

**BANGSAMORO JURIDICAL ENTITY**  
**Philippine Territory at the Negotiating Table—**  
**The Price Tag for Peace?**

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## VII. REAFFIRMANCE

*It is the duty of the government to seek a just,  
comprehensive and enduring peace with any rebel group  
but the search for peace must  
always be in accord with the Constitution.  
Any search for peace that undercuts  
the Constitution must be struck down.  
Peace in breach of the Constitution is worse than worthless.<sup>1</sup>*

### INTRODUCTION

History reveals that there are times when violence has to be embraced and frontally met as the price for a lasting peace. History teaches that those who sacrifice everything else for the sake of peace ultimately pay a very high price.<sup>2</sup> For the quest for it, no matter how difficult and illusive it may be, should never be out of fear of threatened violence. These are lessons learned in the unfolding of history.

Mindanao,<sup>3</sup> the southern part of the Philippines has been plagued by armed conflicts. For decades now, lives have been sacrificed and dreams have been shattered, and these include those of the young, innocent, and old – the vulnerable. The government, in its desire to find an ultimate solution,

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<sup>1</sup> Separate Concurring Opinion of Puno, C.J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-puno.htm> (last accessed 30 October 2008).

<sup>2</sup> Separate Concurring and Dissenting Opinion of Brion, J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-brion.htm> (last accessed 30 October 2008).

<sup>3</sup> Situated in the southernmost section of the Philippine Archipelago, Mindanao is the second largest island in the Philippines. With a land area of 102,043 square kilometers, it occupies one-third of the Philippines' total land area and is larger than a number of Asian countries like Taiwan or Singapore. Mindanao is strategically located within the East ASEAN region, almost equidistant to the eastern sections of Indonesia, Malaysia and Brunei Darussalam, <http://www.medco.gov.ph/medcoweb/mindanao.asp> (last accessed 27 January 2009).

entered into a Memorandum of Agreement on Ancestral Domain (MOA-AD). Paradoxically, though, it opened up a *pandora's box*. For no matter how great one's desire is, to end the armed conflicts in the south, bounds within which the President of the Philippines may lawfully exercise her discretion, must strictly adhere to the Constitution and be carefully delineated to enable her to pursue the peace process effectively.

This article will attempt to elucidate the questions raised in the October 14, 2008 case of The Province of North Cotabato, *et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, *et al.*<sup>4</sup> which bears relevance on the sanctity of the Philippine territory and the extent of the powers of the President to conduct peace negotiations. The case consists of various petitions assailing the constitutionality of the Memorandum of Agreement on Ancestral Domain (MOA-AD) between the respondent Government of the Republic of the Philippines Peace Panel (GRP), and the Moro Islamic Liberation Front (MILF).

### **THE CAUSE OF THE CAUSE**

The Separate Concurring Opinion<sup>5</sup> of Chief Justice Reynato S. Puno in the said case aptly narrated the historical perspective of the problem of insurgency in the south, as follows:

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<sup>4</sup> The Province of North Cotabato, duly represented by Governor Jesus Sacdalan and/or Vice-Governor Emmanuel Pinol, for and in his own behalf *v.* The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), represented by Sec. Rodolfo Garcia, Atty. Sedfrey Candelaria, Mark Ryan Sullivan, and/or Gen. Hermogenes Esperon, Jr., the latter in his capacity as the present and Duly-appointed Presidential Adviser on the Peace Process (OPAPP) or the so-called Office of the Presidential Adviser on the Peace Process, G.R. Nos. 183591, 183572, 183893 and 183951, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591.htm> (last accessed 30 October 2008).

<sup>5</sup> *Supra* note 1.

Our Muslim problem exploded in March of 1968 when Muslim trainees were massacred by army officers at Corregidor. About 180 Muslim trainees had been recruited in the previous year as a part of the covert force named *Jabidah*,<sup>6</sup> allegedly formed to wrest away Sabah from Malaysia. The trainees were massacred when they reportedly protested their unbearable training and demanded the return to their home. The *Jabidah* Massacre fomented the formation of Muslim groups clamoring for a separate Islamic state. One of these groups was the Muslim Independence Movement (MIM), founded by the then Governor of Cotabato, Datu Udtog Matalam. Another was the Nurul Islam, led by Hashim Salamat.

On September 21, 1972, Martial Law was declared by President Ferdinand E. Marcos. Among the reasons cited to justify martial law were the armed conflict between Muslims and Christians and the Muslim secessionist movement in the Southern Philippines. The imposition of Martial Law drove some of the Muslim secessionist movements to the underground. One of them was the Moro National Liberation Front (MNLF) headed by Nur Misuari. In 1974, the MNLF shot to prominence, when the Organization of Islamic Conference (OIC) officially gave it recognition. During the 5<sup>th</sup> Islamic Conference of Foreign Ministers (ICFM), they strongly urged “the Philippine Government to find a political and peaceful solution through negotiation with Muslim leaders, particularly with representatives of the MNLF in order to arrive at a just solution to the plight of the Filipino Muslims within the framework of national sovereignty and territorial integrity of the Philippines;” and recognize “the problem as an internal problem with the Philippine Government to ensure the safety of the Filipino Muslims and the preservation of their liberties in accordance with the Universal Declaration of Human Rights”.

In December 1976, the Philippine Government and the MNLF, under the auspices of the OIC, started their peace negotiation in Tripoli, Libya. It bore its first fruit when on January 20, 1977, the parties signed the Tripoli Agreement in Zamboanga City in the presence of the OIC Representative.

President Marcos immediately implemented the Tripoli Agreement. He issued Presidential Proclamation No. 1628, “Declaring Autonomy in Southern Philippine”. A plebiscite was conducted in the provinces covered under the Tripoli Agreement to determine the will of the people thereat. Further, the legislature enacted Batasang Pambansa Blg. 207 mandating the organization of regional legislative assemblies in Regions IX<sup>8</sup> and XII.<sup>9</sup> President Marcos then ordered the creation of Autonomous Region IX and XII.

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<sup>6</sup> *Id.* The formation of the commando unit was supposedly for a destabilization plan by the Marcos government aimed at Sabah. The young Muslim recruits were to be mobilized for operations against Sabah and subsequently claim it from Malaysia.

<sup>7</sup> Providing for the Organization of Sangguniang Pampook (Regional Legislative Assembly) in Each of Regions IX and XII.

<sup>8</sup> Region IX (Zamboanga Peninsula) consists of the provinces of Zamboanga del Norte, Zamboanga del Sur and Zamboanga Sibugay, <http://www.livinginthephilippines.com/region9.html> (last accessed 27 January 2009).

<sup>9</sup> Region XII (SOCCSKSARGEN) consists of the provinces of North Cotabato, Saranggani, South Cotabato and Sultan Kudarat, <http://philippines-archipelago.com/contents.html#geography> (last accessed 27 January 2009).

In the meanwhile, the MNLF continued embracing its international status. It was accorded the status of an **observer** in Tripoli, Libya during the 8<sup>th</sup> ICFM. In the 15<sup>th</sup> ICFM at Sana'a, Yemen, in 1984, the MNLF's status was further elevated from a mere "legitimate representative" to "**sole legitimate representative**" of the Bangsamoro people.<sup>10</sup>

In 1986, the People Power Revolution catapulted Corazon C. Aquino to the presidency. Forthwith, she ordered the peace talks with the MNLF to resume. The 1987 Constitution was ratified by the people. It provided for the creation of the Autonomous Region of Muslim Mindanao (ARMM) through an act of Congress. But again the talks with the MNLF floundered in May 1987. Be that as it may, it was during President Aquino's governance that a culture of peace negotiations with the rebellious MNLF and MILF was cultivated. Thus, the ARMM was created through Republic Act No. 6734.<sup>11</sup> The law took effect on August 1, 1989.

Then came the presidency of President Fidel V. Ramos. He issued on September 15, 1993, Executive Order No. 125 (E.O. 125) which provided for a comprehensive, integrated and holistic peace process with the Muslim rebels. E.O. 125 created the Office of the Presidential Adviser on the Peace Process to give momentum to the peace talks with the MNLF.

In April 1997, the peace talks between the Government of the Republic of the Philippines (GRP) and MNLF collapsed. Schism split the MNLF leadership. **The irreconcilable difference between Nur Misuari and Hashim Salamat led to the formation of the Moro Islamic Liberation Front (MILF), headed by Hashim Salamat.** Thus, the Maguindanao-led MILF parted ways with the Tausug-led MNLF.

President Joseph Estrada continued the peace talks with the MILF. The talks, however, were limited to cessation of hostilities and did not gain any headway. President Estrada gave both sides until December 1999 to finish the peace process. They did not meet the deadline. The year 2000 saw the escalation of acts of violence and the threats to the lives and security of civilians in Southern Mindanao.<sup>12</sup> President Estrada then declared an "all-out-war" against the MILF. He bowed out of office with the "war" unfinished.

Thereafter, President Gloria Macapagal-Arroyo assumed office. Peace negotiations with the MILF were immediately set for resumption.

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<sup>10</sup> The Bangsamoro people refer to those who are natives or original inhabitants of Mindanao and its adjacent islands including Palawan and the Sulu archipelago at the time of the conquest or colonization of its descendants whether mixed or of full blood. Spouses and their descendants are classified as Bangsamoro.

Memorandum of Agreement – Ancestral Domain (MOA-AD), Concepts and Principles, §1.

<sup>11</sup> As amended by Republic Act 9054 entitled "An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao", amending for the purpose Republic Act 6734, entitled an "Act of Providing for the Autonomous Region in Muslim Mindanao", as amended.

<sup>12</sup> *Supra* note 4. Towards the end of 1999 up to early 2000, the MILF attacked a number of municipalities in Central Mindanao and, in March 2000, it took control of the town hall of Kauswagan, Lanao del Norte.

This resumption of peace negotiations, coupled with the pursuit of the ultimate solution to end the problem, urged the government to forge an agreement with the MILF, the Tripoli Agreement 2001. Its Ancestral Domain Aspect threatens the very existence and sovereignty of this country and questions the extent of the President to negotiate.

### **THE MEMORANDUM BETWEEN “*DAVID AND GOLIATH*”**

When President Gloria Macapagal-Arroyo assumed office, the military offensive against the MILF was suspended and the government sought a resumption of the peace talks.

The President delegated the authority to conduct the peace negotiations to the Government of the Republic of the Philippines (GRP) Negotiating Panel<sup>13</sup> by virtue of Executive Order No. 3 (E.O. 3).<sup>14</sup> The said executive order, together with the Memorandum of Instructions of March 1, 2001 and the Memorandum of Instructions of September 8, 2003, constitutes the mandate of the GRP Peace panel. It was within the parameters of this mandate that the GRP Peace panel was to negotiate with the MILF and arrive at a Comprehensive Peace Agreement. It was pursuant to these strictures that the MOA-AD was crafted, initialed and scheduled for signing.<sup>15</sup>

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<sup>13</sup> *Id.* Composed of its Chairperson, Sec. Rodolfo Garcia, and members, Atty. Leah Armamento, Atty. Sedfrey Cabrera, with Mark Ryan Sullivan as Secretariat Head.

