COMMENTS ON THE MOA-AD SUPREME COURT DECISION

By Michael O. Mastura

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

A. Premises Reconsidered

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

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

(2) How do negotiators frame contested issues when they take an initial position on the Moro question within the legal framework (Constitution or statutes or conventions) but without constraining broad range of alternative solutions discussed with facilitation? Whoever sits as negotiators the common task is to reach a **political settlement** *free of any imposition in order to provide chances of success and open new formulas that permanently respond to the aspirations of the Bangsamoro people for freedom*.

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

An answer to these questions would comprise movements to justify the 'seamless web' in jurisprudence similar to theoretical justification for the "Brandeis amicus brief" to resolve conflict between formal "rules" and substantive "justice". Abstract legal rhetoric can obscure a number of dilemmas deep at the core of constitutionalism as a source of legitimacy. Yet, in our understanding of sociological interactions, in this country we "outlaw" heinous crime such as plunder because "*it inflicts palpable harm on actual people.*" Consider that the Court of last resort strikes down a constitutional

challenge because it confronts us with a "**continuing harm or a substantial potential of harm**" viewed in scrutiny of "mootness" as "the doctrine of standing set in a time frame." Next, this Court of last resort resolves "to deny with finality" as a matter of practice and policy.[1] Nullity, as in American judicature, can be seen to be a mistake in the MOA-AD decision if we take it to be botched or rendered incomplete otherwise the Court would be resolving between two competing conceptions of political morality. But we do not agree that the Court already has passed on the "basic issues" and that "no substantial arguments were presented to warrant the reversal of the questioned decision" on the basis of two motions for reconsideration.[2]

At the core of good offices of the Prime Minister of Malaysia is tendered in all good faith the act of maintaining contact with both the conflicting parties and providing both the means of negotiation and pacific settlement. There is no coercion or forceful carrying out of one's will in facilitation. So it is crucial to recognize in the first place that the Court looked at the development of events amid current war hysteria and the 'big picture' myopia of digital and print media that put the impetus:

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

What sense of justice puts **personal interest** above the obligation to respect **dignity, personality, privacy and peace of mind** defined in the Civil Code for human relations with neighbors and others? To fill in the void, the chief magistrate could have returned to his well-written treatise on balancing vexed 'peace of mind' and legal foundations by analogy to meet novel problems as herein.[3] At the onset of the controversy some lawyer crackpot burned the flag of the Federation of Malaysia in front of the office of the IMT office in Cotabato City. Not unlike the constitution the flag is 'a powerful symbol of a particular set of sentiments and ideas' and thus both must be placed in a higher realm of existence than the material. Here the significant ontological point is not 'the misuse or desecration of the emblem' but that *its use is a protected speech*. Both the flag and the constitution convey emotive message: "just as forcefully as in a dozen different ways" to borrow Rehnquist's phraseology. As an equation, the pretext for the discretion of what the flag represents Justice Brennan's remark is instructive in an important footnote: these assertions "sit uneasily". By analogous reasoning the place of "consultation" to give effect to "the right to information" elevated to a constitutional right in the 1987 Constitution[4] cannot be equated with same universal status as liberty or freedom of *speech* or of the press, or the right of the people peaceably to assemble and petition for *redress* of grievances.

Certain factors explain why the High Court should not get embroiled in a "culture war" when faced with ambiguity about cynical manipulation of patriotic symbols to appeal to passions initiated by some Mindanao local government executives-petitioners. True enough the Constitution is a powerful abstraction—in which *not only a "legalese*

*process" but also a cognitive belligerenc*e embroiled in a "war of culture" can be easily read into it—because it is profoundly offensive to the majority of the people. No matter what excuses of "with due respect" those who sit in ivory towers may get it right; yet, there is a high level of anticipatory regret, if the decision does not transpire as expected. A magistrate who tips the balance sometimes has expressed regret years later that one had voted the way he or she did with cultural overtones.

I respectfully submit in such event lies the endowment of *human life and safety* marked by the *pursuit of peace of mind*. Overlapping with the foundation for independent legal concept of *speech* through "self-evident truths" for redress of grievances is never about passion for reason. Whose preference shall govern? Dean Raul Pangalangan's point about 'warmongering' and 'rebels and constitutionalism rhetoric'[5] is correct analysis but he has misapplied this enlightened attitude to institutional failings from powerful countervailing skeptics: the forces of self (ego), ambition, narrowness, ignorance, prejudice, and misunderstanding. Seen as episodes of democratic behavior, consensus building and conflict resolution one cannot find "the conditional language of earlier agreements" in the furtive MOA-AD precisely because our negotiating formulation embodies the very nature itself of 'conditional' or 'provisional' or 'earned' sovereignty via transitional process. Transitory provisions of the 1987 Constitution are basic examples, if one accepts the skeptical premise of political decision as simply a matter of whose preference shall govern: from private armies to political dynasties to inadequate remedies for reversion to the State of all lands of the public domain and real rights arising therein.

Judicial intrusive scrutiny has boiled down to repudiating not merely the MOA-AD because the Supreme Court also refused to consider the "public policy" argument. The Chief Justice opening is curt: **"Any search for peace that undercuts the Constitution must be struck down,"** runs the next two lines in his separate concurring opinion with the majority. The majority looked up to the grandeur of the Constitution preceded by considerations of the duty of government to seek enduring peace. Puno's jurisprudence holds the premise: **"Peace in breach of the Constitution is worse than worthless"** [See concurring opinion at p. 1] influence of this ruling as a value judgment can undercut public confidence in conflict resolution through preventive diplomacy. Constitutionalism means limiting executive 'pre-decisional' deliberative action that outweighs the object of MOA-AD for domestic tranquility and peaceful dispute settlement to guide judicial decision-making in special cases. And yet the Court acknowledges that "the President is in a singular position to know the precise nature of their [MILF] grievances which, if resolved may bring an end to hostilities."[6]

I have come to ask whether the pursuit of domestic tranquility of the country is tolerably repugnant to constitutional supremacy. This is a tricky proposition enunciated in *Marcos v. Manglapus*[7] on "unstated residual powers" and residual executive privilege. The framing of this hypothesis is lifted from political beliefs and discourses of the legal realist school, which precludes the "excesses of democracy." Something like a "**political tilt**" of the separation-of-powers favors the status quo substantive goals. The argument from democracy asks that those in political power 'be invited to be the sole judge of their

own decisions.' Yet I need hardly add what it is to be humanitarian (and necessarily human dignity) is obscured like the sort of public reasons that are ascribed in "hard cases" just to discover some underlying principles and possibilities.

B. Critique: The Threshold of Legitimacy

We submit that a more progressive realistic jurisprudence is to break the legitimacy issue into two components. Fundamental to common understandings is the concept of legitimacy in a normative sense. It means no more than the task of working out arrangements for coming to terms with permissible aims and methods of diplomacy (negotiation). Thus, it implies Government-MILF reciprocal acceptance of the legal framework about constitutional and international order. The acceptance aspect is preoccupied with the form of legitimacy; whereas, the content aspect is concerned more with results than with methods (process). In a period of legitimacy, **the principles of obligation** are taken for granted as in the instant case, but during a revolutionary situation principles are crucial so they get to be talked about: i.e. public opinion 'as arbiter of political life on an intimate footing' with the principle of sovereignty itself. There is much talk about the GRP duty to honor the MOA and willingness to be bound to avoid legitimacy deficit.[8]

Herein it is equally important that we do not confuse legitimacy with justice, applied to problems of peace and security. Justice requires political structures (like the BJE) that allow people to make collective, binding decisions. Social dominance theory argues that underlying major conflicts and profound differences there is a grammar of social power shared by all societies. The content aspect of legitimacy is about **what kind of domestic social orders** are legitimate—such as the political and social institutions upon which the state is based. We can say here (unlike in revolutionary diplomacy) when the MILF could organically construct system of Islamic norms, values, beliefs and definitions to pose challenges to the Government's national consensus precisely political legitimacy becomes imperative. The Court and judges cannot refuse to listen to protesters who put in doubt a de facto support for the regime yet engage in negotiations (which is not really concerned with acceptance or explicit principles).

