura, J., *dissenting*).

[99] *Id.* at 502, *citing* Marcos v. Manglapus, G.R No. 88211, 178 SCRA 760, 763, Oct. 27, 1989.

constitutional observation of again Randy David given to a Senate workshop before the opening of the 10th Congress in July 1995 is insightful:

> All the constitutions we have had, including the present one, take peace for granted. What they problematize is war. Most states renounce war as an instrument of national policy. It is the politically correct thing to say. Yet, in truth, the basis of State power itself is control over the means of violence. Ultimately, the State enforces its authority against those who oppose it through violent means.
>
> Therefore, it is not surprising, although it is an interesting oversight considering our national experience, that **the 1987 Constitution contains no reference whatsoever to the concept of peace negotiations as an instrument for resolving social conflicts.**
>
> While the Constitution (Art. VII, Sec. 18) provides the President extraordinary powers "to prevent or suppress lawless violence, invasion or rebellion," **it has no provisions for the use by government of extraordinary peaceful means to meet armed threats to the State.** Perhaps the assumption of the framers of the Constitution is that existing laws and normal institutional processes are sufficient for dealing with situations that do not require martial law.[100] (emphasis supplied)

Since mention was made therein of the **Commander-in-Chief powers** of the President "to prevent or suppress lawless violence, invasion or rebellion" by calling out the Armed Forces of the Philippines, *does this not imply a corollary or concomitant power of the President to conduct diplomatic negotiations to prevent or reverse an invasion, or to conduct peace negotiations to prevent or solve rebellion?* Would this not be very much in line with the wisdom of Sun Tzu's *Art of War* of solving a military problem without having to fire a single shot or lose a single life? Is this not also executive duty? Indeed, the Decision has declared that "the President's power to conduct peace negotiations is implicitly included in her powers as Chief Executive and Commander-in-Chief."[101] The only *caveat*, however, might be that "to prevent or suppress rebellion," on one hand, may have different terms of reference from "to resolve the armed conflict" towards "the attainment of a just and lasting peace," on the other. Stated otherwise, "to prevent or suppress (the Moro) rebellion" is not necessarily the same as to "achieve a negotiated political settlement... to solve the Bangsamoro problem."

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[100] Randolf David, *Peace Issues and the Senate*, presented during the Senate Workshop in Batangas, Jul. 21, 1995.

[101] North Cotabato, at 502.

Speaking of **executive duties**, the usual term of reference is the **President's Oath** in Art. VII, Sec. 5 of the 1987 Constitution. And with this, the usual reference is to "preserve and defend its Constitution" as well as "execute its laws." There are those who interpret these terms statically, if not literally, as in "preserve" or keep the Constitution as it is, "defend" it against changes. Thus, their constant admonition "Don't tinker with the Constitution." What they really want to "preserve and defend" is not so much the Constitution, but the status quo. With regard to the MOA-AD Cases, it is to permanently keep the Moros down to the status quo of "low-intensity" autonomy and the power relations around that.

"Execute its laws" that "preserve and defend" this status quo, including calling out the AFP to suppress Moro rebellion. As Dean Pacifico Agabin said on interpellation by Justice Leonardo Quisumbing, exercise the State's "monopoly of the forces of violence... to make them abide by the laws of the Republic."[102] To which Justice Quisumbing later said, "That's what the State says. That's why you don't have peace in the world."[103] And this is perhaps why, as Prof. David notes, Constitutions tend to problematize war.

Less attention is paid to "do justice to every man" in the President's Oath. The societal version of this is, of course, **social justice**. And this is very relevant to peace negotiations the "common goal" of which is not only "to resolve the armed conflict" but also "the attainment of a **just** and lasting **peace**" – a peace based on justice or more precisely social justice. In what is already considered a classic analysis by a Christian prelate, Cotabato Archbishop Orlando Quevedo, O.M.I., had singled out *injustice as the root of the Moro conflict*, particularly injustice to Moro identity, political sovereignty and integral development.[104] A Moro academic says two concepts constitute the core of the Moro grievance: the *principle of social justice* which calls for the correction of the neglect of and injustices against the Moro people in the past, and the *principle of self-determination* which calls for an appropriate and substantial degree of self-rule in terms of powers and area where the Moro people will have the opportunity and capability to effectively address their marginalization.[105]

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[102] TSN, Oral argument hearing on Aug. 22, 2008, at 603.