<sup>14</sup> *Id.* The authority of the GRP negotiating Panel is defined by Executive Order No. 3 (E.O. No. 3), issued on February 28, 2001. The said executive order requires that the government's policy framework for peace, including the systematic approach and the administrative structure for carrying out the comprehensive peace process x x x be governed by this Executive Order.

<sup>15</sup> Dissenting Opinion of Nachura, J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-nachura.htm> (last accessed 30 October 2008).

The MILF initially responded with deep reservation, but when President Arroyo asked the Government of Malaysia through Prime Minister Mahathir Mohammad to help convince the MILF to return to the negotiating table, the MILF convened its Central Committee to seriously discuss the matter and, eventually decide to meet with the GRP. The parties met in Kuala Lumpur on March 24, 2001, with the talks being facilitated by the Malaysian government, the parties signing on the same date the Agreement on the General Framework for the Resumption of Peace Talks between the GRP and MILF. The MILF thereafter suspended all its military actions. Formal peace talks between the parties were held in Tripoli, Libya from June 20-22, 2001, the outcome of which was the GRP-MILF Tripoli Agreement on Peace (Tripoli Agreement 2001) containing the basic principles and agenda on the following aspects of the negotiation: Security, Rehabilitation and Ancestral Domain. With regard to the Ancestral Domain Aspect, the parties in Tripoli Agreement 2001 simply agreed “that the same be discussed further by the Parties in their next meeting”.<sup>16</sup> The succeeding peace talk produced the finalization of the Security and Rehabilitation Aspects of the Tripoli Agreement 2001.<sup>17</sup>

On August 5, 2008, the Government of the Republic of the Philippines (GRP) and the MILF, through the Chairpersons of their respective peace negotiating panels, were scheduled to sign the Memorandum of Agreement on the Ancestral Domain (MOA-AD) Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 in Kuala Lumpur, Malaysia. The signing of the MOA-AD was not to materialize, however, for

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<sup>16</sup> *Supra* note 4.

<sup>17</sup> *Id.* A second round of peace talks was held in Cyberjaya, Malaysia on August 5-7, 2001 which ended with the signing of the Implementing Guidelines on the Security Aspect of the Tripoli Agreement 2001 leading to ceasefire status between the parties. This was followed by the Implementing Guidelines on the Humanitarian Rehabilitation and Development Aspects of the Tripoli Agreement 2001, which was signed on May 7, 2002 at Putrajaya, Malaysia. Nonetheless, there were many incidence of violence between government forces and the MILF from 2002 to 2003.

upon motion of [interested parties]<sup>18</sup>, specifically those who filed their cases before the scheduled signing of the MOA-AD, the Supreme Court issued a Temporary Restraining Order (TRO) enjoining the GRP from signing the same. The said agreement contains, among others, the commitment of the parties to pursue peace negotiations, protect and respect human rights, negotiate with sincerity in the resolution and pacific settlement of the conflict, and refrain from the use of threat or force to attain undue advantage while the peace negotiations on the substantive agenda are on-going.<sup>19</sup> The *ponencia* of Justice Conchita Carpio-Morales on the overview of the MOA-AD underscores controversial points of the agreement:

Under the heading “Terms of Reference” (TOR), the MOA-AD includes not only four earlier agreements between the GRP and MILF, but also two agreements between the GRP and the MNLF: the 1976 Tripoli Agreement, and the Final Peace Agreement on the Implementation of the 1976 Tripoli Agreement, signed on September 2, 1996 during the administration of Fidel Ramos.

The MOA-AD also identifies as TOR two local statutes—the organic act for the Autonomous Region in Muslim Mindanao (ARMM) and the Indigenous People’s Rights Act (IPRA),<sup>20</sup> and several international law instruments—the ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries in relation to the UN Declaration on the Rights of the Indigenous Peoples, and the UN Charter, among others.

The MOA-AD states that the Parties “HAVE AGREED AND ACKNOWLEDGED AS FOLLOWS,” and starts with its main body.<sup>21</sup> Of

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<sup>18</sup> Petitioners in *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, namely, The Province of North Cotabato (G.R. No. 183591), City Government of Zamboanga, Rep. Ma. Isabelle G. Climaco and Rep. Erico Basilio A. Fabian (G.R. No. 183752), The City of Iligan (G.R. No. 183893), The Provincial Government of Zamboanga del Norte (G.R. No. 183951), and Ernesto M. Maceda, Jejomar C. Binay and Aquilino L. Pimentel III, and Petitioners-in-Intervention, namely, Franklin M. Dylon and Adel Abbas Tamano, Sen. Manuel Roxas, Municipality of Linamon, The City of Isabela, Basilan Province, The Province of Sultan Kudarat, Ruy Elias Lopez (G.R. No. 183962), Carlo B. Gomez, Gerardo S. Dilig, Nesario G. Awat, Joselito C. Alisuag and Richalex G. Jagmis, Marino Ridao and Kisin Buxani.

<sup>19</sup> *Supra* note 4.

<sup>20</sup> An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for other purposes, Republic Act 8371 (1997).

<sup>21</sup> *Supra* note 4.

the four strands<sup>22</sup> contained in the main body of the MOA-AD, those of Territory and Governance deserve a closer look.

### Territory

The Bangsamoro people<sup>23</sup> claim their ancestral domain, a part of the Philippine territory, as Bangsamoro Juridical Entity (BJE), on the basis of prior rights of occupation.<sup>24</sup> Its territory comprises the Mindanao-Sulu-Palawan geographic region,<sup>25</sup> more specifically, the area of ARMM and certain municipalities of Lanao del Norte that voted for inclusion in the 2001 plebiscite.<sup>26</sup> The MOA-AD goes on to describe the Bangsamoro people as the “**First Nation**”<sup>27</sup> with defined territory and with a system of government having entered into treaties of amity and commerce with foreign nations.<sup>28</sup> Justice Antonio T. Carpio, in his Separate Concurring Opinion,<sup>29</sup> had noted a glaring historical inaccuracy in the MOA-AD:

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<sup>22</sup> *Id.* The main body of the MOA-AD is divided into four strands, namely, Concepts and Principles, Territory, Resources, and Governance.

<sup>23</sup> *Supra* note 10.

<sup>24</sup> *Supra* note 4. The MOA-AD proceeds to refer to the “**Bangsamoro homeland**”, the ownership of which is vested exclusively in the Bangsamoro people by virtue of their prior rights of occupation. Both parties to the MOA-AD acknowledge that ancestral domain does **not** form part of the public domain.

<sup>25</sup> The Bangsamoro homeland and historic territory refer to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain, the atmospheric space above it, embracing the Mindanao-Sulu-Palawan geographic region. However, delimitations are contained in the agreed Schedule (Categories).  
MOA-AD, Territory, §1.

<sup>26</sup> *Id.* §2 ¶c. The Parties affirm that the core of the BJE shall constitute the present geographic area of the ARMM, including the municipalities of Baloi, Munai, Nunungan, Pantar, Tagoloan and Tangkal in the province of Lanao del Norte that voted for inclusion in the ARMM during the 2001 plebiscite.

<sup>27</sup> *Supra* note 4. The term “First Nation” is of Canadian origin referring to the indigenous people of that territory, particularly those known as Indians. In Canada, each of these indigenous people is equally entitled to be called “First Nation”, hence, all of them are usually described collectively by the plural “First Nations”, The Charter of the Assembly of First Nations, the leading advocacy group for the indigenous peoples of Canada, adopted in 1985.

<sup>28</sup> *Supra* note 4.

<sup>29</sup> Separate Concurring Opinion of Carpio, J., The Province of North Cotabato, *et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-carpio.htm> (last accessed 30 October 2008).

*“The MOA-AD declares the Bangsamoro as the single ‘First Nation’.”<sup>30</sup>*  
x x x In Mindanao, the Lumads who kept their indigenous beliefs, as well as those who centuries later converted to either Islam or Christianity, belong to the same ethnic Malay race. Even the settlers from Luzon and Visayas belong to the same ethnic Malay race. Declaring the Bangsamoros alone as the single “First Nation” is a historical anomaly. *If ethnicity alone is the criterion in declaring a First Nation, then all peoples of Mindanao belonging to the Malay race are the First Nations. If resistance to foreign beliefs is the criterion in declaring a First Nation, then the 18 Lumad groups in Mindanao are the First Nations.*

When asked during the oral arguments why the MOA-AD declares the Bangsamoros as the single “First Nation”, the Solicitor General answered that “the MILF requested that they be considered a First Nation.” The GRP Panel should not readily agree to include in the text of the agreement, an official document, anything that the MILF Panel wants. Claims to historicity must be verified because *historical inaccuracies have no place in a peace agreement* that resolves a dispute rooted to a large extent in historical events.

Justice Carpio also took pain to point out the evident violation of the constitutional rights of Lumads in the MOA-AD:

“Under the MOA-AD, the Executive branch also commits to incorporate all the Lumads in Mindanao, who are non-Muslims, into the Bangsamoro people who are Muslims. x x x Suddenly, without the knowledge and consent of the Lumads, the Executive branch has erased their identity as separate and distinct indigenous peoples. x x x The Lumads may freely practice their indigenous customs, traditions and beliefs, but they are still identified and known as Bangsamoros under the authority of the BJE.

The MOA-AD divests the Lumads of their ancestral domains and hand over possession, ownership and jurisdiction of their ancestral domains to the BJE. x x x After defining the Bangsamoro people to include all the Lumads, the MOA-AD then defines the ancestral domain of the Bangsamoro people as the ancestral domain of **all** the Bangsamoros, which now includes the ancestral domains of all the Lumads. x x x The incorporation of the Lumads as Bangsamoros, and the transfer of their ancestral domains to the BJE, without the Lumads’ knowledge and consent, violate the Constitutional guarantees that the “State **recognizes and promotes the rights of indigenous cultural communities** within the framework of national unity and development”<sup>31</sup> and that the “State shall, subject to the provisions of this

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<sup>30</sup> *Id.* The term ‘First Nations’ originated in Canada. The term refers to indigenous peoples of a territory, with the assumption that there are one or more subsequent nations or ethnic groups, different from the indigenous peoples that settled on the same territory. Thus, in Canada, the United States, Australia and New Zealand, the white European settlers are the subsequent nations belonging to a different ethnic group that conquered the indigenous peoples. In Canada, there is not a single First Nation but more than 600 recognized First Nations, reflecting the fact that the indigenous peoples belong to various “nation” tribes.

<sup>31</sup> CONST. art. II, §22.

Constitution and national development policies and programs, **protect the rights of indigenous cultural minorities to their ancestral lands** to ensure their economic, social and cultural well-being”.<sup>32</sup>

In fact, representatives of the 18 Lumad groups met in Cagayan de Oro City and announced on 27 August 2008, through their convenor Timuay Nanding Mudai, that “**we cannot accept that we are part of the Bangsamoro**”.”