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

The Supreme Court has just rubbed metaphorically 'fresh salt' in the "wounds of the all-out war" with its decision truncating the Government-MILF peace deal. To read the decision is to become aware of **the veil of ignorance** in culture-driven war about the historic claims and legitimate grievances of the Bangsamoro people. One argument that purports to test here the ground on which to anchor a motion for reconsideration is simply to ask, "*Have you read the memorandum of agreement on which the Supreme Court ruled on*?" If so, then, the lack of consultation argument has undermined the veil of ignorance with unintended effect to cover for deep-seated prejudice. Nowadays even *pro bono* work

requires attorney's training and competence such that even paralegals are involved in it. I have personified the BJE like the response to **the naïve view** of corporate formality in support of arguments to portray it as a person. Similarly the battle against the naïve view of BJE and BDA imagery has nearly been won on the conceptual *naïvete* fronts but striving continues on the empirical naïvete collective activities.

C. The Constitutional Metes and Bounds

From the 1986 bloodless end of martial rule under the Marcos dictatorship to the 2000 political morality fall of the Estrada presidency in 2000 are frenzied extra-constitutional upheavals means to check power. The aftermaths are lessons learned in 'people power' but such direct populist act sounds paradoxical rather than pathological. Consideration also of the impeachment proceedings has had profound bearing on the readiness of the Respondents to proffer the **mootness and academic**[9] argument to predict removal from office of the President for culpable violation of the Constitution. This is why the case logic of *David v. Arroyo* while "not a magical formula that automatically dissuades courts in resolving cases" fed back on the question of the right to intervene linked to the question of *status standi* to initiate litigation. The minority opposing views did not bear much analysis for predictability. What judicial restraint does in practice is to qualify the broad constitutional doctrines by allowing the decisions of the Executive and of Congress to stand, even if it would not please political conservatives, or it is repugnant to the judges' own sense of principles.

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

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

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

constitutional adjudication stands and draws claim for legitimacy and acceptance to bring about the best result for the parties in the negotiating panel.

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

> MR. CHIEF JUSTICE PUNO,
> Separate concurring opinion
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> "It is crystal clear that the initialing of the MOA-AD is but the evidence of the government peace negotiating panel's assent to the terms contained therein. If the MOA-AD is constitutionality infirm, it is because the conduct of the peace process itself is flawed. It is the constitutional duty of the Court to determining whether there has been a grave cause of discretion amounting to lack or excess of jurisdiction on the part of the government peace negotiating panel in the conduct of the peace negotiations with the MILF. The Court should not restrict its review on the validity of the MOA-AD which is but the end product of the flawed conduct of the peace negotiation with the MILF." [Puno, *CJ.* at p. 8]
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> "In sum, there is no power nor is there any right to violate the Constitution on the part of any official of government. No one can claim he has a blank check to violate the Constitution in advance and the privilege to cure the violation later through amendment of its provisions. Respondents' thesis of violate now, validate later makes a burlesque of the Constitution." [Puno, *CJ*. at p. 22]

The Puno Court's jurisprudential effort to shift the key issue from *the question of procedure* to *the question of constitutional duty* is to check the potential abuse of power through the use of onerous legalistic constraints. Such an understanding of the factual antecedents rather begins with the search for near absolutes than to unravel the complexities of conduct of peace negotiations with the MILF. It is our contention that crippling the *unshared duty* of presidential negotiating position on the needs of diplomatic negotiations on account of the 'right to know' in the case at bench can open the way for endless legal assaults on the arena of treaty negotiations. The ground for TRO as would **probably work injustice** to the petitioner local executives representing LGUs against the act of the Presidency (in this instance the signing of MOA-AD) is quiet unprecedented because *as a rule it is not designed to protect contingent or future rights*. In this American-inspired jurisprudence model the criteria of legal validity incorporates principles of justice or substance in which the statutes may be *a mere legal shell*.

There is a **preclusive effect** combined with a few incumbent law-makers' application for special civil action of certiorari, prohibition and mandamus so as to

intervene. And, therefore, it is quite inconsistent with the 'impermissible collateral attack' doctrine. By analogy, legal scholars have documented the direct influence of injunctions in altering the course of labor or protest movement which we can proffer to explain the **collateral bar rule** in cases[10] (where TRO is disobeyed without first challenging it in court). This is a case of procedure used to support particular substantive results as building blocks for justice. Needless to say, the Congress has the constitutional means to satisfy the right to know as a matter of sovereign prerogative under truly extraordinary circumstances.

The search for constitutional absolutes herein misstates the potential stalemate that results from withholding information. Certainly *the end is not secrecy as to the end product*—the template agreement.[11] But it is confidentiality as to negotiation that lead up to the MOA-AD to prevent compromising flexibility of presidential negotiating positions. Admittedly broad public dissemination must subject the MOA-AD to fullest public scrutiny. Did framing the rights analysis for judicial review make any difference in this petition in the strategy of deference or strategy of craft?

What the Puno Court contemptuously plays out in the MOA-AD is the Respondent's thesis **"violate now, validate later makes a *burlesque* of the Constitution** [italics mine]" turns process into substance. Such dire prediction of unworthy purpose does not demonstrate in-depth split in intellectual attitudes of the Court towards right to know and the freedom to associate. For one, the majority opinion is notable for this passion. But the dissenters reserve theirs for liberal legality in the sense that *law is autonomous and above the play of politics*. I shall say more of this later as to why it was difficult to seek the Court's unanimity among its own members. For another, the majority opinion has logic too. In breadth, the chief judge argues for a decision on the merit. What is more, the Chief of the highest court rules, that the constitutionality of the conduct of the **entire** peace process and not just the MOA-AD should go **"under the scalpel of judicial scrutiny."** This criterion expects the citizens to accept the worst in wedge issues, *but if convictions are too deep, we cannot assume the Constitution is always what the Supreme Court says it is*.

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

MR. JUSTICE TINGA,
Dissenting in Separate Opinion

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

Cast at the center of the controversy was, one, **an agreement** and, two, a party to it that is neither **a state nor an international legal person** that was not impleaded. Justice Tinga characterizes the role of the 'unimpleaded party' as instance of cases that are "laden with international law underpinnings or analogies which it may capitalize on to serve adverse epiphenomenal consequences" [at p. 2]. My take is (worth noting in parenthesis) that I originally used such conception-laden clauses in analytical constructs and 'real' entities to tell us most about any given event or derivative epiphenomenon before Kusog Mindanaw consultations. In the same interpretive sense, Chief Justice Puno asserts the MOA-AD is **heavy-laden with self-executing components**. This has in mind the duty to perform and carry out obligations in which a State cannot plead that it is waiting for its lawmakers to legislate or that it may need to be given some effect in domestic law. Precisely, there is no sure method for determining whether a treaty is or is not self-executing. This has to be decided *in each case* by the courts so there should be less regard to *text* and more to the *intention* of the parties. For this reason, the Court must give weight to an interpretation given by the negotiating panel of Government in *amicus curiae* briefs.

Now we come to my question: Is the *law's concern just to bring the MILF as party litigant* in the instant case? Then, the non-joinder of MILF is a fatal flaw, if we follow the dissenting opinion of Justice Presbitero J. Velasco, Jr. [at p. 2] But if we turn to the *argument from democracy* to establish rights demonstrated by a process of history, an expanded reading of the MOA-AD makes a summary restatement of the *theory of antecedent right*. It calls for **the justness of the original position**.[12] The program of judicial activism could hold it out as earned sovereign authority traced to the suzerainty of the sultanate of the Bangsamoro people. Constitutionalism can little progress until we focus the problem of Moro collective rights against the unitary state to make that problematic part of its own agenda. In crafting the MOA-AD, we used 'Bangsamoro people' and 'Indigenous peoples' to signify that conceptual framework as distinguished from political states as traditionally conceived, with powers of sovereignty included in (positive) international law, *because* the aims of politics are not part of the theory of war in pursuit of politics by other means.