[103] *Id.* at 606.

[104] Orlando Quevedo, *Injustice: The Root of Conflict in Mindanao*, Paper delivered to the Bishops-Businessmen's Conference in 2004.

[105] S. TANGGOL, MUSLIM AUTONOMY IN THE PHILIPPINES: RHETORIC AND REALITY (1993).

Both social justice and self-determination are constitutional mandates and parameters with particular bearing on the GRP-MILF peace negotiations. Let us take social justice first. There has been an expansion of the social justice provisions in the 1987 Constitution, compared with the 1935 and 1973 Constitutions. Aside from its declaration as a state policy,[106] there is now a whole article of more specific social justice provisions, followed by human rights provisions.[107] Perhaps more important than the letter is the spirit of social justice provisions that aim to "protect and enhance the right of all the people to human dignity, reduce social, economic and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good."[108] It should not be hard to relate this to the Bangsamoro problem and the aspired political equality of and diffused sovereignty to the Bangsamoro people.

The classic discussion on social justice in ***Calalang vs. Williams***[109] is most instructive:

> ...Social justice means the promotion of the welfare of all the people, the adoption by the Government of measures calculated to insure economic stability of all the component elements of society, through the maintenance of a proper economic and social equilibrium in the interrelations of the members of the community, **constitutionally, through the adoption of measures legally justifiable, or extra-constitutionally, through the exercise of powers underlying the existence of all governments on the time-honored principle of *salus populi est supreme lex.***
>
> Social justice, therefore, must be founded on **the recognition of the necessity** of interdependence among diverse units of a society and of the protection that should be equally and evenly extended to all groups as a combined force in our social and economic life...[110] (emphasis supplied)

Solving the Bangsamoro problem, which is also a big Philippine problem, can be framed as a measure of social justice. Solving it promotes the welfare not only of the Bangsamoro people but also of the Filipino people. Note how the general welfare can be promoted either constitutionally or extra-constitutionally. In other words, *extra*-constitutional measures are not necessarily *un*constitutional. **Theoretically, a negotiated**

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[106] CONST., art. II, § 10.
[107] art. XIII.
[108] art. XIII, § 1.
[109] No. 47800, 70 Phil. 726, Dec. 2, 1940.
[110] *Id.* at 734-35.

political settlement of the centuries-old Bangsamoro problem can even be done as an extra-constitutional measure of social justice. But the GRP-MILF peace negotiations up to the draft MOA-AD had not even taken that extra-constitutional track. It was still on the constitutional track of constitutional processes, still in the realm of executive power, duty and processes of conducting peace negotiations with a major rebel group.

At this juncture, it is important to point out that there are at least three common constitutional, Islamic and Moro concepts touched in this discussion on social justice. First of all, there are both Islamic *('adl)* and Moro (*kaadilan*) concepts of justice. Second, the constitutional **general welfare clause** (*salus populi est suprema lex*) has its Islamic conceptual equivalent in *maslalah* (public good). MILF peace negotiator, Atty. Michael Mastura, who once served as *amicus curiae* to the Supreme Court in a *shari'ah* case, says "that the 'general welfare clause' of the Philippine Constitution matching the principle of *maslaha wal mursalah* in Islamic constitutionalism is a catch-all framework to accommodate 'a medley of associative ties and tiers' [e.g. as indicated under Governance in the draft MOA-AD]."[111] And third is a common **doctrine of necessity**, *darurah* in Islamic law.[112] Recall the prefatory paragraph from a GRP-MILF peace agreement quoted earlier: "***Recognizing* the need** to resume their stalled peace talks in order to end the armed hostilities..."[113]

Calalang's reference to the general welfare clause as well as to "the recognition of the necessity" is echoed 55 years later in ***Lim vs. Pacquing***:[114]

> The police power has been described as the least limitable of the inherent powers of the State. It is based on the ancient doctrine – *salus populi est suprema lex* (the welfare of the people is the supreme law). In the early case of *Rubi vs. Provincial Board of Mindoro* (39 Phil. 660), this Court through Mr. Justice George A. Malcolm stated thus:

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[111] Datu Michael Mastura, *An Open Letter on the MOA-AD*, Aug. 24, 2008, available at www.mindanews.com.