It must be emphasized that “the establishment of a political and territorial space under this so-called BJE is nowhere to be found in the 1987 Constitution”.<sup>33</sup> Worse, its establishment contravenes the Constitution.<sup>34</sup> The 1987 Constitution provides that “The waters around, between and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.”<sup>35</sup> However, in the MOA-AD, it was stated that “The BJE shall have jurisdiction over the management, conservation, development, protection, utilization and disposition of all natural resources, living and non-living, within its **internal waters** extending fifteen (15) kilometers from the coastline of the BJE area”.<sup>36</sup> The same agreement further provides that “Beyond the fifteen (15) kilometers internal waters, the Central Government and the BJE shall exercise joint jurisdiction and management over areas and of all natural resources, living and non-living contained therein”.<sup>37</sup> This gives us the scenario wherein the BJE shall have exclusive jurisdiction over its own internal waters and a joint jurisdiction with the government over its territorial waters. This conclusion is bolstered by the fact that “all potential sources of energy, petroleum in situ, hydrocarbon, natural gas and other minerals,

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<sup>32</sup> CONST. art. XII, §5.

<sup>33</sup> Separate Concurring and Dissenting Opinion of de Castro, J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-de-castro.htm> (last accessed 30 October 2008).

<sup>34</sup> CONST. art. X, §2. The territorial and political subdivisions of the Republic of the Philippines are the provinces, cities, municipalities and barangays. There shall be autonomous regions in Muslim Mindanao and the Cordilleras as hereinafter provided.

<sup>35</sup> CONST. art. I.

<sup>36</sup> MOA-AD, Territory, §2(f).

<sup>37</sup> *Id.* §2 ¶(1).

including deposits or fields found within the territorial waters, shall be shared between the Central Government and the BJE in favor of the latter through production sharing agreement or economic cooperative agreement”,<sup>38</sup> but no mention was made of the sharing of minerals and allowed activities with respect to the internal waters of the BJE.

By these provisions on Territory embodied in the MOA-AD, the BJE effectively fenced their very existence within the metes and bounds it itself defined by adjudicating sole jurisdiction over their “own” territory free from the government supervision. The worst picture that one can imagine is that a small portion of the country seeks to be an independent State and desires to be much more powerful than its creator. In such a case, we will have our own version of the famous duel of David and Goliath depicted in the Holy Bible, with the “small but terrible” David defeating the giant Goliath.

### Governance

As if a sweet coating over a bitter dark chocolate, the MOA-AD enunciates that “The relationship between the Central Government and the Bangsamoro Juridical Entity shall be **associative** characterized by shared authority and responsibility with a structure of governance based on executive, legislative, judicial and administrative with defined powers and functions in the comprehensive compact”.<sup>39</sup> A serious flaw is evident from this as it is the comprehensive compact and not the Constitution which will be the basis of the structure of governance spoken of in the MOA-AD. Furthermore, the President’s power of general supervision over all

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<sup>38</sup> *Supra* note 36, §2 ¶h.

<sup>39</sup> MOA-AD, Governance, §4.

autonomous regions will be abrogated with this “associative relationship”.<sup>40</sup> More Constitutional infirmities are apparent in the succeeding paragraphs.

It was also provided in the MOA-AD that “The BJE shall be empowered to build, develop and maintain its own institutions, inclusive of, civil service, electoral, financial and banking, education, **legislation**, legal, economic, and police and internal security force, **judicial system**, and correctional institutions x x x”.<sup>41</sup> If the BJE will have its own legislation, then Section 1 of Article VI<sup>42</sup> of the Constitution will no longer hold true as the BJE may pass laws which are not subordinate to laws passed by Congress. On the other hand, if the BJE shall be allowed to build, maintain and develop its own judicial system, this will again be contrary to the 1987 Constitution which provides that “The judicial power shall be vested in one Supreme Court and in such lower courts **as may be established by law**”<sup>43</sup> because the BJE can have its own Supreme Court. There is also a possible clash of exercise of administrative powers over such judicial system since “The Supreme Court shall have administrative supervision over all courts and the personnel thereof”.<sup>44</sup> These are just few of the provisions in the MOA-AD which are constitutionally controversial as their implementation involves “drastic changes” to the fundamental law.<sup>45</sup> More of these controversial points will be discussed under “Substantive Issues”.

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<sup>40</sup> CONST. art. X, §16. The President shall exercise general supervision over autonomous regions to ensure that laws are faithfully executed.

<sup>41</sup> *Supra* note 39, §8.

<sup>42</sup> The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.

<sup>43</sup> CONST. art. VIII, §1.

<sup>44</sup> *Id.* §6.

<sup>45</sup> *Supra* note 29. During the oral arguments, Atty. Sedrey Candelaria admitted that the implementation of the MOA-AD requires “**drastic changes**” to the Constitution. The Executive branch thus guarantees to the MILF that the Constitution shall be drastically overhauled to conform to the MOA-AD. The Executive branch completely disregards that under the Constitution, the sole discretionary power to propose amendments to the Constitution lies with Congress, and the power to approve or disapprove such proposed amendments belongs to the people.

In sum, the MOA-AD gives to the BJE the attributes of a State, with its own people, territory, government, armed forces, foreign trade missions, and all other institutions of a State, under the BJE's own basic law or constitution. It is not far-fetched that once the MOA-AD is signed, the MILF, as the acknowledged representative of the BJE, can exercise the rights of the BJE as a state.”<sup>46</sup>

### **THE IRONY AND BRAVERY OF *DAVID***

At this point, we might think of the Autonomous Region of Muslim Mindanao (ARMM), currently enjoying a part and parcel of independence. If the government had validly constituted the ARMM, why cannot the Bangsamoro Juridical Entity (BJE) enjoy the same independent existence?

In the case of the autonomous regions, their creation is the shared responsibility of the political branches of the government and the constituent units affected. The Constitution<sup>47</sup> is explicit in this regard, to wit:

“The Congress shall enact an organic act for each autonomous region **with the assistance and participation of the regional consultative commission composed of representatives appointed by the President** from a list of nominees from multisectoral bodies. The organic act shall define the basic structure of government for the region consisting of the executive department and legislative assembly, both of which shall be elective and representative of the constituent political units. The organic acts shall likewise provide for special courts with personal, family and property law jurisdiction consistent with the provisions of this constitution and national law.

The creation of the autonomous region shall be effective when approved by majority of the votes cast by the constituent units in a plebiscite called for the purpose, provided that only provinces, cities and geographic areas voting favorably in such plebiscite shall be included in the autonomous region.”

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<sup>46</sup> *Supra* note 29.

<sup>47</sup> CONST. art. X, §18.

If the establishment of autonomy requires the joint participation of Congress, the President, and the people in the area affected, **from the inception of the process of creation of an autonomous region**, with more reason, the creation of the BJE—an entity intended to have its own basic law to be adopted in accordance with an “associative arrangement”, which would imply, in legal terms, semi-independence if not outright independence—cannot be negotiated without the participation of Congress and consultations with the people, residing not only in the area to be placed under the BJE but also in the rest of our country. Even with the participation of Congress and the consultation with stakeholders, the **process at the onset** must conform and explicitly be subject under our Constitution. This is specially important as the unsigned MOA-AD stipulates a definite framework that threatens to erase, through the “policies, rules and regulations” and basic law of the BJE, the objective existence of over four hundred (400) years of development and progress of our people by unsettling private voluntary agreements and undoing the official acts of our government institutions performed pursuant to the Constitution as well as the laws in force during the said long period in our national territory, and with only the “details”, the “mechanisms and modalities for actual implementation” to be negotiated and embodied in a Comprehensive Compact.<sup>48</sup>

#### ARMM—The Forerunner

The creation of autonomous regions does not signify the establishment of a sovereignty distinct from that of the Republic, as it can be installed only “within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines”.<sup>49</sup> While it is true that “in the Philippine setting, regional autonomy implies the cultivation of more positive means for national

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<sup>48</sup> *Supra* note 33.

<sup>49</sup> *Disomangcop v. DPWH*, 444 SCRA 203 (2004) at 229.

integration and would remove the wariness among the Muslims, increase their trust in the government and pave the way for the unhampered implementation of the development programs in the region”,<sup>50</sup> the same should not, however, be incongruous with the fundamental law.

The MNLF model in dealing with rebels, which culminated in the Peace Agreement of 1996, was free from any infirmity because it respected the metes and bounds of the Constitution. While the MNLF model is ostensibly based on the Tripoli Agreement of 1976, its implementation was in perfect accord with Philippine laws. The implementation of the Tripoli Agreement of 1976 came in two phases: the first, under the legislative power of then president Marcos and the second, under the provisions of Article X (Local Government) of the 1987 Constitution and its implementing legislation, Republic Act No. 6734. Under President Marcos, autonomy in the affected provinces was recognized through Presidential Proclamation No. 1628. It declared autonomy in 13 provinces and constituted a provisional government for the affected areas. The proclamation was followed by a plebiscite and the final framework for the autonomous region was embodied in Presidential Decree No. 1618. x x x **Clearly, the mandate for the creation of the ARMM is derived principally from the 1987 Constitution.** Thereafter, ARMM was given life by Republic Act No. 6734, the Organic Act of the ARMM. Our executive officials were guided by and did not stray away from these legal mandates at the negotiation and execution of the Peace Agreement with the MNLF in 1996. Without ifs and buts, its Whereas Clauses affirmed our sovereignty and territorial integrity and completely respected our Constitution.<sup>51</sup>

#### CAR—The Frustrated Attempt

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<sup>50</sup> *Id.* at 231.

<sup>51</sup> *Supra* note 1.

It may be recalled that then President Corazon Aquino, in her exercise of legislative powers, issued Executive Order No. 220 (E.O. No. 220) creating a Cordillera Administrative Region (CAR). *Cordillera Broad Coalition v. Commission on Audit*<sup>52</sup> upheld the constitutionality of the said executive order and provided the history of the establishment of CAR:

“In April 1986, just after the EDSA Revolution, Fr. Conrado M. Balweg, S.V.D., broke off on ideological grounds from the Communist Party of the Philippines (CPP) and its military arm—the New People’s Army (NPA).

After President Aquino was installed into office by People Power, she advocated a policy of national reconciliation. She called on all revolutionary forces to a peace dialogue. The CPLA heeded this call of the President. After the preliminary negotiations, President Aquino and some members of her Cabinet flew to Mt. Data in the Mountain Province on September 13, 1986 and signed with Fr. Conrado M. Balweg (As Commander of the CPLA) and Ama Mario Yag-ao (as President of Cordillera Bodong Administration, the civil government of the CPLA) a ceasefire agreement that signified the cessation of hostilities.

The parties arrived at an agreement in principle: the Cordillera people shall not undertake their demands through armed and violent struggle but by peaceful means, such as political negotiations. The negotiations shall be a continuing process until the demands of the Cordillera people shall have been substantially granted.

On March 27, 1987, Ambassador Pelaez [Acting as Chief Negotiator of the government], in pursuance of the September 13, 1986 agreement, flew to the Mansion House, Baguio City, and signed with Fr. Balweg (as Chairman of the Cordillera panel) a joint agreement, paragraphs 2 and 3 of which state:

Par. 2-Work together in drafting an Executive Order to create a preparatory body that could perform policy-making and administrative functions and undertake consultations and studies leading to a draft organic act for the Cordilleras.