Overall, the MOA-AD was meant to be an instrument that is engaged politically to draw the totality of relationships into focus for an **associative arrangement**. Its theory of law *combines descriptive with prescriptive elements* and presupposes a conception of self-determination and freedom. Although it is far from clear whether the MOA-AD is

binding under international law because it lacks the arena of institutional articulation. And the litigation of MOA-AD as a framework 'treaty' device may prospectively require national legislation. What is now clear is that our peace negotiation stratagem works to clarify the common misconception that "ratification" is a **constitutional process**. What is often overlooked is that the "consent to be bound" carried out at "international plane" is quite a different process in diplomacy.[9]

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

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

The Court's majority ruling has followed a program of *deference* approach to legislative process but rested its decision on inconsistency between agreed-on *texts* of the MOA-AD and the Constitution. With due respect, the *ponencia* utterly fails even to correlate contextually the MOA, in particular, the principles and concepts (par. 7) with that of resources (para. 9). But, first of all, the design does not establish the point that the agreement would **vest ownership of a vast territory** to the Bangsamoro people, which could "result to the diaspora or displacement" of a great number of inhabitants [See Decision, at p. 45]. There are a lot of skepticisms exploiting anti-Moro prejudice in on cartoons and op-editorials. With background culture, distrust and irrational belief in public reason to sway the discourse of the Justices distort the factual antecedent that "vested rights" are to continue or operate unless otherwise expired, reviewed, or canceled by the BJE. My corrective account of the MOA-AD 'treaty framework' proceeds to extend that conception to frame BJE institutions in a way as to motivate decent people to honor these terms, and not for its own bureaucratic ambitions, or to protect "large interests veiled from public knowledge" almost free from accountability.[13]

Here again the *ponencia* mixed up the categories of territorial land base of the BJE with land grants under the policy of land tenure leftover of the regalian doctrine. Land struggles without a governing base are not national struggles; by this, interactions are played out within the parameters of civil rights actions and property rights premised

on individual actions. There is no more MILF justifiable argument for patchwork pattern of geographical partition as the frame of reference for self-determination. The deployment of the Spanish politico-military districts of Mindanao served as a pivot around which the partition of "the southern tier of islands" into the Moro Province originated with American policy. Mapping a narrative on to a land base and internal waters for BJE is predicated on the official intention of all the mandates (legal frameworks) that geographic discourses depict guidance toward self-rule. There is no need for MILF to espouse the two-nation theory in Mindanao to project that Moros who do not fit neatly or willingly into the Filipino nation as imagined—perhaps preferred by Lumad nationalists—are the ones massacred in land grabbing of genocidal proportions.

The thrust of the separate concurring opinion of Justice Carpio is a perceived violation of constitutional rights of Lumads. Has the Executive branch **erased their identity** as separate and distinct indigenous peoples in the MOA-AD? It would be a stretch to think of it as having to do with the means lobbyist hobble with the politics of law on big business. If we kept in mind the ways TRO distorts our democracy the bench and bar might gain a deeper understanding into various national discontents. But if we kept due respect a little less to Carpio, *J*. for a scatting statement of "cultural genocide" in his opinion of officially identifying Indigenous peoples as "Bangsamoros" in the MOA-AD, we might weigh in more respect for ourselves as he signed on to the agenda of "culture war".[14] The *erasure* of indigenous identity conceived by legal expert-knowledge takes place in the narrow epistemology of the written word that comes into historical being with the powerful abstraction of the nation and the state.

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

Certain factual situations created in the MOA-AD revalidate Moro statutory status and a definitional component of Bangsamoro identity to recognize one another as compatriots. Struggles for recognition are primarily played out in contested sites between perceived sovereign rights and rights of indigenous peoples. The MOA-AD declares it is a **birthright** x x x **to identify with and be accepted as "Bangsamoros"** as a counterpoint where it is interpreted with *Public reason* to obtain general acceptance. If we follow John Rawls the idea of public reason applies more to judges than others, especially in the discourse of those in a supreme court. To be realists about importance or unimportance of identity, we are right to claim some kind of entity is not well signified/ represented, or ways of existence/ identity with justification for that public reason. Consider first the barest sketch of constitutive reductionist view that from birth indigenous people's identity just consists in the existence of a group of people. So officially the "Bangsamoros" are not the same as that ethnic group, or that territory. Consider next what we can call eliminative reductionist view that is sometimes a response to arguments against the *Identifying* view.[15] Whereas the "freedom of choice" arises from a conception of citizenship in a constitutional democracy, for indigenous affinity within the basic structure of closed society we only enter by birth. From such discursive dimensions, it is politically incorrect to hold that the freedom of choice given to Lumads is "an empty formality" culling from the Carpio, *J*. (at p. 16), when we take the wide view of public political culture.

While some legitimate concerns in to respect **the freedom of choice of the indigenous peoples** it is tied in the MOA-AD to the ultimate objective to entrench them into a geographic territorial space:

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

Traditional forms of collectivity under contemporary indigenous struggle for global justice are done through treaty settlement models. New mechanisms in international law also process for contestation over language and meaning in relation to indigenous peoples 'lands' and 'territories' problematized by the power and control over resources. In his separate opinion in the IPRA case, Panganiban *J*. has written that based on ethnographic surveys, 80 percent of our mineral resources and between 8 and 10 million hectares of land in the country. The conceptual framework treaty device of the MOA-AD is not a "lever for concessions" within the constitutional framework. There was therefore a need for it to include a dynamic element. Asymmetrical associative relationship to the metropole authority is a fail-safe mode from pre-emption with room for mutual trust. The judgment of the ICJ and its Advisory Opinion in the Western Sahara case heard in 1975 saw that Court ruling: RSD is applicable to all non-self governing territories and that it is a moral and legal right that accrues to all peoples.[16]

The Supreme Court's failure to grasp our craftsmanship does not affect the argument I have advanced for the initialed text of MOA-AD. This is not 'a simple and naïve return to past principles' but an intersecting form of "governmentality" arising from global new politico/ economic global structure. For one thing, there is a shift toward a new meaning of governance and the transition mechanism by which power is exercised. A central feature is its restyling of basic principles in ways that accommodate exigencies. Working drafts were submitted to various forums on very different terms. Much principled or 'constant' thinking about 'equality of peoples' versus 'equality before the law' loomed large in our attitudes.[17] Between appealing to "social contract" theory and demanding from judicial decisions "neutral" substantive principles, it is in our mind not a political morality choice or preference. By parsing foundations of indivisible concepts our peace negotiators conceptualized the 'constants' as **birthright** sense of **"peoplehood"** into the pages of the MOA-AD. For brevity, it restored their pride as "First Nation."[18]

Jurists who appeal to substantive principles with a progressive view of separation of powers, wherein the conservative constitutional structure does not impede radical changes, are instructive for peace negotiators. Legal commentators face hardship to specify the constitutive unity of a country similarly provided by the crown. Because the vessel of presidential system contains the formalist "unitary" executive position, it is a historically contested forum for the Bangsamoro people and the indigenous peoples. There does not appear to be a substantive approach to reconfigure the structure of the Constitution as a *compact of the people*. Nineteenth century theory of social contract and constitutional structure from 1916 through 1935-1946 to 1973-1987 seem hardly sufficient for the new generation. Judicial recognition of "the Bangsa Moro people's claim to their ancestral" was construed in the IPRA[19] litigation, albeit in Justice Artemio V. Panganiban's separate opinion, thus uploading that status forward to 2000 from the Zamboanga formal declaration of the "Moro Nation" in 1924. The Commonwealth of 1935 was a mercantilist organic form in which Americans enjoyed "parity rights" more than the Bangsamoro people under the post-war Republic of 1946. Beyond the current charter, democratic standards could have changed with the way the Court *thinks* about constitutional growth points that shape Moro autonomy protected by judicial review.