[112] Mehol Sadain, *Islamic Perspective on Resolving the Mindanao Conflict*, Paper delivered at the roundtable discussion on "Human Rights and Development: The Quest for a Lasting Peace in Mindanao" on Jun. 5, 2000 at the University of the Philippines Law Center.

[113] *Agreement on the General Framework for the Resumption of Peace Talks Between the Government of the Republic of the Philippines and the Moro Islamic Liberation Front*, Mar. 24, 2001, Kuala Lumpur, Malaysia, second prefatory paragraph.

[114] G.R. No. 115044, 240 SCRA 649, Jan. 27, 1995.

> "The police power of the State x x x is a power coextensive with self-protection, and is not inaptly termed the **'law of overruling necessity'**..."[115] (emphasis supplied)

Speaking of the **police power** of the State, though this is conventionally exercised through the Legislative Department and also delegated, within limits, to Local Governments, there is no reason why this power, which rests upon public necessity and upon the right of the State and of the public to self-protection, cannot also be exercised by the Executive Department, especially by the President with her amplitude of executive power. If a municipal ordinance granting burial assistance to indigents is upheld as a valid exercise of police power,[116] then with more reason should the same be said about the conduct of peace negotiations with rebel groups to resolve the armed conflict and thereby prevent further loss of lives, waste of resources and damage to the economy and the social fabric.

Lim's mention of ***Rubi v. Provincial Board of Mindoro***[117] is providential, as it were, because it is this case that, though unfortunate in some aspects, *directly links the best part of the American Indian policy of the U.S.*, as enunciated in ***Worcester v. Georgia***[118] *to the Moros, Igorots and other indigenous tribes of the Philippines.* The best part we are referring to is *Worcester*'s characterization of the Cherokees as a "nation," meaning "a people distinct from others," "as a distinct, independent political community, having territorial boundaries, within which their territory is exclusive... in which the laws of Georgia have no force." The Cherokee Nation's relationship with the U.S. government is governed by a treaty which is treated as "the supreme law of the land" between them, a "treaty" being defined as "a compact formed between two nations or communities, having the right of self-government." This in fact illustrates the tried and tested concept of **treaty constitutionalism**.[119] Now, both these rather old cases of *Rubi* and *Worcester* were referred to in the leading separate opinion of then Associate Justice Puno in ***Cruz vs. Sec. of Environment and Natural Resources,***[120] better known as the "**IPRA Case**," thus giving those old cases still some later-day currency.

We are deferring to the next section our discussion of the constitutional right to self-determination in relation to the constitutional

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[115] *Id.* at 676.
[116] *See* Binay v. Domingo, G.R. No. 92389, 201 SCRA 508, Sep. 11, 1991.
[117] No. 14078, 39 Phil. 660, Mar. 7, 1919.
[118] 31 U.S. 515 (1832)
[119] *See esp.* J. TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995).
[120] G.R. No. 135385, 347 SCRA 128, Dec. 6, 2000.

principle of sovereignty. We shall now wind up this long but important discussion on the other constitutional mandates and parameters for peace negotiations with rebel groups. There may be no specific constitutional provisions on peace negotiations, as David had observed, but there are specific constitutional provisions **for peace or against war** from which to glean and draw support for peace negotiations, or *at least the spirit of giving peace a chance*:

> "...a regime of truth, justice, freedom, love, equality and **peace**..."[121]
>
> x x x
>
> "The Philippines **renounces war** as an instrument of national policy... and adheres to the policy of **peace**, equality, justice, freedom, cooperation, and amity with all nations."[122]
>
> x x x
>
> "The maintenance of **peace** and order... are essential for the enjoyment by all the people of the blessings of democracy."[123] (emphasis supplied)

While Art. II, Sec. 2 of the Constitution is traditionally seen in the context of international relations, there is ground to argue that the renunciation of war as an instrument of national policy and the policy of peace also applies or should apply domestically, including "with all nations" *inside* the Philippines like the Bangsamoro.