Par. 3-Have representatives from the Cordillera panel join the study group of the R.P. Panel in drafting the Executive Order pursuant to the above joint agreement. E.O. 220 was drafted by a panel of the Philippine government and of the representatives of the Cordillera people.

On July 15, 1987, President Corazon C. Aquino signed the joint draft into law, known now as E.O. No. 220.”

In the same case, the Court held that E.O. No. 220 actually envisions the consolidation and coordination of the delivery of services of line departments and agencies of the National Government in the areas covered

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<sup>52</sup> 181 SCRA 495 (1990) at 499.

by the administrative region as a step preparatory to the grant of autonomous to the Cordilleras. It does not create the autonomous region contemplated in the Constitution. It merely provides for transitory measures in anticipation of the enactment of an organic act and the creation of an autonomous region. x x x This does not necessarily conflict with the provisions of the Constitution on autonomous regions. x x x It created a region, covering a specified area, for administrative purposes with the main objective of coordinating the planning and implementation of programs and services. Subsequent to the issuance of E.O. No. 220, the Congress, after it was convened, enacted Republic Act No. 6658 which created the Cordillera Regional Consultative Commission. The President then appointed its members. The commission prepared a draft organic act which became the basis for the deliberations of the Senate and the House of Representatives. The result was Republic Act No. 6766, the organic act for the Cordillera Autonomous Region, which was signed into law on October 23, 1989. A plebiscite for the approval of the organic act, to be conducted shortly, shall complete the process outlined in the Constitution x x x. To emphasize, CAR is not the autonomous region in the Cordilleras. x x x The CAR is a mere transitory coordinating agency that would prepare the stage for political autonomy for the Cordilleras. The CAR is a mere transitory coordinating agency that would prepare the stage for political autonomy for the Cordilleras.<sup>53</sup>

On October 23, 1999, Republic Act No. 6766 (R.A. 6766)<sup>54</sup> was enacted into law. Pursuant to said law, the City of Baguio and the Cordilleras, which consist of the provinces of Benguet, Mountain Province, Ifugao, Abra and Kalinga-Apayao, all comprising the Cordillera Autonomous Region, shall take part in a plebiscite for the ratification of said Organic Act originally scheduled on December 27, 1989 which was, however, reset to January 30,

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<sup>53</sup> *Cordillera Broad Coalition v. Commission on Elections*, 181 SCRA 495 (1990) at 506.

<sup>54</sup> An Act Providing For An Organic Act For The Cordillera Autonomous Region, Republic Act 6766 (1999).

1990 by virtue of COMELEC Resolution No. 2226 dated December 27, 1989.<sup>55</sup> On January 30, 1990, the people of the provinces of Benguet, Mountain Province, Ifugao, Abra and Kalinga-Apayao and the city of Baguio cast their votes in a plebiscite held pursuant to R.A. 6766. The official Commission on Elections (COMELEC) results of the plebiscite showed that the creation of the Region was approved by a majority of 5,889 votes in only the Ifugao Province and was overwhelmingly rejected by 148,676 votes in the rest of the provinces and city above-mentioned.

Consequently, the COMELEC, on February 14, 1990, issued Resolution No. 2259 stating that the Organic Act for the Region has been approved and/or ratified by majority of the votes cast only in the province of Ifugao. On the same date, the Secretary of Justice issued a memorandum for the President reiterating the COMELEC Resolution. As a result of this, on March 8, 1990, Congress enacted Republic Act No. 6861 setting the elections in the Cordillera Autonomous Region of Ifugao on the first Monday of March 1991.<sup>56</sup> Petitioners, who questioned such act in *Ordillo v. COMELEC*,<sup>57</sup> maintain that there can be no valid Cordillera Autonomous Region in only one province as the Constitution and Republic Act No. 6766 require that the said Region be composed of more than one constituent unit. The Court ruled therein that “The sole province of Ifugao cannot validly constitute the Cordillera Autonomous Region” contending that “Ifugao is a province by itself. To become part of a region, it must join other provinces, cities, municipalities, and geographical areas. It joins other units because of their common and distinctive historical and cultural heritage, economic and social structures and other relevant characteristics. The Constitutional requirements are not present in this case.”<sup>58</sup>

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<sup>55</sup> *Sanidad v. COMELEC*, 181 SCRA 529 (1990) at 530.

<sup>56</sup> *Ordillo v. COMELEC*, 192 SCRA 100 (1990) at 104.

<sup>57</sup> 192 SCRA 100 (1990).

<sup>58</sup> *Ordillo*, 192 SCRA at 106.

Hence, Cordillera Autonomous Region failed to materialize. However, E.O. No. 220, creating the Cordilleras Administrative Region, remains valid and “in force and effect until properly repealed or amended.”<sup>59</sup>

Be that as it may, had the Cordillera Autonomous Region come into being, it will also be vested legitimacy because establishment is authorized by the Constitution.

#### BJE—The Frustration

In stark contrast, the peace process with the MILF draws its mandate principally from Executive Order No. 3, as discussed in the earlier part of this article. This executive order provided the basis for the execution of the Tripoli Agreement of 2001 and thereafter, the MOA-AD. During the whole process, the government peace negotiators conducted themselves free from the strictures of the Constitution. They played fast and loose with the dos and donts of the Constitution. They acted as if the grant of executive power to the President allows them as agents to make agreements with the MILF in violation of the Constitution. They acted as if these violations can anyway be cured by committing that the sovereign people will change the Constitution to conform with the MOA-AD. They forgot that the Constitution grants power but also sets some impotence on power.<sup>60</sup> It was even believed that “the BJE would have far superior powers than any of the political subdivisions under the Constitution, including the ARMM”.<sup>61</sup>

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<sup>59</sup> *Id.* at 109.

<sup>60</sup> *Supra* Note 1.

<sup>61</sup> Separate Opinion of Tinga, J., *The Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et. al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-tinga.htm> (last accessed 30 October 2008).

Retired Justice Vicente V. Mendoza is of the view that “the premise of the MOA is that the BJE is a semi-independent state. That is the reason the MOA does not purport to be made in accord with the Constitution or the Organic Act for ARMM”.<sup>62</sup>

Hence, unlike the ARMM and CAR, the Bangsamoro Juridical Entity (BJE) has no Constitutional mandate to stand on.

### **PROCEDURAL ISSUES**

Although this article focuses more on the substantive issues of national territory and extent of Executive power to negotiate in the light of the obstructed establishment of BJE, a backdrop of the Court’s ruling on the procedural issues is still instructive.

#### Ripeness

The Solicitor General argues that there is no justifiable controversy that is ripe for judicial review reasoning that the MOA-AD contains mere consensus points, hence, remains to be a proposal;<sup>63</sup> petitioners did not suffer direct injury attributable to the execution of the agreement;<sup>64</sup> and also,

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<sup>62</sup> The Legal Significance of the MOA on the Bangsamoro Ancestral Domain, XXII L. REV. 2 (2008).

<sup>63</sup> The unsigned MOA-AD is simply a list of consensus points subject to further negotiations and legislative enactments as well as constitutional processes aimed at attaining a final peaceful agreement. Simply put, the MOA-AD remains to be a proposal that does not automatically create legally demandable rights and obligations until the list of operative acts required have been duly complied with. x x x  
Solicitor General’s Comment, *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://supremecourt.gov.ph/juriprudence/2008> (last accessed 30 October 2008)

<sup>64</sup> *Id.* In the cases at bar, it is respectfully submitted that this Honorable Court has no authority to pass upon issues based on hypothetical or feigned constitutional problems or interest with no concrete bases. Considering the preliminary character of the MOA-AD, there are no rights since the acts complained of are mere contemplated steps toward the formulation of a final peace agreement.

necessary amendments to the Constitution is a prerequisite for the implementation of the said agreement.<sup>65</sup>

“Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”<sup>66</sup> The foregoing text emphasizes the judicial department's duty and power to strike down grave abuse of discretion on the part of any branch or instrumentality of government including Congress. It is an innovation in our political law. As explained by former Chief Justice Roberto Concepcion, "the judiciary is the final arbiter on the question of whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature." As this Court has repeatedly and firmly emphasized in many cases, it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality or department of the government.<sup>67</sup>

An actual controversy involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished

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Plainly, petitioners and intervenors' perceived injury, if at all, is merely imaginary and illusory apart from being unfounded and based on mere conjectures.

<sup>65</sup> Any provision of the MOA on Ancestral Domain 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 timeframe to be contained in the comprehensive compact. MOA-AD, Governance, §7.

<sup>66</sup> CONST. art. VIII, §1.

<sup>67</sup> *Tanada v. Angara*, 272 SCRA 18 (1997) at 48-49.

from a hypothetical or abstract difference or dispute. There must be a contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence.<sup>68</sup> The Court can decide the constitutionality of an act or treaty only when a proper case between opposing parties is submitted for judicial determination.<sup>69</sup> Related to the requirement of an actual controversy is the requirement of ripeness. A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it.<sup>70</sup> For a case to be considered ripe for adjudication, it is a prerequisite that something had then been accomplished or performed by either branch before a court may come into the picture,<sup>71</sup> and the petitioner must allege the existence of an immediate or threatened injury to itself as a result of the challenged action.<sup>72</sup> He must show that he has sustained or is immediately in danger of sustaining some direct injury as a result of the act complained of.<sup>73</sup>

The petitions allege that respondents have exceeded their authorities defined by Executive Order No. 3 (E.O. 3)<sup>74</sup> when the latter drafted the terms of the MOA-AD without consulting the local government units or communities affected, nor informing them of the proceedings. This omission, by itself, constitutes a departure by respondents from their mandate under the said executive order. Moreover, the drafting of the provisions in the agreement which require certain amendments to the Constitution to conform to the MOA-AD is indicative of respondent's

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<sup>68</sup> *Dipidlo Earth Savers' Multi Purpose Association, Incorporated (DESAMA) v. Gozun*, 486 SCRA 286 (2006) at 598-599.

<sup>69</sup> *U.S. v. Muskrat*, 219 U.S. 346 (1902) at 357.

<sup>70</sup> *Guingona, Jr. v. Court of Appeals*, 345 Phil. 415 (1998) at 427-428.

<sup>71</sup> *Francisco, Jr. v. House of Representatives*, 460 Phil. 830 (2003) at 901-902.

<sup>72</sup> *Warth v. Seldin*, 422 U.S. 490 (1975) at 511.

<sup>73</sup> *Id.* at 526.

<sup>74</sup> Defining Policy and Administrative Structure for Government's Peace Efforts (2001), which reaffirms and reiterates Executive Order No. 125 of September 15, 1993.

violation of the authority bestowed upon them.<sup>75</sup> All of these reasons make a prima facie case which is ripe for adjudication.<sup>76</sup> In *Pimentel, Jr. v. Aguirre*,<sup>77</sup> the Court had ruled that “even a singular violation of the Constitution and/or the law is enough to awaken judicial duty. x x x By the same token, when an act of the President, who in our constitutional scheme is a coequal of Congress, is seriously alleged to have infringed the Constitution and the laws x x x settling the dispute becomes the duty and the responsibility of the courts”.<sup>78</sup>

Justice Presbitero J. Velasco, Jr., in his Dissenting Opinion, believes that the non-joinder of MILF is fatal to the action as it will not render binding effects to the latter.<sup>79</sup> However, the author joins in the argument of the petitioners that impleading the MILF would be futile as the group does not acknowledge the Court’s jurisdiction over it.