Litigation of the MOA-AD is illustrative of the signifiers of being "Moro" reclaiming the right to self-determination and changing the legal landscape. The *theory of antecedent autonomy* missed attention in past constitutional conventions and amendatory projects, which are restated formally by the MOA-AD agreed text. Aspects of the constitutional question dealing with the substance of power relationship and the Islamic theory of rights are less familiar in this jurisdiction. And its jurisprudence is not obvious in the national polity, except in courts of limited jurisdictions. The Court was reluctant to test its assumption in *Abbas v. Commission on Elections,*[20] on the legacy of the Moro treaty-based rights and freedom of religion. Certainly there are other aspects of our Islamic way that are probably shaped by our conception of collective rights. This is culled from the Terms of Reference of MOA-AD as the Court has herein pronounced:

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

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

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

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

> "**The MOA-AD cannot be reconciled with the present Constitution and laws**. Not only its **specific provisions** but the very **concept underlying them**, namely, the associative relationship envisioned between the GRP and the BJE, are **unconstitutional,** for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence. [Morales, *J*. at 86]

x x x x

> While the MOA-AD would not amount to an international agreement or unilateral declaration binding on the Philippines under international law, respondents' act of guaranteeing amendments is, by itself, already a constitutional violation that renders the MOA-AD fatally defective." [Morales, *J*. at id.]

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

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

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

The context in which the substantive issues have to be resolved is framed out of the conduct of the GRP-MILF peace negotiation. The MILF has presented its case as embodied in the manner that the MOA-AD was crafted treating the Constitution as imperfect. The Court framed the substantive issue: **Do the contents of the MOA-AD violate the Constitution and the laws**? The **right to information** on matters of public concern being constitutionally protected against the abuse of power is a procedural issue argued by Petitioners-Intervenors. The constitutional compact being argued to protect **antecedent rights** against government Respondents is a substantive issue favored by Respondents-in-Interventions.[21]

1. **Governing Law of the MOA-AD**

In theory, the Constitution is a compact not to be debunked because power is in it ordained with the people's plebiscitary consent. As said in strong American tradition, 'it's something to be preserved, protected, and defended, as the President swears by God to do justice.' Classical theory of social contract leaves room to argue Montesquieu-like

discourse when principles or policies intersect; for, the one who resolves the conflict has to take the dimension of weight or importance (as case-law) to the freedom of contract (or association). To recommend that the Mindanao conflict be argued in terms of "so rarefied an abstraction" as constitutional theory is to mistake the national character of constitutional crises. This is what happened to the MNLF in the 1996 Final Peace Agreement. Obviously this is not the way the litigation of the MOA-AD operates for the Bangsamoro people's right to self-determination that has come to hinge upon the interpretation given to the fundamental law.

Constitutional issues are addressed with efforts to balance public concern, involving sovereignty and territorial integrity of the State, and to comport Moro belief in self-determination. Specific provisions of the MOA-AD on the formation and the powers of the BJE are compiled by the intervening respondents CBCS and BWSF. Affected are 36 constitutional provisions per listing of Justice Carpio, whereas 15 constitutional and statutory provisions are on the list of Justice Ynares-Santiago. I take it that "irreconcilability" is the basic essence of the legal myth that law can entirely be predictable. Now in this stress on paradigm shift, if a judge attempts to contrive a new rule would the courts usurp the power of the lawmakers? Do courts always act "unconstitutionally" when after the Decision "the law" was fixed (or reversed)? The judge-made law or case law of the MOA-AD is that "**not only its specific provisions but the very concept underlying them,** namely, the associative relationship envisioned between the GRP and the BJE**, are unconstitutional**, for the associated entity is a state and implies that the same is on its way to independence." [Decision at p. 86]

Simultaneously moves towards peace could not be motivated with loads of publicity. The Government-MILF conflict far from over has claimed its last victim last August 4, 2008 on the issuance of TRO. Did it matter what the MILF view was in the act being challenged? Substantial consolidation of the consensus points into the MOA-AD takes on "preliminary character" in the culture of writing, but its consensual validation as the political embodiment of representation assumes a "mere contemplated steps"[22] toward the formulation of a final peace agreement. Ancestral domain controversy was (it still is) founded and sustained on injustice. Might the option to secede be the broader political context for MILF political violence since the Government including now the Supreme Court erected another obstacle to frustrate sitting down at the negotiating table? I believe the litigation of the MOA-AD has created a singular distinct political reality: that the dominant ideology sustains the "irreformability" of the Constitution with its structurally construed bias against Moro antecedent rights.

Self-evidently the Court majority interprets the MOA-AD in this ruling: That it "**virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place**…" [Decision at p. 75] This was the template for parsing documents and working drafts to break the impasse in the evolving tension between two responses – rejecting talks on constitutional matters and of welcoming concessions – to secure common positions on key provisions. As couched, paragraph 7 of the Governance strand reads:

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

"Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of a Comprehensive 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." [Par. 7 of Governance, MOA-AD]

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

"6. The modalities for the governance intended to settle the outstanding negotiated political issues are deferred after the signing of the MOA-AD."

The establishment of institutions for governance in a Comprehensive Compact, together with its modalities during the transition period, shall be fully entrenched and established in the basic law of the BJE. The Parties shall faithfully comply with their commitment to the associative arrangements upon entry into force of the Comprehensive Compact." [Par. 6 of Governance, MOA-AD]

x x x x

2 (d) Without derogating from the requirements of prior agreements, the Government stipulates to conduct and deliver, using all possible legal measures, within twelve (12) months following the signing of the MOA-A, a plebiscite covering the areas as enumerated in the list and depicted in the maps as Category A attached herein (the Annex"). The Annex constitutes an integral part of this framework agreement. Toward this end, the Parties shall endeavor to complete the negotiations and resolve all outstanding issues on the Comprehensive Compact within fifteen (15) months from the signing of the MOA-AD. [Par. 2 (d) of Territory, MOA-AD]

The strands of critical legal commentary cover a broad range of transitional arrangements with a timeframe. More generally MILF position is guided by the intertwining policy of irreversibility and incrementality. Justice Carpio is correct to dissect the clause "**due regard to non derogation of prior agreements**" to signify 'mandatory observance' or 'no deviation'. Thus, by inference, "the 'due regard rule'

remains the principal treaty obligation imposed upon States" in contract clauses. Certainly, the GRP credibility was undermined by less than reliable way of complying with the FPA 1996 with the MNLF. That stands to reason out the MOA-AD deviation from the MNLF modality of TP 1976 and FPA 1996 modality 'beyond the metes and bounds' of the Constitution on *the results* concurred in by Chief Justice Puno. But this interpretation should not distract from the legal power of the Executive to sign an agreement if it breaks its duty from a combination of purposes. Indeed the Court missed this important point in the Respondent-Petitioners in their briefs that observance in good faith can be demonstrated whether in the context of a commercial contract, international treaty or peace agreement.

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

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

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

I have proffered lately amendatory mechanisms in the context of the transitory stage leading to referendum. The statistical argument comes with the policy that it is people who have rights, not *territory*. (This calls for thinking "out of the box" that the *ponencia* adverted to). As a practical matter there is an obscure provision of the original U. S. Constitution which was not extended here because a federative structure was not introduced in the country. It provides for "state rights" in order to reduce the unequal representation of the citizens in the Senate via an amending process: "no State, without its consent, shall be deprived of its equal suffrage in the Senate." What if I introduced it

to Senate Joint Resolution No. 10 of Petitioner-Intervenor Aquilino Q. Pimentel, Jr. to add to the 154 revisions/ amendments? Truly unpopular decisions will be eroded because of public rejection of an imperfect charter. There is one other little problem: *it's unconstitutional*! So we leave it there just a thought of *companeros* when we run the risk that Justices of the highest tribunal may make the wrong decisions.