Finally, one can find solace in the record of deliberations of the 1986 Constitutional Commission which has in turn been adopted as part of recent Philippine jurisprudence. We refer in particular to certain remarks of Commissioner Blas Ople, quoted both in the Decision penned by Justice Tinga in ***Disomangcop v. Datumanong***[124] and in his Separate Opinion in the very recent case of ***Sema vs. Commission on Elections***,[125] better known as the "**Shariff Kabunsuan Case**":

> MR. OPLE.... **We are writing a peace Constitution.** We hope that the Article on Social Justice can contribute to a climate of peace so that any civil strife in the countryside can be more quickly

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[121] CONST., preamble.
[122] art. II, § 2.
[123] art. II, § 5.
[124] G.R. No. 149848, 444 SCRA 203, 232, Nov. 25, 2004, *citing* III RECORD 534, Aug. 20, 1986.
[125] G.R. No. 177597, 558 SCRA 700, 758-59, Jul. 16, 2008 (Tinga, J., *dissenting and concurring*).

> and more justly resolved. We are providing for autonomous regions so that we give constitutional permanence to the just demands and grievances of our own fellow countrymen in the Cordilleras and in Mindanao. One hundred thousand lives were lost in that struggle in Mindanao, and to this day, the Cordilleras is being shaken by an armed struggle as well as a peaceful and militant struggle. (emphasis supplied)

Ironically, Justice Tinga had in fact complained that the majority's Decision in the Shariff Kabunsuan Case "has dealt another severe blow to the cause of local autonomy," particularly that of the ARMM and its Regional (Legislative) Assembly which the ruling "deprived of the power delegated to it by Congress to create provinces" under R.A. No. 9054.[126] This actually underscores the low-intensity autonomy of the "MNLF Model" and the merit in the effort of the GRP-MILF peace negotiations up to the MOA-AD to seek a solution with a higher and better degree of self-determination than that allowed for autonomous regions under the Constitution, albeit short of independence or secession.

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."[127]

C. Sovereignty and Self-Determination of Two Peoples

We continue and finish our discussion on constitutional mandates and parameters with a discussion on sovereignty and self-determination, the principles most important to the GRP and MILF, respectively. They are at the core of the GRP-MILF peace negotiations and of their most developed product so far, the proposed MOA-AD, which sought to balance those principles as well as interests.

This brings us to the question of *where* ***the "immutable" principle of sovereignty*** *is at now in Philippine constitutional law and jurisprudence.* It is no longer conventional wisdom that sovereignty is "permanent, exclusive,

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[126] An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, Amending for the Purpose Republic Act No. 6734, entitled An Act Providing for the Autonomous Region in Muslim Mindanao, as Amended.

[127] North Cotabato, at 670 (Velasco., J., dissenting), *citing O'Donaghue v. US*, 289 U.S. 516 (1933).

comprehensive, absolute, indivisible, inalienable, and imprescriptible,"[128] with powers exercised by a single locus -- The One and Only State. There has already been a *reconceptualization of this traditional concept of sovereignty*,[129] including in recent Philippine jurisprudence, and even as the Philippines remains a unitary state. In ***Tañada vs. Angara,***[130] which upheld the constitutionality of the Philippine ratification of the World Trade Organization (WTO) Agreement, it was held that:

> ...while sovereignty has traditionally been deemed absolute and all-encompassing on the domestic level, it is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations.
>
> x x x
>
> ...The sovereignty of a state therefore cannot in fact and in reality be considered absolute. Certain restrictions enter into the picture: (1) limitations imposed by the very nature of membership in the family of nations and (2) limitations imposed by treaty stipulations...
>
> Thus, when the Philippines joined the United Nations, as one of its 51 charter members, it consented to restrict its sovereign rights under the "concept of sovereignty as auto-limitation."[131]

While *Tañada* tried to limit the restrictions on the absoluteness of state sovereignty to the international level, it is clear that *elements of international law and relations will impinge on sovereignty at the domestic level, making it less than absolute.* This is clear in the application of the international human right of peoples to self-determination to the case of the Bangsamoro people in the Philippines. More so, that the right to self-determination also has constitutional status in the Philippines, under the Constitution's Art. II, Sec. 7 and possibly also under Sec. 2, as will be discussed shortly below.