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<sup>75</sup> *Supra* note 4. “The present petitions allege that respondents GRP Panel and PAPP Esperon drafted the terms of the MOA-AD without consulting the local government units or communities affected, nor informing them of the proceedings. x x x such omission, by itself, constitutes a departure by respondents from their mandate under E.O. No.3. Furthermore, the petitions allege that the provisions of the MOA-AD violate the Constitution. The MOA-AD provides that “any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon the signing of a Comprehensive Compact and upon effecting the necessary changes to the legal framework, “implying an amendment of the Constitution to accommodate the MOA-AD. This stipulation, in effect, guaranteed to the MILF the amendment of the Constitution. Such act constitutes another violation of its authority. x x x As the petitions allege acts or omissions on the part of respondents that exceed their authority, violating their duties under E.O. No. 3 and the provisions of the Constitution and statutes, the petitions make a prima facie case for Certiorari, Prohibition and Mandamus, and an actual case or controversy ripe for adjudication exists.”

<sup>76</sup> *Supra* note 4.

<sup>77</sup> 391 Phil. 43 (2000).

<sup>78</sup> *Id.* at 107-108.

<sup>79</sup> As it were, the MILF was not impleaded in this case except in G.R. No. 183962. But it would appear that MILF, doubtless a real party in interest in this proceedings, was not served a copy of and asked to comment on the petition in G.R. No. 183962 x x x While the non-joinder of an indispensable party will generally not deprive the court of jurisdiction over the subject matter, the only prejudice to the winning party being the non-binding effect of the judgment on the unimpleaded party, the situation at bar is different. x x x The obvious result is that the Court would not be able to fully adjudicate and legally decided the case without the joinder of the MILF xxx.

Dissenting Opinion of Velasco, Jr., J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-velasco.htm> (last accessed 30 October 2008).

### Locus Standi

For a party to have *locus standi*, one must allege “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”<sup>80</sup> Because constitutional cases are often public actions in which the relief sought is likely to affect other persons, a preliminary question frequently arises as to this interest in the constitutional question raised.<sup>81</sup> In any case, the Court has discretion to relax the procedural technicality on *locus standi*, given the liberal attitude it has exercised, highlighted in the case of *David v. Macapagal-Arroyo*,<sup>82</sup> where technicalities of procedure were brushed aside, the constitutional issues raised being of paramount public interest or of transcendental importance deserving the attention of the Court in view of their seriousness, novelty and weight as precedents.<sup>83</sup> The Court’s forbearing stance on *locus standi* on issues involving constitutional issues has for its purpose the protection of fundamental rights. In not a few cases, the Court, in keeping with its duty under the Constitution to determine whether the other branches of government have kept themselves within the limits of the Constitution and the laws and have not abused the discretion given to them, has brushed aside technical rules of procedure.<sup>84</sup> All of the petitioners and intervenors in the case at point were adjudged by the Court to have *locus standi* to question the MOA-AD, except for petitioners Ernesto Maceda, Jejomar Binay and Aquilino Pimentel III for failure to specify that they would be denied some right or privilege or there would be wastage of public funds.

### Mootness

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<sup>80</sup> *Baker v. Carr*, 369 U.S. 186 (1962) at 678.

<sup>81</sup> V. Mendoza, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS 137 (2004).

<sup>82</sup> 489 SCRA 160 (2006) at 223.

<sup>83</sup> *Integrated Bar of the Philippines v. Hon. Zamora*, 338 SCRA 81 (2000) at 101.

<sup>84</sup> *Tatad v. Secretary of Energy*, 346 Phil. 321 (1997) at 357-358.

Justice Minita V. Chico-Nazario expressed, in her Separate Opinion, the argument that the petitions at bar should have been dismissed for being moot and academic. The reason being that “the MOA has not even been signed, and will never be. x x x The Executive Department has already manifested to this Court, through the Solicitor General, that it will not sign the MOA in its present form or in any other form. x x x”<sup>85</sup> Justice Presbitero J. Velasco, Jr., in his Dissenting Opinion, strongly argues that “The element of justifiable controversy is palpably absent in the petitions at bar x x x there is really no MOA-AD to speak of since its perfection or effectivity was aborted by supervening events, to wit: the TRO the Court issued enjoining the Kuala Lumpur signing of the MOA and the subsequent change of mind of the President not to sign and pursue the covenant”.<sup>86</sup> Justice Arturo Brion shares the same view.<sup>87</sup> Justice Dante O. Tinga, in his Separate Opinion, believes the same thing and added that “The correct course of action for the Court is to dismiss the petitions”.<sup>88</sup> On the other hand, Justice Antonio Eduardo T. Nachura, in his Dissenting Opinion, advances the speculation that “The President’s decision not to sign the MOA-AD may even be interpreted as a rectification of flawed peace negotiations by the panel x x x With an abandoned and unsigned MOA-AD and a dissolved peace panel, any purported controversy has virtually disappeared.”<sup>89</sup> They could have given less attention to one of the usual exceptions to the moot and academic principle, that is, where the case is capable of repetition yet evading review.

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<sup>85</sup> Separate Opinion of Chico-Nazario, J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-chico-nazario.htm> (last accessed 30 October 2008).

<sup>86</sup> *Supra* note 79.

<sup>87</sup> *Supra* note 2. “I likewise concur with the implied conclusion that the non-signing of the MOA-AD and the eventual dissolution of the Government of the Republic of the Philippines (GRP) panel mooted the prohibition aspect of the petitions,’ but disagree that the exception to the ‘moot and academic’ principle should apply.”

<sup>88</sup> *Supra* note 61.

<sup>89</sup> *Supra* note 15.

The press statements of the Presidential Adviser on the Peace Process, General Hermogenes Esperon, Jr. are clear that the MOA-AD will still be used as a **major reference** in future negotiations. x x x<sup>90</sup> The author respectfully objects to the view of Justice Tinga that “assuming that the act can be repeated at all, it cannot be repeated with any ease, there being too many cooks stirring the broth. And further assuming that the two sides are able to negotiate a new MOA-AD, it is highly improbable that it would contain exactly the same provisions or legal framework as the discarded MOA-AD”. On this point, it cannot be gainsaid that if future agreements will use the MOA-AD as a major reference, it is not far from possibility that the former shall contain identical provisions or at the very least, contain the same principles or guidelines. It does not have to contain exactly the same provisions as the previous MOA-AD to possess the same infirmity. This is akin to a grade school boy writing his homework using a classmate’s own work. It is likely that these two homeworks will bear the same pattern, if not the same format.

Justice Consuelo Ynares-Santiago supposed that respondents, through the Office of the Solicitor General, and the Executive Secretary’s open declaration that the MOA-AD or any similar instrument will not be signed by the GRP, was a mere afterthought because it was done “Only after certain quarters took notice and raised a clamor, and only after this Court has issued a temporary restraining order enjoining the signing of the MOA-AD. x x x For were it not for the timely exposure of the MOA-AD in the public light, the signing thereof would have gone ahead as planned.”<sup>91</sup>

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<sup>90</sup> *Supra* note 1.

<sup>91</sup> Separate Concurring Opinion of Ynares-Santiago, J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-ynares-santiago.htm> (last accessed 30 October 2008).

The Court should not avoid its constitutional duty to decide the petitions at bar on their merit in view of their transcendental importance. x x x The constitutionality of the conduct of the entire peace process and not just the MOA-AD should go under the scalpel of judicial scrutiny. The review should not be limited to the initialed<sup>92</sup> MOA-AD for it is **merely the product** of a constitutionally flawed process of negotiations with the MILF. x x x Supervening events whether contrived or accidental, cannot prevent the Court from rendering a decision if there is a grave violation of the Constitution that has already been committed or the threat of being committed again is not a hypothetical fear.<sup>93</sup>

## SUBSTANTIVE ISSUES

The Chairman of the MILF and its highest-ranking official, Al Haj Murad Ebrahim, candidly admitted that the MILF's understanding that the Constitution shall be amended to conform to the MOA-AD.<sup>94</sup> During the oral arguments, Atty. Sedfrey Candelaria, principal counsel to the GRP Panel, when asked about this statement, did not dispute that MILF Chairman Murad made the statement. Atty. Candelaria simply told the Court that MILF Chairman Murad "did not sit in the negotiating table." Clearly, under the MOA-AD, the Executive branch assumes the **mandatory obligation** to amend the Constitution to conform to the MOA-AD. He further admitted

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<sup>92</sup> It appears that the persons who initialed the MOA-AD were Philippine Presidential Peace Adviser Hermogenes Esperon, Jr., Philippine government peace negotiator Rodolfo Garcia, MILF chief negotiator Mohagher Iqbal and Datuk Othman bin Abdulrazak, chief peace facilitator of the Malaysian government, "Govt: Initials do not make draft MOA on ancestral domain a done deal", GMANews.Tv, <http://www.gmanews.tv/story/111830/Govt-Initials-do-not-make-draft-MOA-on-ancestral-domain-a-done-deal> (last accessed 11 October 2008).

<sup>93</sup> *Supra* note 1.

<sup>94</sup> *Supra* note 29. "In an ABS-CBN television interview aired nationwide on 20 August 2008, and widely reported in the newspapers, MILF Chairman Murad stated: 'It may be beyond the Constitution but the Constitution can be amended and revised to accommodate the agreement. What is important is during the amendment, it will not derogate or water down the agreement because we have worked this out for more than 10 years now.' "

that the implementation of the MOA-AD requires “**drastic changes**” to the Constitution.<sup>95</sup> The listing provided by Atty. Candelaria of these “drastic changes”, enumerating only five amendments to the Constitution, was deemed insufficient by Justice Carpio. The latter noted a total of thirty-six (36) amendments,<sup>96</sup> a far number from the former’s.