Apart from political and constitutional theory, there are also sociological factors and societal facts that may rise to constitutional status. Ordinarily, in case of ineffective counsel test, courts separate the *question of constitutional error* from the question of the error's effect on outcomes. It may be 'heretical to hint' that adjudication work back from conclusions to principles where courts turn a blind eye to disparities or 'look the other way' in peace negotiations.[23] It may also be too subtle to compare the MOA-AD peace negotiation and JPEPA diplomatic negotiation on the 'double standard' test. Judicial opinions "work" as ideology by rhetorical process to resolve a lawsuit outcome.

Now a central point to understand is that contract law operates to conceal what is going in the marketplace. In this, a key social function of the full bench's opinion at oral argument is not in the outcome; it is in the rhetorical structure of the en banc opinion itself. Now and again a total point of law in the JPEPA case decision *Akbayan et al. vs Aquino et al.*[24] is that the Court recognized the confidential nature of diplomacy to construe the scope of executive privilege but the *ponencia* faltered on the confidentiality case logic in the MOA-AD. I submit that the deep skepticism of Justice Brion (at p. 20) is patently correct: It bears further analysis on **the error's effect of the outcome of the ruling** rested on *Chavez v. PEA* rule logic which is based on a commercial transaction. This criticism is highlighted in the CBCS and BWSF briefs (at p. 40) of Muslim lawyers Raissa H. Jajurie and Laisa Masuhud Alamia their Motions for Reconsideration. This struggle in constitutional arena may be likened to an "associational jurisprudence" publicly sentencing the MOA-AD without fair trial.

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

Central to the substantive issues in the case at bench, I submit that the Court revisit sovereignty-based theme of defining the statutory status of the Moros out of line of

the original charter. The organic act amendments, and the array of legislation and judicial rulings that define identity politics and gerrymandering-related issues, are in part founding father failures of the constitutional unitary scheme. The Organic Act of the Autonomous Region in Muslim Mindanao[25] is not a negotiated political settlement about the Tripoli Agreement of 1976 but a product of the 1987 Constitution. Scholars celebrated the Court in *Disomangcop v. Datumanong*[26] for judicial activism to deploy constitutional substantive Muslim autonomy. Thus it is a high point mark setting loose some new conception. Albeit the turnabout tipped in judicial strict scrutiny in *Sema v. Comelec*,[27] it still left the dissenting opinion to point out that judicial ruling-making **deprived of the power delegated to it by Congress to create provinces**. Ambiguity again has set in to douse an enthused autonomous project by the reality of post-MOA-AD litigation.

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

The argument behind 'preparatory work' must make distinction between 'commitment' and 'guarantee' on basis that in the timeframe there is "no uncertainty being contemplated" (Decision at p. 74). It is not unusual to set a deadline but it was not exercised as a choice point for persuasion progression. There is another misconception that once a treaty has been 'ratified' or 'accepted' it is then valid. The manifestation of the Executive Secretary and the Solicitor General to give up signature was a great blunder. The problem for GRP could have been remedied by inserting a provision postponing the entry into force of MOA-AD by *ad referendum*. Confirmation later will constitute full signature; but unlike 'ratification', confirmation is of the signature, not of the treaty [see Art. 12 (2) (b), Vienna Convention]. It became awkward for the GRP on account of the aborted signing ceremony and worst it closed the door by dissolving its panel and pursuing a military offensive. The weight of authority admits: *framework treaties may develop also in other ways that do not involve the creation of legal rights and obligations such as the adoption of guidelines*.[28] Diplomatic practice only requires that a state must refrain from signature if it has little intention of ratifying [Art. 14 (1), id., 1969].

Justice Ynares-Santiago summarizes in her separate concurring opinion the envisioned plebiscite to which the GRP committed itself committed to implement this framework agreement on territory. She is correct about the MOA-AD, as intended, to be "the controlling document for the essential terms" of the Comprehensive Compact. And yet, "the details for the effective enforcement of the MOA-AD" [Par. 3 of Governance] cannot be fully appreciated until the outstanding issues are negotiated and embodied in

the Comprehensive Compact. By this, in her view, the Compact instrument will simply lay down "the particulars of the parties' final commitments, as expressed in the assailed agreement" (concurring at p. 11). Specifically relevant problems with this position center around: First, what is to ensure "**the mechanisms and modalities for the actual implementation**" that will be spelt out in the Compact instrument "to mutually take such steps to enable it to occur effectively" [Par. 7]. Second, what modalities for governance intended "to settle **the outstanding negotiated political issues** are deferred" after the signing of the MOA-AD, and "the details of which are to be discussed in the negotiation" of the Compact instrument [Par. 6 & 8].

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

Most treaties entered into by the GRP are executive agreements in the exercise of Executive power which, as the MOA-AD bears out, is a controversial and ill-defined area. The brief digression into treaty regime clears the way for specialized knowledge need for guideline for intended effect of prior agreements. As the *ponencia* argues, by the time these changes are put in place, "the MOA-AD would be counted among the 'prior agreements' from which there could be no derogation" (Decision at p. 74). To argue for "guidelines" thus ignores, first, the history behind the 'treaty framework' device based on legal means of compact. Moreover, it is not argued that the Constitution already provides the modes of the amendatory process but as between the parties the MOA-AD is unaffected. Because the non-derogation clause turns on how this struck on the minds of individual Justices, there do not appear to be a GRP interpretive declaration to object on the part of MILF. In interpreting the MOA-AD, the Justices have applied their own individual value judgments to the material agreed-upon text on review.

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

> "In the context of implementing prior and incremental agreements between the GRP and MILF, it is the joint understanding of the Parties that the term

> "entrenchment" means, for the purposes of giving effect to this transitory provision, the creation of a process of institution building to exercise shared authority over territory and defined functions of associative character." [Par. 5 of Governance, MOA-AD]

One will need to know whether the regime constructed by the MOA-AD comes with territorial extension clauses and trade relations. The BJE participation in the negotiation of border agreements and or protocols bear mutual benefits derived from the Philippine archipelagic status and security. The MOA-AD does not attempt to provide an answer but lays down a residual rule: The homeland of the Bangsamoro people never formed part of the public domain. That it is an intensely felt issue: so historian Rudy Rodil and lawyer Camilo M. Montesa and his counterpart lawyer Musib M. Buat who headed the GRP and MILF technical working committees, respectively, and I all rested the argument on *non derogation*. I have read the majority and separate opinions in the IPRA litigation in which the Davide Court confirms this under the concept of native title. Lawyers celebrate the *Carino* decision[29] as legacy of the policy "to do justice to the natives" rested on American constitutionalist's concept of "due process". As a pivotal precedent, the MOA anchored ownership of the Bangsamoro homeland and provision for wealth-sharing of resources on the legal heritage that the Regalian doctrine is all "theory and discourse".[30]

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

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

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

It is verbatim restatement of paragraph A. 2. Security Aspect of the Tripoli Agreement of Peace of 2001. The two sides became locked into their hard positions as this tangled with

the phrase "changes to the legal framework" under paragraph 7 of the Governance. This may explain the paradox that while OPAPP Hermogenes Esperon, Jr. was widely judged to have a better grasp of the "non derogation", the Court formally ruled: "PAPP Esperon committed grave abuse of discretion" [See Decision, at p. 43]

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

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

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

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

A brief *restatement* of the "consensus points" assumes the context of an imperfect unitary system under aegis of existing legal framework. Confronting reality means disaffection from that state itself. *The Constitution does not require integration: I dare say it is merely an endless search for antidote to separatism. It can be reasonably argued that constitutional politics is about compact*. What might seem to achieve equality of people is by way of revolution rather than law. And yet, whatever choice our people decide in regard to their political status spelt out in the Comprehensive Compact belies this. What are we then to make of our historic juridical entity? Armed struggle is merely a means to reverse the denial of the right to self determination; it is a social fact of structural bias against the Bangsamoro people's birthright to claim distinct domestic identity. Short of independence, political status a determinant has never been fully resolved by conflating the birth of the Filipino nation.[31] Was the European identity mania resulting in Catholic evangelization through "hispanization" and American "filipinization" project as opposed to Islamic identity process made possible because of the longing for national identity in the modern world? Critically rethinking the evangelization of Philippine unitary state formation, the MOA-AD is not flawed in terms

of consultation; it has rather exposed the diocesan limits of things as they are conceived as a Catholic country.