Still speaking of sovereignty, it was Justice Adolfo Azcuna who pointed out, at the oral argument hearing of 15 August 2008, that the Constitution includes what is called the "Constitution [or Charter] of

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[128] ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 35 (1982), *citing* Laurel v. Misa, No. 409, 77 Phil. 856, Jan. 30, 1947.

[129] *See* SOLIMAN SANTOS, THE MORO ISLAMIC CHALLENGE: CONSTITUTIONAL RETHINKING FOR THE MINDANAO PEACE PROCESS 124-26 (2001). Discussion on "Old and New Sovereignty" which was made reference to by Justice Carpio-Morales during the oral argument hearing on 15 Aug. 15, 2008 (TSN, at 132-33).

[130] G.R. No. 118295, 272 SCRA 18, May 2, 1997.

[131] *Id.* at 66-67.

Sovereignty" the Article or provisions for its own amendments or revisions. What better upholding therefore of sovereignty can there be than for the peace process with rebel groups to propose constitutional amendments addressing the root causes of rebellion? It has been said that under a written constitution, "the people can do no act except make a new constitution or make a revolution."[132]

Speaking of "the people" in whom sovereignty resides,[133] as in "the sovereign Filipino people,"[134] the Constitution had centralized this sovereignty in the undifferentiated Filipino people representing the imagined Filipino nation-state. In reality, it is **peoples** of the Philippines, including the "tri-peoples" of Mindanao, or at least a *culturally diverse* people.

In the separate opinion of then Associate Justice Artemio Panganiban in the IPRA Case, he makes reference to "the Bangsa Moro people's claim to their ancestral land."[135] This is the first time for Philippine jurisprudence to use the term "**Bangsa Moro people**" and can be taken as a *judicial recognition* of that status. And there is also executive and legislative recognition of the Bangsamoro people. One finds the *executive recognition* in Paragraph 95 of the 1996 Final Peace Agreement with the MNLF, and the *legislative recognition* in Art. X, Sec. 3(b) of R.A. No. 9054 (These two documents are among the terms of reference of the draft MOA-AD). At least this time, the three great departments of government have gotten their act together.

Given that recognition and status of the Bangsamoro *as a people*, it follows that, like the Filipino people, the Bangsamoro people have the **right of self-determination** under **generally accepted principles of international law**, particularly the identical provisions in the two great international covenants on human rights: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.... freely dispose of their natural wealth and resources...."[136]

This right to self-determination as understood in international law and relations is actually given constitutional status as a "paramount consideration," among

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[132] VICENTE SINCO, PHILIPPINE POLITICAL LAW: PRINCIPLES AND CONCEPTS 66 (11th ed., 1962).

[133] CONST., art. II, § 2.

[134] preamble.

[135] Cruz v. Sec. of Environment and Natural Resources, G.R. No. 135385, 347 SCRA 128, 333, Dec. 6, 2000.

[136] International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 1(1), (3); International Covenant on Civil and Political Rights (ICCPR), art. 1(1), (3), *cited in* North Cotabato, at 490.

other principles, in Art. II, Sec. 7 of the Constitution: "The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and **the right to self-determination.**" (emphasis supplied) This constitutional right to self-determination is actually overlooked in the SC Decision's otherwise extensive and commendable discussion of the international law right to self-determination of peoples "understood not merely as the entire population of a State but also a portion thereof."[137]

The Decision then approvingly quoted 1998 Canadian jurisprudence in *Reference Re Secession of Quebec*[138] that "the right of a people to self-determination is now so widely recognized in international conventions that **the principle has acquired a status beyond 'convention' and is considered a general principle of international law.**"[139] (emphasis supplied) The international human right of self-determination of peoples was thus thereby *adopted as part of at least the law of the land* by virtue of the incorporation clause,[140] as in fact also by virtue of the treaty clause,[141] of the Constitution.