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<sup>95</sup> *Id.*

1. <sup>96</sup> Article 1 on the National Territory. During the oral arguments, Atty. Sedfrey Candelaria stated that this provision would have to be amended to conform to the MOA-AD.
2. Section 3, Article II on the role of the Armed Forces of the Philippines as “protector of the people and the State.” Under the MOA-AD, the AFP’s role is only to defend the BJE against external aggression.
3. Article III on the Bill of Rights. The MOA-AD does not state that the Bill of Rights will apply to the BJE. The MOA-AD refers only to “internationally recognized human rights instruments” such as the United Nations Universal Declaration on Human Rights, International Humanitarian Law, and the United Nations Declaration on the Rights of Indigenous Peoples. No reference is made to the Bill of Rights or even to the Constitution.
4. Section 1, Article VI on the Legislative Department. Legislative power shall no longer be vested solely in the Congress of the Philippines. Under the MOA-AD, the BJE shall “**build, develop and maintain its own institutions**” like a legislature whose laws are not subordinate to laws passed by Congress.
5. Section 1, Article VII on executive power. Executive power shall no longer be vested exclusively in the President of the Philippines. The BJE shall have its own Chief Executive who will **not** be under the supervision of the President.
6. Section 16, Article VII on the President’s power to appoint certain officials, including military officers from the rank of colonel or naval captain, with the consent of the Commission on Appointments. All public officials in the BJE, including military officers of any rank in the BJE internal security force, will be appointed in accordance with the BJE’s own basic law or constitution.
7. Section 17, Article VII on the President’s control over all executive departments. The President will not control executive bureaus or offices in the BJE, like foreign trade missions of the BJE.
8. Section 18, Article VII on the President as “Commander-in-Chief of **all** armed forces of the Philippines.” Under the MOA-AD, the President will not be the Commander-in-Chief of the BJE’s internal security force. The BJE’s internal security force will not be part of the AFP chain of command.
9. Section 21, Article VII on the ratification of treaties and international agreements by the Senate. This will not apply to the BJE which, under the MOA-AD, has the power to enter into economic and trade treaties with other countries.
10. Section 1, Article VIII on judicial power being vested in **one** Supreme Court. Since the BJE will have “**its own x x x judicial system,**” the BJE will also have its own Supreme Court.
11. Section 2, Article VIII on the power of Congress to define and apportion the jurisdiction of lower courts. Under the MOA-AD, Congress cannot prescribe the jurisdiction of BJE courts.
12. Section 5(2), Article VIII on the power of the Supreme Court to review decisions of lower courts and to promulgate rules of pleadings and practice in all courts. Under the MOA-AD, the BJE will have its own judicial system. Decisions of BJE courts are not reviewable by the Supreme Court.
13. Section 5(6), Article VII on the power of the Supreme Court to appoint **all** officials and employees in the Judiciary. This power will not apply to courts in the BJE.
14. Section 6, Article VIII on the Supreme Court’s administrative supervision over **all** courts and their personnel. Under the MOA-AD, the Supreme Court will not exercise administrative supervision over BJE courts and their personnel.

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15. Section 9, Article VIII on the appointment by the President of **all** judges in the Judiciary from nominees recommended by the Judicial and Bar Council. This provision will not apply to courts in the BJE.
  16. Section 11, Article VIII on the power of the Supreme Court to discipline judges of **all** lower courts. This power will not apply to judges in the BJE.
  17. Section 1(1), Article IX-B on the power of the Civil Service Commission to administer the civil service. Under the MOA-AD, the BJE will have “**its own x x x civil service**” The Civil Service Commission will have no jurisdiction over the BJE’s civil service.
  18. Section 2(1), Article IX-C on the power of the Commission on Elections to enforce and administer **all** election laws. Under the MOA-AD, the BJE will have “**its own x x x electoral system.**” The Commission on Elections will have no jurisdiction over the BJE’s electoral system.
  19. Section 2(1), Article IX-D on the power of the Commission on Audit to examine and audit **all** subdivisions, agencies and instrumentalities of the Government. Under the MOA-AD, the BJE can “**build, develop and maintain its own institutions**” without limit. The BJE can create its own audit authority. The Commission on Audit will have no jurisdiction over the BJE or its subdivisions, agencies or instrumentalities.
  20. Section 1, Article X on the political subdivisions of the Philippines. A new political subdivision for the BJE will have to be created.
  21. Section 4, Article X on the power of the President to exercise general supervision over **all** local governments. Under the MOA-AD, this provision will not apply to the BJE.
  22. Section 5, Article X subjecting the taxing power of local governments to limitations prescribed by Congress. Under the MOA-AD, the BJE shall have “**its own x x x legislation.**” The BJE’s taxing power will not be subject to limitations imposed by national law.
  23. Section 6, Article X on the “just share” of local government units in national taxes. Since the BJE is in reality independent from the national government, this provision will have to be revised to reflect the independent status of the BJE and its component cities, municipalities and barangays vis-à-vis other local government units.
  24. Section 10, Article X on the alteration of boundaries of local government units, which requires a plebiscite “in the political units affected.” Under paragraph 2(d) on Territory of the MOA-AD, the plebiscite is only in the barangays and municipalities identified as expansion areas of the BJE. There will be no plebiscite “in the political units affected,” which should include all the barangays within a city, and all municipalities within a province.
  25. Section 15, Article X on the creation of autonomous regions within the framework of the Constitution, national sovereignty and territorial integrity of the Philippines. This will have to be revised since under the MOA-AD the BJE has all the attributes of a state.
  26. Section 16, Article X on the President’s power to exercise general supervision over autonomous regions. This provision will not apply to the BJE, which is totally independent from the President’s supervision.
  27. Section 17, Article X which vests in the National Government residual powers, or those powers which are not granted by the Constitution or laws to autonomous regions. This will not apply to the BJE.
  28. Section 18, Article X which requires that personal, family and property laws of autonomous regions shall be consistent with the Constitution and national laws. This will not apply to the BJE which will have its own basic law or constitution.
  29. Section 20, Article X on the legislative powers of autonomous regional assemblies whose laws are subject to the Constitution and national laws. This provision will not apply to the BJE.
  30. Section 21, Article X on the preservation of peace and order within autonomous regions by the local police as provided in national laws. Under the MOA-AD, the BJE shall have “**its own x x x police**” to preserve peace and order within the BJE.
  31. Section 2, Article XII on State ownership of all lands of the public domain and of all natural resources in the Philippines. Under paragraph 3 on Concepts and Principles of the MOA-AD, **ancestral domain, which consists of ancestral lands and the natural resources in such lands, does not form part of the public domain.** The ancestral domain of the Bangsamoro refers to land they or their ancestors continuously possessed since time immemorial, excluding the period that their possession was disrupted by conquest, war, civil disturbance, force majeure, other forms of usurpation or displacement by force, deceit or stealth, or as a consequence of

Justice Carpio also believes that “The Executive branch guarantees to the MILF that the Constitution shall be drastically overhauled to conform to the MOA-AD”, and in the process “completely disregards that under the Constitution the sole discretionary power to propose amendments to the Constitution lied with Congress, and the power to approve or disapprove such proposed amendments belongs exclusively to the people.”<sup>97</sup>

### Philippine Territory – Land for Bargain

The MOA-AD is one peculiar program that unequivocally and unilaterally vests ownership of a vast territory to the Bangsamoro people, which could pervasively and drastically result to the diaspora or displacement of a great number of inhabitants from their total environment. x x x The Indigenous People’s Rights Act (IPRA) does **not** grant the Executive Department or any government agency the power to delineate and recognize

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government project, or any voluntary dealings by the government and private parties. Under paragraph 1 on Concepts and Principles of the MOA-AD, the Bangsamoro people are the Moros and all indigenous peoples of Mindanao, Sulu and Palawan. Thus, the ancestral domain of the Bangsamoro refers to the lands that *all the peoples in Mindanao, Sulu and Palawan possessed before the arrival of the Spaniards in 1521. In short, the ancestral domain of the Bangsamoro refers to the entire Mindanao, Sulu and Palawan.* This negates the Regalian doctrine in the 1935, 1973 and 1987 Constitutions.

32. Section 9, Article XII on the establishment of an independent economic and planning agency headed by the President. This agency is the National Economic and Development Authority. Under the MOA-AD, the BJE will have its own economic planning agency.
33. Section 20, Article XII on the establishment of an independent monetary authority, now the *Bangko Sentral ng Pilipinas*. Under the MOA-AD, the BJE will have its own financial and banking authority.
34. Section 4, Article XVI on the maintenance of “**a regular force** necessary for the security of the State.” This provision means there shall only be **one** “Armed Forces of the Philippines” under the command and control of the President. This provision will not apply to the BJE since under the MOA-AD, the BJE shall have “**its own x x x internal security force**” which will not be under the command and control of the President.
35. Section 5(6), Article XVI on the composition of the armed forces, whose officers and men must be recruited proportionately from all provinces and cities as far as practicable. This will not apply to the BJE’s internal security force whose personnel will come only from BJE areas.
36. Section 6, Article XVI on the establishment of one police force which shall be national in scope under the administration and control of a national police commission. The BJE will have “**its own x x x police**” which is a **regional police force** not administered or controlled by the National Police Commission.

<sup>97</sup> *Supra* note 29.

an ancestral domain claim by *mere agreement or compromise*. The recognition of the ancestral domain is the *raison d'être* of the MOA-AD, without which all other stipulations or “consensus points” necessarily must fail. In proceeding to make a sweeping declaration on ancestral domain, without complying with the IPRA, which is cited as one of the Terms of Reference (TOR) of the MOA-AD, **respondents clearly transcended the boundaries of their authority.**<sup>98</sup>

Of the eight defects of the MOA-AD discussed by Justice Ruben T. Reyes in his Separate Opinion,<sup>99</sup> the first six relate to Philippine territory:

“*First.* The MOA-AD creates a new political subdivision, the so-called Bangsamoro Juridical Entity (BJE). This is not permitted by the Constitution, which limits the political subdivisions of the Republic of the Philippines into provinces, cities, municipalities, barangays and autonomous regions.

Worse, the BJE also trenches on the national sovereignty and territorial integrity of the Republic of the Philippines. This is so because pursuant to the MOA-AD: (1) The Bangsamoro homeland and historic territory is clearly demarcated; (2) The BJE is given the authority and jurisdiction over the Ancestral Domain and Ancestral lands. This includes both alienable and non-alienable lands encompassed within their homeland and ancestral territory, specified “internal waters” as well as “territorial waters”; (3) The declared ultimate objective of entrenching the Bangsamoro homeland as a territorial space is “to secure their identity and posterity, to protect their property rights and resources as well as to establish a system of governance suitable and acceptable to them as a distinct dominant people. The Parties respect the freedom of choice of the indigenous peoples;” and (4) The BJE is empowered “to build, develop and maintain its own institutions, inclusive of, civil service, electoral, financial and banking, education, legislation, legal, economic, and police and internal security force, judicial system and correctional institutions, necessary for developing a progressive Bangsamoro society, x x x.” Otherwise stated, respondents agreed to create a BJE out of the national territory of the Republic, with a distinct and separate system of government from the Republic of the Philippines.

Notably, the United Nations Declaration on the Rights of Indigenous Peoples, while recognizing the rights of indigenous peoples

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<sup>98</sup> *Id.*

<sup>99</sup> Separate Opinion of Reyes, J., *The Province of North Cotabato, et al. v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP), et al.*, G.R. Nos. 183591, 183572, 183893 and 183951, October 14, 2008, <http://www.supremecourt.gov.ph/jurisprudence/2008/october2008/183591-reyes.htm> (last accessed 30 October 2008).

to self-determination, does not give them the right to undermine the territorial integrity of a State.

**Second.** The creation of the BJE is prohibited even assuming that the MOA-AD only attempts to create the BJE as an autonomous region. Only Congress is empowered to create an autonomous region.