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

Now, some legal commentators infuse social code to embody basic notions of political freedom on a broader doctrinal sequence and contextual roots in constitutionalism. When historic birthright to claim identity is denied, and beliefs are at the root of a political struggle it is hard to compromise the matter through the negotiating table bargaining. It is plausible to argue that by deciding, as if there have been no peace talks, or as if current political violence is in no way connected to justness of the original position, the law defines separatism out of existence. Yet, in this progressive brief, we argue coherently and not simply the social problems that reformers attribute to the existing systems. As an ideological matter economic interests are divisible—political or religious are not—as humans interact in society on account of interests (market and labor). Of course the Court is not wrong to take judicial notice that the mere concept animating many of the provisions of the MOA-AD already requires for its validity the amendment of constitutional provisions. Nothing in the MOA-AD prevents Congress from amending or reenacting an Organic Act.

Much of the jurisprudence in this jurisdiction springs from progressive realization of uncertainties to write by precedent and for certainties to craft by legislation. There is no rule precisely to predict when the Court verbalizes its verdict in the form of new rule decision or to consider, as exception, to the precedent case logic. How then can equality between distinct *demos* be constitutionally articulated and negotiated? It cannot be denied that the Moro struggle far antecedes the political dynamics by which the movement came to view the status quo as problematic to the Bangsamoro people's long-term interests. The Code of Muslim Personal Laws with functioning courts and the Islamic investment banking laws are examples of the attempt of legal relations to be observed as part of the "laws of the land".[32] But the extant Magindanaw *Luwaran* and Sulu codes[33] were much

cared for in the formation of a territorially pre-twentieth century Moro rulers and sultanates and in the service of a creating more expansive legal culture.

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

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

Above all they are opposed to the associative concept that links the different provisions of the MOA-AD to block the meaningful exercise of the right to self-determination. Already our lawyers in the MILF Panel Musib M. Buat, Lanang Ali and this writer see that the understanding of BJE is incomplete and is unlikely to be a firm one until outstanding issues are politically settled in the Comprehensive Compact.

Independence of the Moros has never been put to the test of a referendum. Fears of uninformed choice and widespread beliefs in divergence of opinion put them at a disadvantage. Typologies are simplifications such as can be gleaned from the MOA-AD litigation:

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

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

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

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

Finally, the Court construed the open texture of the MOA-AD from the strictest scrutiny limits rather the outer bounds of judicial restraints. Factual finding of the MOA-AD provisions indicates that the **Parties** aimed to vest in the BJE **the status of an associated state or, at any rate, a status closely approximating it**. As the Decision puts it in a concept of "association" in international legal context:

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

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

> "The design of a constitution and its constitution-making process can play an important role in the political and governance transition. Constitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate."[34]

Nonetheless back to our narrative of craftsmanship there exist ways other than de-colonization (ended in 1969) and trust of nongoverning territories (ended in 1996) to connect people with correct associative or federative modality or protectorate status depending on dominant constitutive elements with practical consequences. As said I take the view that even if the reinstatement of New Caledonia in 1986 had no significance for decolonization, it validates our thesis that a unitary State sovereignty can be (un)defined and (de)constructed as it should be constitutionally. Dean Callagan Aquino predicts the conceptual frame less restrictive because *'association' under international law is not a univocal concept* [not one meaning only] ergo 'associative status' can be empirically *sui generic* [a class by itself]. Continuing, he comments that the proposed "BJE could have been another variant to the already variegated forms of association: An association between a sovereign State, the Republic of the Philippines, and a political entity analogous to, but not quite (nor necessarily 'on the road to') a state."[35]

I think it plain in jurisprudential rule of recognition that the plausibility of the theory of the MOA-AD cannot be grasped on the behavior of the named negotiating officials. *Is our peace process an idle game of nonclosure and disclosure?* What is thus left unstated is: Government-MILF panel of negotiators in trying to reach a compromise acted not on a single motive but from a combination of purposes. Some puzzles connected with the 'expanded definition' of neglect of duty and grave abuse of discretion

are *presupposed* such that the BJE is spoken of *as if* that *associative* relationship is efficacious enough to dismember this "strong" Republic. To grasp the 'treaty' framework anchored on the important distinction between concept *of associative ties* and conception of *as if associative tier* (BJE) means factually the entity is stillborn. The two *as if suppositions* are very closely associated in trying to reach a compromise acted not on a single motive but from a combination of purposes.

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

> Mr. Justice Azcuna
> Separate Opinion
>
> "Finally, precedents are not strictly followed in international law, so that an international court may end up formulating a new rule out of the factual situation of our MOA-AD, making a unilateral declaration binding under a new type of situation, where, for instance, the other party is not able to sign a treaty as it is not yet a State, but the declaration is made to a "particular recipient" and "witnessed" by a host of sovereign States." [Azcuna, *J*. at p. 3]

What correct information contemplates on the Comprehensive Compact to be negotiated leading to the contractual bind? The Court decision concluded that the government panel did not draft the instrument with the clear intention of being bound thereby to the international community as a whole or to any State, "but only to the MILF". The Court also completed the logical correlation that "the same instrument may not be considered a unilateral declaration" under international law, but it would have provided a basis for a suit in an international court. This theory makes strict scrutiny of the MOA-AD agreed text yield a narrow conception of the right to self-determination only to restrict such right to a limited people at a fixed date of history in a country at war with itself. But it takes for granted the theory of meaning on which the asymmetric associative ties to the totality of relationships of the abstract "people" employed in modern conceptions of popular sovereignty. The main force of argument ignores a distinction that political commentators[36] in sovereignty-based conflicts have made but lawyers have yet to appreciate about discourses in the scheme of justification to aspire to a different future via a transitional 'framework treaty' device.

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

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

> "It may be beyond the Constitution but the Constitution can be amended and revised to accommodate the agreement. What is important is during the amendment [process] it will not derogate or water down the agreement because we have worked this out for more than 10 years now."[37]

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

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

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

Could it be that the idea of a charter change might itself be "unconstitutional" seems to dawn on us also in the factual use of the MOA-AD revision? But the Parties to

this Agreement commit themselves to the full and mutual implementation of this framework agreement and there is apprehension undesirable about results in the future.

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

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

Careful scrutiny indicates that popular demands and political movements by people have resulted in rules governing *speech* rather than from the canonical language of the Constitution or legacy from the framers. The relevance of the doctrine of *prior restraint* could have been played out in the MOA-AD litigation because it includes repudiation of judicial or other actions. According to Professor R. Dworkin, what is characteristic of a right is only that it has **"a certain threshold weight against collective goals in general."** Our submission is the open texture of the MOA-AD can be argued on the contours of the Constitution for "**rights may also be less than absolutes; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts"** for courts to make fresh determination.[38] Might the Puno Court have applied the "**implicit in a scheme of ordered liberty**" in weighing the liberty of contract vis-à-vis the right to information? I believe that the Constitution can be forced into a "process" mode to redress Bangsamoro grievances. As the counsel for the Government negotiating panel, Sedfrey Candelaria, asserts when the negotiating panels came to the negotiating table, "they were driven by what is possible and not by what is unthinkable."[39]

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

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

> "5. Both Parties affirm their commitment to mutually respect the right to one's identity and the party of esteem of everyone in the political community. The protection of civil rights and religious liberties of individuals underlie the basis of peace and justice of their totality of relations." [Para. 5 of Concepts and Principles, MOA-AD]

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

> ASSOCIATE JUSTICE QUISUMBING: Isn't that a very good example of thinking outside the box? That one day even those who are underground may have to think. But frankly now Dean, before I end may I ask, is it possible to meld or modify our Constitutional Order in order to have some room for the newly developing international notions on Associative Governance Regulation Movement and Human Rights?