At this point, we recall the interpellation by Justice Quisumbing of Dean Agabin, counsel for intervenor Sen. Manuel Roxas III, on human rights and self-determination during the oral argument hearing of 22 August 2008. Dean Agabin remarked then: "... the primary value of human rights here is the value of self determination... which prevails I believe over even the concept of ancestral domain."[142] The latter point is actually correct when it comes to the Bangsamoro people for whom self-determination is the broader context of ancestral domain. Since ancestral domain has constitutional status, self-determination can prevail over it only the premise that self-determination itself has constitutional status.

Notwithstanding, or in addition to, the entrenchment of "the right to self-determination" in Art. II, Sec. 7 of the Constitution, **the Supreme Court could have made, or can in the future make, a declaration, for clarity and emphasis, that the human right of self-determination of peoples is a generally accepted principle of international law adopted as part of not only the law *but also the fundamental law of the land***

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[137] North Cotabato, at 489.
[138] 2 S.C.R. 217 (1998).
[139] *Id., cited in* North Cotabato, at 489.
[140] CONST., art. II, § 2.
[141] art. VII, § 21.
[142] TSN, Oral argument hearing on Aug. 22, 2008, at 605.

and therefore of constitutional status. The further legal basis for this lies in at least three angles of legal reasoning:

(1) The right of peoples to self-determination is established in the International Bill of Rights which itself actually deserves the same constitutional status as the domestic Bill of Rights, considering also the many common human rights and fundamental freedoms in both Bills of Rights.

(2) The right of peoples to self-determination has an *erga omnes* (towards all) character and is one of the essential principles of contemporary international law, according to several International Court of Justice (ICJ) rulings.[143] In other words, this is not only a generally accepted principle of international law which is adopted as part of the law of the land, but also a generally accepted *fundamental* principle of international law which should be adopted as part of the *fundamental* law of the land.

(3) There is the precedent of ***Kuroda vs. Jalandoni***[144] which ruled that certain "generally accepted principles and policies of international law," particularly "the Hague Convention, the Geneva Convention and significant precedents of international jurisprudence established by the United Nations... of the laws and customs of war, of humanity and civilization," are adopted as "**part of our Constitution.**"[145] (emphasis supplied) If this has been done for international humanitarian law, then with more reason must it be done for international human rights law.

The suggested declaration by the Court on the constitutional status of the human right of self-determination of peoples would also build on the pronouncement in *Disomangcop* that:

> The aim of the Constitution is to extend to the autonomous peoples, the people of Muslim Mindanao in this case, **the right to self-determination** – a right to choose their own path of development; the right to determine the political, cultural and economic content of their development path within the framework of the sovereignty and territorial integrity of the Philippine Republic.[146] (emphasis supplied)

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[143] East Timor (Portugal v. Australia), Judgment, 1995 I.C.J. 90; Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 31-32; Advisory Opinion on the Western Sahara, 1975 I.C.J. 12, 31-33.

[144] No. 2662, 83 Phil. 171, Mar. 26, 1949.

[145] *Id.* at 177.

[146] G.R. No. 149848, 444 SCRA 203, 239, Nov. 25, 2004.

While according to *Disomangcop*, "In international law, the right to self-determination need not be understood as a right to political separation,"[147] it also need not be limited to the path of the existing autonomous regions provisions of the Constitution, especially if that "MNLF Model" has proven to be unsuccessful in solving the Bangsamoro problem.

The policy reason for a declaration by the Court on the constitutional status of the human right of self-determination of peoples would be to 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.

VI. 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 Bangsamoro Juridical Entity (BJE) or otherwise, will have to be one which is "outside the box" of the Constitution. The Moro Islamic challenge, which is also addressed to the Supreme Court, is one of **constitutional rethinking for the Mindanao peace process.**[148]

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."[149] 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, just like what P.D. No. 1618 creating two Autonomous Regions IX and XIII purported to do in 1979 under the Marcos dictatorship. That resulted then in the collapse of the peace process and ceasefire, with

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[147] *Id.* at 230.

[148] *See* SANTOS, *supra* note 129, for the full discussion on this subject.