In fact, R.A. Nos. 6734<sup>100</sup> and 9054,<sup>101</sup> the laws creating and expanding the ARMM, have already been passed by Congress. As a result of these Organic Acts, the provinces of Lanao del Sur, Maguindanao, Sulu and Tawi-Tawi and the City of Marawi voted to comprise the ARMM territory under the control of the Regional Government of the ARMM. In the case of the MOA-AD, no implementing law is provided to implement its terms. What it purports to do, instead, is to provide for structures of government within the MOA-AD itself. It also obligates the GRP Panel to “conduct and deliver” a plebiscite “within twelve (12) months following the signing of the MOA-AD.”

**Third.** The MOA-AD creates the Bangsamoro Homeland as an ancestral domain. However, there is non-compliance with the procedure laid down under RA No. 8371, otherwise known as the Indigenous Peoples Rights Act (IPRA). True, Article II, Section 22 of the 1987 Constitution recognizes the rights of all indigenous peoples. This, however, cannot be used in the MOA-AD as a blanket authority to claim, without sufficient proof, a territory spanning an entire geographical region, the entire Mindanao-Sulu-Palawan geographic region.

x x x

The MOA-AD is problematic when read in conjunction with the IPRA because it does not present any proof or specific reference that all the territories it enumerates accurately represent the “ancestral domains” of the Bangsamoro Homeland. The MOA-AD assumes that these territories are included in the Bangsamoro Homeland as ancestral domains, without proof or identification of native title or other claim of ownership to **all** the affected areas.

Section 3(g) of the IPRA<sup>102</sup> also requires that there be a “free and informed prior consent” by the indigenous peoples concerned to be exercised through consultations before any decision relating to their ancestral domain is made. This rule not only guarantees the right to information of the people in these areas, but also the right of the indigenous peoples to “free and informed prior consent” as an element of due process. Obviously, respondents did not conduct the required consultation before negotiating the terms of the MOA-AD. Otherwise, no petitions and petitions-in-intervention would have been filed in the first place.

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<sup>100</sup> An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao, Republic Act 6734 (1989).

<sup>101</sup> An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao, Amending for the Purpose Republic Act 6734, Republic Act 9054 (2001).

<sup>102</sup> IPRA, § 3(g). Free and Prior Informed Consent - as used in this Act shall mean the consensus of all members of the ICCs/IPs to; be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language an process understandable to the community.

**Fourth.** Under the MOA-AD, the BJE is vested with jurisdiction, powers and authority over land use, development, utilization, disposition and exploitation of natural resources within the Bangsamoro Homeland. In doing so, respondents in effect surrendered to the BJE ownership and gave it full control and supervision over the exploration, development, utilization over the natural resources which belong to the State. This is in clear contravention of the **Regalian Doctrine** now expressed under Article XII, Section 2 of the 1987 Constitution, thus:

All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish-workers in rivers, lakes, bays, and lagoons.

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

**Fifth.** The MOA-AD also grants to the BJE powers to enter into any economic cooperation and trade relations with foreign countries. It compels the Republic of the Philippines to ensure the BJE's participation in international meetings and events, participation in Philippine official missions and delegations engaged in the negotiation of,

among others, border agreements, sharing of incomes and revenues. Thus, by assenting to install an *intra* sovereign political subdivision independent of the single sovereign state that is the Republic of the Philippines, respondents violated not only the Constitution, Article V, Section 2 of RA No. 6734,<sup>103</sup> but also the unitary system of government of the Republic of the Philippines.

**Sixth.** Article 1, Section 1 of the 1987 Constitution provides:

The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

Without the benefit of any factual determination, the MOA-AD dismembers parts of Mindanao, turning it into a geographical dalmatian. It creates a Bangsamoro Homeland with a specified land mass, maritime, terrestrial, fluvial and alluvial dominions, (with definite internal and territorial waters), aerial domain, atmospheric space, and even distinct “territorial waters” within the RP baselines.”

## Concept of association

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<sup>103</sup> Supra note 100, art. V, §2. The Autonomous Region is a corporate entity with jurisdiction in all matters devolved to it by the Constitution and this Organic Act as herein enumerated:

- (1) Administrative organization;
- (2) Creation of sources of revenues;
- (3) Ancestral domain and natural resources;
- (4) Personal, family and property relations;
- (5) Regional, urban and rural planning development;
- (6) Economic, social, and tourism development;
- (7) Educational policies;
- (8) Preservation and development of the cultural heritage;
- (9) Powers, functions and responsibilities now being exercised by the departments of the National Government except:
  - (a) Foreign affairs;
  - (b) National defense and security;
  - (c) Postal service;
  - (d) Coinage, and fiscal and monetary policies;
  - (e) Administration of justice;
  - (f) Quarantine;
  - (g) Customs and tariff;
  - (h) Citizenship;
  - (i) Naturalization, immigration and deportation;
  - (j) General auditing, civil service and elections;
  - (k) Foreign trade;
  - (l) Maritime, land and air transportation and communications that affect areas outside the Autonomous Region; and
  - (m) Patents, trademarks, trade names, and copyrights; and
- (10) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the Region.

No province, city, or municipality, not even the ARMM, is recognized under our laws as having an “*associative*” relationship with the national government. Indeed, the concept implies powers that go beyond anything ever granted by the Constitution to any local or regional government. It also implies the recognition of the *associated entity* as a state. The Constitution, however, does not contemplate any state in this jurisdiction other than the Philippine State, much less does it provide for a transitory status that aims to prepare any part of Philippine territory for independence.<sup>104</sup>

Even the mere concept animating many of the MOA-AD’s provisions, therefore, already requires for its validity the amendment of constitutional provisions, specifically the following provisions of Article X:

SECTION 1. The territorial and political subdivisions of the Republic of the Philippines are the **provinces, cities, municipalities, and barangays**. There shall be **autonomous regions** in Muslim Mindanao and the Cordilleras as hereinafter provided.

SECTION 15. There shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics **within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.**

Even assuming *arguendo* that the MOA-AD would not necessarily sever any portion of Philippine territory, **the spirit animating it** – which has betrayed itself by its use of the concept of *association* – **runs counter to the national sovereignty and territorial integrity of the Republic.**<sup>105</sup> **Article II, Section 22 of the Constitution must also be amended if the scheme envisioned in the MOA-AD is to be effected.** That constitutional

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<sup>104</sup> *Supra* note 4.

<sup>105</sup> *Supra* note 4.

provision states: “The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.” An *associative* arrangement does not uphold national unity. While there may be a semblance of unity because of the associative ties between the BJE and the national government, the act of placing a portion of Philippine territory in a status which, in international practice, has generally been a *preparation for independence*, is certainly not conducive to **national** unity. x x x Establishing an associative relationship between the BJE and the Central Government is a preparation for independence, or worse, an implicit acknowledgment of an independent status already prevailing.<sup>106</sup>

### **The international scenario**

On September 13, 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UN DRIP) through General Assembly Resolution 61/295. The vote was 143 to 4, the Philippines being included among those in favor, and the four voting against being Australia, Canada, New Zealand, and the U.S. The Declaration clearly recognized the right of indigenous peoples to self-determination, encompassing the right to autonomy or self-government, to wit:

#### **Article 3**

Indigenous peoples have the right to **self-determination**. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

#### **Article 4**

Indigenous peoples, in exercising their right to self-determination, have **the right to autonomy or self-government in matters relating to their internal and local affairs**, as well as ways and means for financing their autonomous functions.

#### **Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while

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<sup>106</sup> *Id.*

retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Self-government, as used in international legal discourse pertaining to indigenous peoples, has been understood as equivalent to “internal self-determination.”<sup>107</sup> The extent of self-determination provided for in the UN DRIP is more particularly defined in its subsequent articles, some of which are quoted hereunder:

#### **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. **States shall provide effective mechanisms for prevention of, and redress for:**
  - (a) **Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;**
  - (b) **Any action which has the aim or effect of dispossessing them of their lands, territories or resources;**
  - (c) **Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;**
  - (d) Any form of forced assimilation or integration;
  - (e) **Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.**

#### **Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

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<sup>107</sup> *Supra* note 99. Federico Lenzerini, Sovereignty Revisited: International Law And Parallel Sovereignty Of Indigenous Peoples,” 42 *Tex. Int'l L.J.* 155 (2006). *Vide* Christopher J. Fromherz, Indigenous Peoples’ Courts: Egalitarian Juridical Pluralism, Self-Determination, And The United Nations DECLARATION On The RIGHTS Of INDIGENOUS Peoples, 156 *U. Pa. L. Rev.* 1341 (2008): While Australia and the United States made much of the distinction between ‘self-government’ and ‘self-determination’ on September 13, 2007, the U.S. statement to the UN on May 17, 2004, seems to use these two concepts interchangeably. And, indeed, under the DRIP [Declaration on the Rights of Indigenous Peoples], all three terms should be considered virtually synonymous. Self-determination under the DRIP means ‘internal self-determination’ when read in conjunction with Article 46, and ‘self-government,’ articulated in Article 4, is the core of the ‘self-determination.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

#### **Article 26**

1. **Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.**
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

#### **Article 30**

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

#### **Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

#### **Article 37**

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

### **Article 38**

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Assuming that the UN DRIP, like the Universal Declaration on Human Rights, must now be regarded as embodying customary international law x x x *the obligations enumerated therein do not strictly require the Republic to grant the Bangsamoro people, through the instrumentality of the BJE, the particular rights and powers provided for in the MOA-AD.* Even the more specific provisions of the UN DRIP are general in scope, allowing for flexibility in its application by the different States. x x x There is x x x no requirement in the UN DRIP that States now guarantee indigenous peoples their own police and internal security force. x x x Nor is there an acknowledgment of the right of indigenous peoples to the aerial domain and atmospheric space. x x x Moreover, the UN DRIP, while upholding the right of indigenous peoples to autonomy, *does not obligate States to grant indigenous peoples the near-independent status of an associated state.*<sup>108</sup>

### **In sum**

Although, according to the MOA-AD, “Both Parties [GRP and MILF] acknowledge that ancestral domain<sup>109</sup> does not form part of the public

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<sup>108</sup> *Supra* note 4.

<sup>109</sup> Ancestral domain and ancestral land refer to those held under claim of ownership, occupied or possessed, by themselves or through the ancestors of the Bangsamoro people, communally or individually since time immemorial to the present, except when prevented by war, civil disturbance, force majeure, or other forms of possible usurpation or displacement by force, deceit,

domain but encompasses ancestral, communal and customary lands, maritime, fluvial and alluvial domains as well as natural resources therein that have inures or vested ancestral rights on the basis of native title”,<sup>110</sup> the same agreement asserts that “Ownership of the homeland is vested exclusively in them [Bangsamoro people] by virtue of their prior rights of occupation that had inhered in them as sizeable bodies of people, delimited by their ancestors since time immemorial x x x”.<sup>111</sup> What is apparent here is the claim of the Bangsamoro to a piece of land, properly recognized as part of the Philippine territory, believed to belong to them by reason of their ancestry. If such is a portion of the national territory, how can it be validly ceded to its own citizens? The maxim “*Nemo dat quod non habet*”<sup>112</sup> seems to answer this question.