DEAN AGABIN: Yes, It is possible, Your Honor, with the consent of the people.[40]

Justice Quisumbing did not write an opinion for the swing vote on substantive judicial activism. To my mind, this argues the claim that the organic political process will secure 'the rights of men' more certainly if it is not hindered by intrusion of the courts responding to political pressures.

D. Task of Constitutional Adjudication

A handful of legal thinkers "off the bench" involved in the GRP-MILF peace process have noted the ignorance of all of us as to how, if at all, can formalist legal framework of constitutional adjudication be effective instrument to settle sovereignty armed disputes? A question that Justice Antonio T. Carpio at the oral argument raised, "What is the governing law of the MOA-AD?" invites an intriguing clue that *law* or rule-making is a function of the undisclosed attitudes of magistrates. When it is a question of writing themselves, as herein, the contextual case-law into the MOA-AD, they are trapped in the rule logics that the Constitution is the paramount thing in the law.

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

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

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

authority but, we know better, the bench and bar usually try to conceal the arbitral function of the magistrates. In negotiation process, the most important analogues are elasticity of procedure and proper perspective between secrecy in deliberation and publicity in results.

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

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

But what of it how? If the resemblance is **capable of repetition yet evading review** as it recurs may stop renegotiation. *When cases turn routinely and repetitive, deep case logics tend to be replaced by shallow ones that enhance prospects for negotiated settlements, because, shallow logics allow for less ambiguity*. No brief statement can be made on the ways our legal institutions intervene and settle disputes. But courts should decide on the narrowest ground possible. To signify a wider meaning is to distinguish the litigated actual issues about the MOA-AD from the surrounding legally relevant circumstances of unfair attribution. Obviously there is more to negotiated political settlement that renders *the prematurity rule as exception precedent*. As for adversary process, political analogy is illustrative enough as a matter of principle and not simply prejudice.

A progressive critique of checks on power requires less abstract focus to link substantive policy with structural process and sociological facts. We turn next to the constitutional adjudication structure to situate the negotiation sets within the legal

framework as the substantive goal of an assertive foreign policy. Evidently, this was on Justice Velasco's mind as he composed his dissent thinking of the intersections of the line dividing **the negotiation stage** and **the execution stage**. The burden of this counterargument unmistakably relies on the safeguards to the separation of powers entrenched in judicial oversight. If, as Justice Nazaro dissent, it is not the province or even the competence of the judiciary to tell the Executive Department exactly **what and what not, how and how not, to negotiate for peace with the insurgents**, is it not even more the function of the Constitution to give effect to the principle of checks on power which the legal framework itself has engendered toward "pure" formalistic doctrine? I have put these matters in a guarded way because the Court was not deciding on a **hypothetical** state of facts in *Tan v. Macapagal*[41] but ascertaining what justiciable controversy is ripe for adjudication. As matters now stand, the Supreme Court has virtually embroiled itself in the war of culture.

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

The Presidency of Arroyo does not hold a coherent constitutionalism, despite the elitist nature of the check-and-balances, for bringing justice in keeping the peace. The check on **the extent of the powers** of the Executive **in pursuit of the peace process** is put to test on MOA-ADD controversy. The separate opinions devote some discourse on "incoherence assumptions" that are attendant to the "controversies" on the signing of the MOA-AD and the issuance of the TRO. These critical views turn 'threats' to legal legitimacy into 'support' for negotiating the obstacles to reinforce the reach of the legal norms. A shift from a subjective to an objective theory that could create more predictability to legal arrangements may serve to make the point more clearly. The most striking argument lined up on the dissenting opinion side is **non-justiciability** which the factual and legal situations warrant for reversal of the disposition – for mootness in the results reached by the majority is obvious by now.

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

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

illustrates a gross evasion of positive duty and a virtual refusal to perform the duty enjoined." [Decision at p. 86]

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

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

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

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

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

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

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

The common requirement specific to *res gestae* that a controversy I am concerned with is the *information* the Court will consider about the negotiation of the MOA-AD. As for the justification for it, in some jurisdiction their courts can give "advisory opinions" unlike here. That is why, both Justices Brion and Velasco warned that continuing to entertain and resolve on the merits these consolidated petitions will constitute a breach against the Sec. of Article 8 of the Constitution. Yet this again is merely an abstraction and the determination will not have any effect in the "real world". In the light of the threshold of judicial review **anything remotely resembling an advisory opinion or a gratuitous judicial utterance respecting the meaning of the Constitution** must altogether be avoided in the instant petition.[42]

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

> MR. JUSTICE BRION,
> Concurring and Dissenting
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> "This kind of history or track record is, unfortunately, not present in the petitions at bar and no effort was ever exerted by the ponencia to explain why the exception should apply. Effectively, the ponencia simply textually lifted the exception from past authorities and superimposed it on the present case without looking at the factual milieu and surrounding circumstances. Thus, it simply assumed that the Executive and ate next negotiating panel, or any panel that may be convened later, will merely duplicate the work of the respondent peace panel."
>
> "This assumption is, in my view, purely hypothetical and has no basis in fact in the way *David v. Macapagal-Arroyo* had, or in the way the exception to mootness was justified in *Roe v. Wade*. As I have earlier discussed, the *ponencia's* conclusion made on the basis of the GRP-MILF Peace Agreement of June 2001 is mistaken for having been based on the wrong premises. Additionally, the pronouncements of the Executive on the conduct of the GRP negotiating panel and the parameters of its actions are completely contrary to what the *ponencia* assumed." [Brion, *J*., at p. 15.]

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

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

My reference here is not for want of expert opinions simplify because the Solicitor General manifested disinterestedness in the complete signatures on the MOA-AD "in this form or in any other form."[43] What difference does it make for handling of the case? (I do not mean to ask if it is *legally proper* for and behalf of the Respondents.) I do want instead to suggest that Government's passive retreat posture was applauded and opposed as the twist and turn under political pressures. From a 'zealous advocate' the State counsel who has ambitions to sit in the Court's next vacancy instead defends the Executive policy shift to disarmament, demobilization and rehabilitation while arguing that the MOA-AD cannot be "obliterated with the declaration of unconstitutionality as it had never come to life and had never come into existence at all."[44] The drama of MOA-AD of an appeal to the symbolic importance of the judiciary opens the constitutional arena through which political struggle can be seen.

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

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

manifestation that it was complying therewith *ex abundante ad cautelam"* [Decision, at p. 44].

Argument can be right for wrong reason so that the function of constitutional review could have been grounded on a theory of judicial of *deference* that Justice Quisumbing began to solicit from Dean Pacifico Agabin, the lead counsel for Intervenors. This assumes that citizens do have moral rights against the state beyond what the law expressly grants, but the political institutions other than the courts are responsible for deciding whose preferences are to govern. As illustrated the negotiation sets find the GRP Respondents botched and boxed in a corner but the Petitioners and Petitioners-in-Intervention come face-to-face instead the Respondents-in-Intervention. As it were the MILF was from the start not impleaded in the case except as an afterthought. In the opinion of Justice Velasco, Jr. the non-joinder of MILF is fatal.

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

At core, the consolidated petitions are case logics of procedure used to support a particular substantive result. Did it make a difference that MILF was not impleaded in the original case, except in G.R. No. 183962 lately filed? MILF was not served a copy of it and could not be asked to comment. In point of fact, the MILF is a real party in interest in the proceedings. This is not a technical matter for the question of standing involves the fundamental participation of interest groups and their role in constitutional processes. Still, it animates lively matters because for its part MILF has considered the MOA-AD a "done deal."[45] As a matter of law, the petitions were mooted by the Government's repudiation of it or failure to sign the challenge the MOA-AD.