[149] 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* North Cotabato, at 576-80 (Puno, C.J., *concurring*).

consequent resumption of fighting in Mindanao till the end of the dictatorship.

The said 1987 constitutional provisions 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. The MNLF through Chairman Nur Misuari was on record, in the *Jeddah Accord* of 3 January 1987 for "suspending pertinent provisions of the draft constitution on the grant of autonomy to Muslim Mindanao in the scheduled plebiscite on February 2, 1987," but this was not acceded to by the Aquino administration. And with that, *the constitutional die was cast.*

But at the end of the 1992-1996 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 helm of the MNLF, to be an *unsuccessful model* which did not bring enough of its promised peace, development and autonomy.

The MILF, after "waiting and seeing," found that 1996 Final Peace Agreement inadequate in addressing Bangsamoro aspirations for a higher degree of self-determination that does justice to their people's identity, way of life and longing for self-rule. As the MILF was able to articulate these aspirations and show a considerable following or constituency as well as armed force, the Ramos administration to its credit explored and pursued peace negotiations with them. The MILF could not but reciprocate this political will.[150] It has since shifted to and stayed the course up to present with a principal strategy of peace negotiations rather than armed struggle to achieve its political objectives of self-determination.

In the "unusual" but better model of the GRP-MILF peace negotiations, as explained earlier, 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

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[150] SANTOS, *supra* note 58, at 7.

problem and how it can be solved. This allowed for "thinking outside 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 stakeholdership over it by the parties concerned.* Constitutional *implementation logically comes after not before* a peace agreement on constitutional solutions; otherwise, it becomes constitutional *preemption.*

But now, because the GRP-MILF peace negotiations are seen through the draft MOA-AD as an "unusual model" by the majority, it has been restrained, gravely stalled and set back. This is where we are now, just to speak of the peace front, without even talking about the unfolding war front. As some of the SC justices had asked during the oral argument, how do we go forward? It can of course be easily said in general that all concerned must do their part for this matter which calls for statesmanship now more than brinkmanship. And that includes *judicial statesmanship*, more than judicial restraint or judicial activism. Such judicial statesmanship would have been shown by a Decision that respects the inherent character and the unfinished process of the peace negotiations so that these may eventually, in the hopefully not too distant future, be completed in achieving their purpose contributory to "a regime of truth, justice, freedom, love, equality and peace."[151] In short, **a Decision that gives peace a chance, but it was not to be**.

It does not speak of judicial statesmanship when the SC Decision on the MOA-AD (and some separate opinions) contains some *misleading* statements that are *alarmist or conducive of hysteria*, like notably the passage that **"The MOA-AD... could pervasively and drastically result to the diaspora or displacement of a great number of inhabitants from their**

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[151] CONST., preamble.

total environment." This is not at all envisioned by the proposed MOA-AD which, on the contrary, expressly "recognizes and respects vested property rights"[152] and "the protection of civil, political, economic, and cultural rights."[153]

We end this long critique of the SC Decision on the MOA-AD by taking note of one specific remark of Justice Azcuna: "The consensus points are still there, [though] you don't have to sign the MOA."[154] 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 Quevedo who lives in the epicenter of the Bangsamoro problem.[155]

Something hard-earned over several years of difficult peace negotiations between the representatives of two peoples, like this balancing of interests, should not have been swept away just like that in the heat of the moment. Whatever is still left, if any, of the MOA-AD, whether its own consensus points or other points of value from the SC Decision which struck it down, we might still move forward if we can find ways which **do not destroy but instead build (on) the peace process.**[156]

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[152] MOA-AD, (Concepts and Principles) ¶ 7.

[153] MOA-AD, (Territory) ¶ 4.

[154] Based on counsel's notes of the oral argument hearing of Aug. 29, 2008.

[155] ORLANDO QUEVEDO, PRIMER ON THE MOA-AD (2nd and 3rd of a series, Aug. 7 & 9, 2008).

[156] *See* Julkipli Wadi, *MOA-AD: Build, Don't Work to Destroy Peace Process*, THE MANILA TIMES, Aug. 29, 2008, at D1.