#### President’s Power to Negotiate – Thesis of Violate Now, Validate Later

As earlier mentioned, the President delegated to the GRP Peace Panel, through E.O. No. 3 and Memorandum Instructions, the authority to negotiate with the MILF. Although the authority of the President to conduct peace negotiations with rebel groups is not explicitly mentioned in the Constitution, it is implicitly included in her powers as Chief Executive<sup>113</sup> and Commander-in-Chief.<sup>114</sup> Nevertheless, the President “may not unilaterally implement policies that require changes to the Constitution without the

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stealth or as a consequence of government project or any other voluntary dealings entered into by the government and private individuals, corporate entities or institutions.  
MOA-AD, Concepts and Principles, §3, second sentence.

<sup>110</sup> *Id.* first sentence.

<sup>111</sup> *Id.* §2, second sentence.

<sup>112</sup> You cannot give what you do not have.

<sup>113</sup> The President’s authority to declare a state of rebellion springs in the main from her powers as chief executive and, at the same time, draws strength from her Commander-in-Chief powers x x x. *Sanlakas v. Executive Secretary*, 421 SCRA 656 (2004) at 677.

<sup>114</sup> CONST. art. VII, §18. The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion.

intervention of Congress, or act in any way as if the assent of that body were assumed as a certainty”.<sup>115</sup>

The MOA-AD grants to the BJE plenary power to undo executive acts and delegate to the same the authority to revoke existing proclamations, issuances, policies, rules and guidelines, forest concessions, timber licenses, contracts or agreements in the utilization of natural resources, mining concessions, land tenure instruments. **This constitutes an undue delegation of executive power.** The President may delegate its executive power only to local government units or an administrative body attached to the executive department. **The delegation of power to the BJE, on the other hand, is a delegation of executive power to an entirely different juridical entity that is not under its supervision or control.** That is impermissible.<sup>116</sup>

Justice Minita V. Chico-Nazario, in her Dissenting Opinion, deems it beyond the power of the Court to enjoin the Executive Department from entering into agreements similar to the MOA in the future x x x”.<sup>117</sup> Justice Presbitero J. Velasco, Jr. joins Justice Chico-Nazario in the latter’s contention that the Executive Department should be given wide latitude in peace negotiations believing that “Under our constitutional set up, there cannot be any serious dispute that the maintenance of the peace, insuring domestic tranquility and the suppression of violence are the domain and responsibility of the executive.”<sup>118</sup>

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<sup>115</sup> *Supra* note 4.

<sup>116</sup> *Supra* note 99.

<sup>117</sup> *Supra* note 85.

<sup>118</sup> *Supra* note 79.

On these arguments, Chief Justice Reynato S. Puno, in his Separate Concurring Opinion, counters that “the exercise of Executive power is subject to the Constitution. x x x All the powers of the President as Commander-in- Chief, spelled in the Constitution,<sup>119</sup> can only be used to quell the rebellion. They cannot be utilized to dismember the State or to create a state within our State and hand it over to the MILF rebels. x x x Undoubtedly, the President as Chief Executive can negotiate peace with the rebels, x x x but undoubtedly too, the exercise of executive power to secure peace with rebels is limited by the Constitution”.<sup>120</sup> Justice Arturo Brion maintains the view that “the Executive should be given the widest latitude in exploring options and initiatives in dealing with the MILF, the Mindanao peace and order problem, and the plight of our Muslim brothers in the long term. It should enjoy the full range of these options—*from changes in our constitutional and statutory framework to full support in waging war, if and when necessary*—subject only to the observance of constitutional and statutory limits.”<sup>121</sup>

Constitutional order cannot be sacrificed for expediency, even if in the name of peace in Mindanao. Assuming that the executive branch has in good faith become intractably convinced that it is necessary to amend the Constitution in order to obtain lasting peace in Mindanao, the consequent step should not to make promises it alone has no power to keep, hoping against hope that the Congress and the voters would ultimately redeem the promises. Since constitutional amendments are involved, the ability of the executive branch to undertake any legally binding commitment to amend the Constitution can only be recognized, if at all, with the prior appropriate

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<sup>119</sup> *Supra* note 114.

<sup>120</sup> *Supra* note 1.

<sup>121</sup> *Supra* note 2.

authorization of Congress, acting with the specified majorities provided in Section 1(1), Article XVII<sup>122</sup> of the Constitution.<sup>123</sup>

Justice Ynares-Santiago provides an elucidating explanation on the powers of the GRP Panel:

“To emphasize, the GRP panel has neither power nor authority to commit the government to statutory and constitutional changes. The power to amend laws and to cause amendments or revisions to the Constitution belongs to Congress and, to a certain extent, the people under a system of initiative and referendum. Only Congress and the people have the competence to effect statutory and constitutional changes in the appropriate manner provided by law. The GRP panel, as a mere organ of the Executive branch, does not possess any such prerogative. In the matter of legislation, it is settled that the power of Congress under Article VI, Section 1<sup>124</sup> of the Constitution is plenary and all-encompassing. The legislature alone determines when to propose or amend laws, what laws to propose or amend, and the proper circumstances under which laws are proposed or amended. As held in *Ople v. Torres*:<sup>125</sup>

**Legislative power** is “the authority, under the Constitution, to make laws, and to alter and repeal them.” The Constitution, as the will of the people in their original, sovereign and unlimited capacity, has vested this power in the Congress of the Philippines. The grant of legislative power to Congress is broad, general and comprehensive. The legislative body possesses plenary power for all purposes of civil government.

Similarly, the power to amend or revise the Constitution also pertains to Congress in the exercise of its constituent functions. The same power is also reserved to the people under a system of initiative, pursuant to Article XVII of the Constitution. In *Lambino v. COMELEC*,<sup>126</sup> the Court stated that there are three modes of amending the Constitution under Article XVII. The first mode is through Congress, acting as a constituent assembly, upon three-fourth’s vote of all its Members; the second mode is through a constitutional convention created under a law passed by Congress; and the third mode is through a people’s initiative. Nowhere in the Constitution does it state that the Executive or any of its organs can effect constitutional changes, as assumed by the GRP panel under the MOA-AD. Notwithstanding

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<sup>122</sup> Any amendment to, or revision of, this Constitution may be proposed by: (1) The Congress, upon a vote of three-fourths of all its members xxx.

<sup>123</sup> *Supra* note 61.

<sup>124</sup> The legislative power shall be vested in the Congress of the Philippines which shall consist of a Senate and a House of Representatives, except to the extent reserved to the people by the provision on initiative and referendum.

<sup>125</sup> 354 Phil 948 (1998) at 966.

<sup>126</sup> 505 SCRA 160 (2006) at 247.

the apparent lack of power or authority, the GRP panel undertook to effect changes to the Constitution and to statutes in order to fully implement the MOA-AD. In doing so, the GRP panel pre-empted Congress by determining, firsthand, the wisdom of effecting these changes as well as the nature of the required amendments to laws and the Constitution. It encroached upon the exclusive prerogative of Congress by assuming to exercise a discretion that it did not possess. It thus exceeded its authority and acted without jurisdiction. It should have been evident to the GRP panel that it could not bargain away laws enacted by Congress or the people's sovereign will as expressed in the Constitution. Apart from the fact that it had no power to do so, its acts were in clear disregard of the instructions of the President as stated in the *Memorandum of Instructions From the President dated March 1, 2001*. The President clearly directed therein that "(t)he negotiations shall be conducted in accordance with the mandates of the Philippine Constitution, the Rule of Law, and the principles of sovereignty and territorial integrity of the Republic of the Philippines." The GRP panel did otherwise and failed to act in accordance with this directive.

The GRP panel derives its authority from the Chief Executive, whose sworn duty is to faithfully execute the laws and uphold the Constitution. In negotiating the terms of the MOA-AD, however, the GRP panel violated our Constitution and our laws by subscribing to stipulations that could very well lead to their emasculation. The GRP panel agreed to illegal and unconstitutional concessions and guaranteed the performance of a prestation that it could not deliver. This constitutes manifest grave abuse of discretion amounting to lack or excess of jurisdiction.<sup>127</sup>

The respondents' [GRP Peace Panel, *et al.*] almost consummated act of guaranteeing amendments to the legal framework is, by itself, sufficient to constitute grave abuse of discretion. The grave abuse lies not in the fact that they considered, as a solution to the Moro Problem, the creation of a state within a state, but in their brazen willingness to guarantee that Congress and the sovereign Filipino people would give their imprimatur to their solution. Upholding such an act would amount to authorizing a usurpation of the constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative, for the only way that the Executive can ensure the outcome of the amendment process is through an undue influence or interference with that process.<sup>128</sup>

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<sup>127</sup> *Supra* note 91.

<sup>128</sup> *Supra* note 4.

There is no power nor is there any right to violate the Constitution on the part of any official of government. No one can claim he has a blank check to violate the Constitution in advance and the privilege to cure the violation later through amendment of its provisions.<sup>129</sup>

### REAFFIRMANCE

In nearly four decades, the country's pursuit of peace and unity seems to be a needle in a haystack. Very elusive and cunning. In the government's ardent desire to end hostilities in the south, it audaciously sought means violative of the Constitution, the very set of laws it sworn to faithfully execute and protect. The President went beyond the sphere of her authority to negotiate and even very nearly bargained away a chunk of the Philippine territory.

Retired Justice Vicente V. Mendoza, in his article,<sup>130</sup> believes that "the only way to save the MOA from invalidity is to consider it an instrument for the recognition and declaration of the independence of BJE".<sup>131</sup> But he is quick to add that such "recognition of a state is the sole prerogative of the President. Its exercise is a political question, which is beyond the power of judicial review."<sup>132</sup> Thus, it is clear that once signed, the MOA will be immediately effective, and unimaginable consequences could lead this nation to a more tumultuous situation.

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<sup>129</sup> *Supra* note 1.

<sup>130</sup> V. Mendoza, *Supra* note 62.

<sup>131</sup> *Id* at 23.

<sup>132</sup> *Id*.

However, no matter how great that desire to attain peace may be, “any peace agreement that calls for amendments to the Constitution, — **whatever the amendments may be, including the creation of the BJE** — must be subject to the constitutional and legal processes of the Philippines. The constitutional power of Congress to propose amendments to the Constitution, and the constitutional power of the people to approve or disapprove such amendments, can never be disregarded. The Executive branch cannot usurp such discretionary sovereign powers of Congress and the people, as the Executive branch did when it committed to amend the Constitution to conform to the MOA-AD. There must also be proper consultations with all affected stakeholders, where the Constitution or existing laws require the same for a practical purpose — to build consensus and popular support for an initiative, in this case the peace agreement. Consultations assume greater importance if the peace agreement calls for constitutional amendments, which require ratification by the people. A peace agreement negotiated in secret, affecting the people’s rights, lives and destinies, that is suddenly sprung on the people as a *fait accompli*, will face probable rejection in a plebiscite”.<sup>133</sup>

The aborted MOA-AD is a setback to the government. But the setback is only temporary, not a permanent one. The path to peace is long, but it can be traveled. On one hand, the government should be commended in its effort to bring lasting peace to the South. On the other hand, it needs to be reminded that any negotiation it enters into, even in the name of peace, should be within the parameters of the Constitution.<sup>134</sup>

All of these in the name of peace.

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<sup>133</sup> *Supra* note 29.

<sup>134</sup> *Supra* note 99.