E. Summation: Preclusive Effects to Failure to Intervene

Petitioners may not be playing the litigation game that has complicated the peace negotiation at 'intersectionality' but perhaps to delay or bargain beyond the negotiation sets. Yet the MOA-AD also fixed rigid outer legal boundaries to thinkable politico social

change. The banner of the favor rule outcome or 'doctrine of victories' was hoisted former Chief Justice Panganiban and Petitioners. But the Puno Court also failed to draw arguments analogizing points of contract law when doctrinally applied to peace agreements. Justification for rights particularly the third-generation collective right to self-determination cannot be dependent on any single comprehensive doctrine[46] made applicable to the MOA-AD. Nor do we have much basis for supposing that Respondent-Intervenors could have tested new grounds to pitch their argument to plea for "equitable decision procedure" rather than intersection of a formalistic stance. It rests on the justness of a decision in such a way as to adjust the formalist "two-level procedure" of justification.

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

END.

[1] See Cruz, Isagani, and Cynthia Cruz Datu, **Res Gestae**, *a history of the Supreme Court* at 260 (2000) for a critical analysis of how the Justices voted for a motion for reconsideration in *Imelda Marcos v. Sandiganbayan*, 99 SCAD 409. There appears to be an exceptional treatment on the motion for reconsideration of this case.

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

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

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

[5] Raul Pangalangan, "War-mongering civilians" (*Philippine Daily Inquirer*, posted 09/05/2008) recognizes why the MILF can invoke RSD but draws attention to some "evident truths" such as "when… it becomes necessary for one people to dissolve the political bands…" Likewise in PDI, posted 09/24/2008: "Revolutionaries are indifferent to constitutions… Trying to subject [them] into the strictures of law will

only marginalize or distort constitutionalism…" Negative campaigning drive got so ugly by then in the national media which is now an extended tactic for narrow partisan gain come 2010 elections rather than responsiveness to public opinion.

[6] See *ponencia* at p. 70. The majority perceived the MOA-AD as an attempt of respondents to address the root cause of the armed conflict in Mindanao. The majority grants that Executive Order No. 3 authorized them to "think outside the box", so to speak, which would thus require new legislation and constitutional amendments (at p. 67).

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

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

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

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

[11] The arguments for exercise of secrecy in favor of executive privilege and for "open" presidencies are well established. For a good introduction to the dilemma of secrecy and democratic accountability, see Rozell, Mark J. **Executive Privilege** (University Press of Kansas, 2002).

[12] This phrase originally appeared in the seminal writings of John Rawls on a "theory of justice". Cf. Rawls' latest work, **The Law of Peoples**, (Harvard University Press, 1999) with the sub-title: "*The idea of public reason revisited*" discussed

[13] Lawyer Soliman M. Santos, Jr. in his blog, "*Disappointing SC denial of MOAtions for reconsideration*", exposes 'A tale of two very different cases' to illustrate how vested interests of the mining industry Motion for Reconsideration was supported by an "advocate" within the SC in the Mining Act Case (445 SCRA 1). After all, the mining industry and big business were all on the same side on the MOA-AD issue.

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

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

[16] International Court of Justice (1975) *Western Sahara Advisory Opinion of 16 October 1975*. The Hague: IJC Reports at p. 12.

[17] When Thomas Jefferson wrote that all men are endowed by their Creator with the same right to life, liberty, and property, it meant that *all must be equal before the law*. This is the equality that the

Constitution speaks about in the Bill of Rights, but it is not the same as the "equality of all peoples" in the context of the right to self-determination in the Declaration of Human Rights.

[18] To craft the MOA-AD, we advanced and elevated the position of the IPs beyond the theorization of the central role of the 'media' in *imagined national communities* to form the demographic core to that category. It differs in essence of 'rootedness' from the Canadian conception of "first nations"; hence, "freedom of choice" embodies recurrent dimensions of cultural community and identity for global justice. Our great problem is not how Moros came to be called *bangsa* because it is an undeniable historical fact that they constituted a distinct domestic community established as being the first to organize a proto-state and a trade-ties established in various written treaties of amity and commerce with European nations.

[19] The constitutionality of R.A. No. 8371, the Indigenous Peoples' Rights Act, was contested in *Cruz v. NCIP*, G.R. No. 135385, December 6, 2000.

[20] In *Abbas v. Commission on Elections*, 179 SCRA 287 (1989), the 1976 Tripoli Agreement and Republic Act No. 6734 was challenged as infringement of the freedom of religion in relation to P.D. 1083, but the Court did inquire into the constitutionality of the peace agreement.

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

[22] See the Solicitor General's Comment to G.R.183752, pp. 11.

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

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

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

[26] *Disomangcop vs. Datumanong* 444 SCRA 203 (2004)

[27] G.R. N. 177597 and G.R. No. 178628, July 16, 2008.

[28] See Fitzmaurice, M. "*Modifications to the Principles of Consent in Relation to Certain Treaty Obligations*", Australian Review of International and European Law (1997), at p. 275.

[29] *Carino v. Insular Government of the P.I.*, 28 Phil. 939 (1914)

[30] *Carino*, id., In his Separate pinion, Associate Justice Puno quotes a passage the *Laws of the Indies* in which reference to the fact that "titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in the books."

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

[32] See Presidential Decree No. 1083 (1976). See, R.A. No. 6848 (1990) the charter of Al-Amanah Islamic Bank of the Philippines.

[33] These were based on standard Shafi'i texts circulated in Arabic jawi scripts. Translated, as part of Ethnographic Studies, see Saleeby, Najeeb. **Studies in Moro History, Law and Religion**, Manila (1905).

[34] Quoted by the *ponencia*, see Samuels, Kirsti. *Post-Conflict Peace-Building and Constitution-Making*, 6 Chi. J. Int'l L. 663 (2006)

[35] Quoted in Patricio Diaz and posted in mindanews, visit <http://www.com/index2.php?>

[36] See Williams, Paul R. Michael P. Scharf, and James R. Hooper, "Resolving Sovereignty-Based Conflicts: The Emerging Approach of Earned Sovereignty", in Denver Journal of International Law and Policy, (Vol. 31:3, 2004).
[37] Noted by Court as posted in <http://222.abs-cbnews.com/topftthhour.aspx?StoryId=128834>
[38] See Dworkin, Ronald. **Taking Rights Seriously**, (Harvard University Press, 1975) for study of doctrinal legacies in which he rejects the traditional positivist separation of law from morality.
[39] See Candelaria, Sedfrey "Silencing Peace: The Story of MOA-AD" in *Pieces for Peace*, PCID pamphlet (2008) at p. 45. I have since thought the litigation was about 'sentencing' rather than 'silencing' the MOA-AD just to establish a jurisprudence on peace negotiation with copious footnotes.
[40] TSN, pp. 603-611.
[41] *Tan v. Macapagal*, 150 Phil. 778, 785 (1972).
[42] See Van Alstyne, W., *Judicial Activism and Judicial Restraint*, cited in Concurring and Dissenting Opinion, Justice Artutoro D. Brion at p. 18.
[43] Memorandum of Respondents dated September 24, 2008, at p. 7.
[44] See *BusinessWorld* posted at GMANEWS.TV. 11/06/2008. This is the gist of the *constancia* filed by Solicitor General Devanadera to express displeasure for the Court's breaching the barrier between the Executive and the Judiciary.
[45] This position to treat the initialed MOA-AD a "done deal" was expressed in *luwarn.com* by the MILF panel chairman Mohagher Iqbal and was reiterated by Vice-Chairman Ghazali Jaafar. The initialing of the MOA-AD on July 27, 2008 was for the purpose s of adoption or authentication which explains why the initials are not placed in the signature block – the place for the testimonium.
[46] An-Na'im, A. A. **Conclusion**. *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania, 1992) at 431.
END