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The Framework Agreement on the Bangsamoro

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Foreword

It often happens, unfortunately in this country, that the foundation principles on which the State defines its identity becomes merely a formal declaration of an ideal embroidered into official policies. This has habitually included the principle of sovereignty, together with its derivatives such as exclusive domestic jurisdiction, sovereign equality of states and non-intervention. These appear as convenient slogans in the face of mindless acquiescence or outright consent on the part of the political leadership.

The entire process of peace settlement, or series of settlements, has been subjected to internationalization. It is an internal conflict of the kind that has eliminated the distinction between international cooperation and foreign intervention. On the whole, it naturally gives rise to the issue: whose internal conflict is it anyway?

It is not the present task to catalogue the broad spectrum of influences that come under the style of "international cooperation", but there is need to discern in the nature and history of the conflict that the boundary line between the internal and the external easily shades into a penumbra, blurred by the interests of foreign powers in terms of their territorial, security, and resources policy.

It is in this larger perspective, that the peace settlement agenda suffers for lack of a strategic center drawn by the long-term directions and enduring interests of the national community. **MMM**

...⚖...

Historical Note

Under Republic Act No. 9054 (2001), the Autonomous Region in Muslim Mindanao (ARMM) at present is composed of five (5) Muslim provinces in southern Philippines, namely, Lanao del Sur, Maguindanao, Sulu, Basilan and Tawi-Tawi, including Marawi City.

The grant of autonomy to the Bangsamoro was a response by the Philippine Government (PHG) to end the secessionist insurgency of the Bangsamoro that began in the early 1970s.

In 1976, the Moro National Liberation Front (MNLF) and the Philippine Government signed the Tripoli Agreement. Except for the provision for the appointment of a Muslim Justice to the Supreme Court, all the other items therein are open-ended, made subject to future discussion.

Sans the participation of the MNLF and despite protest from Libyan Leader Moammar Khadafy, President Marcos issued Presidential Decree No. 1678 creating two (2) autonomous governments, one in Western Mindanao (Region 9) and another in Central Mindanao (Region 12). In a referendum-plebiscite on 17 April 1977, only 10 provinces opted for membership in the autonomous regions. Five of these provinces are Christian-dominated. Later on, the two (2) regions were reconstituted into one (1) autonomous region.

Since then autonomy has gone through twists and turns, the PHG coming out with policies in piecemeal fashion to strengthen the authority of the autonomous government and expand its territorial coverage within the limits set by the 1987 Constitution.

In 1996, a Final Comprehensive Peace Agreement was forged between the PHG and the MNLF. But its implementation has been the subject of negotiation between the Parties to this day.

Since 1996, the PHG and the National Islamic Liberation Front (MILF), which formally broke away from the MNLF in 1981, have been engaged in peace talks. On July 27, 2008, their peace panels initialed a Memorandum of Agreement on Ancestral Domain (MOA-AD).

On August 4, 2008, the Supreme Court issued a TRO preventing its signing by both parties, finally declaring it unconstitutional on October 14, 2008 for establishing the Bangsamoro as an Associated State, among other things. A year later the Parties resumed negotiations, the MILF pursuing its demand for a sub-state while the PHG adamant on the resolution of the so-called Moro Problem within the domain of the Constitution.

On October 15, 2012, the PHG and the MILF signed the Framework Agreement on the Bangsamoro at Malacañang, which is now the subject of disquisition in this issue of the IBP Journal.

The Framework Agreement on the Bangsamoro: Towards Hurdling the Constitutional Obstacle to Moro Self-Determination

Atty. Nasser Marohomsalic[*]

"This desire for self-determination," writes Archbishop Quevedo, "we recognize now as a fundamental right. It does not necessarily mean an independent state; it simply means as a common attribute of all people an option for self-government outside or within a national community. It is an option that is enduring, lying deep in the subconscious of the human community, part and parcel of that divine right we call freedom, or self determination. It does not die. It may be dormant, it might be repressed, but sooner or later it will want to surface either in rebellion or in peaceful assertion. War will not defeat this fundamental option. It cannot be killed. Without recognition and some form of implementation, peaceful co-existence is simply an artificial temporary veneer. That is the human condition, the condition of human communities with distinct cultures and identities, especially with a history of self-determination."[1]

The Right to Revolution

Revolution is the ultimate tool of people against exploitation and oppression. The 1948 United Nations Universal Declaration of Human Rights provides for its utility as a means of last resort. Thus:

> Whereas, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression that human rights should be protected by the rule of law.[2]

The Declaration embodies customary international law[3] and thus forms part of the law of the land, which provides, thus:

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[*] Presently, Marohomsalic is the National Secretary of the IBP and Member of the IBP Law Journal. He was IBP Governor of Western Mindanao Region (2009-2011), former Commissioner of Human Rights (2004-2001), former Commissioner of the 1988 Regional Consultative Commission for Muslim Mindanao, founding Convenor of the Philippine Council for Islam and Democracy which spun off into the Philippine Center for Islam and Democracy, founding Member of the Board of the Legal Network for Truthful Elections and founding Chair of the Muslim Legal Assistance Foundation. He is the author of a book on the history of the Bangsamoro entitled, "Aristocrats of the Malay Race", 2001. A collection of his Speeches as Human Rights Commissioner entitled, "Towards Peace, Autonomy and Human Rights", was published by the Institute of Foreign Service in 1999 in commemoration of the 50th anniversary of the Universal Declaration of Human Rights. Many of his articles were published in various journals and media.

1 Orlando V. Quevedo, *Two Fundamental Postulates for Lasting Peace in Mindanao.* In *Pieces for Peace: The MOA-AD and the Mindanao Conflict,* published by the PCID, Magbasa Kita, and Konrad Adenauer Stiftung, 2008, p.56. Archbishop Quevedo, OMI, is the Archbishop of Cotabato and former two-term President of the Catholic Bishop Conference of the Philippines. He was CBCP President during the 2000 and 2003 wars against the MILF.

2 Preamble, 1948 Universal Declaration of Human Rights.

3 This international instrument is akin to the 1987 United Nations Declaration on the Rights of the Indigenous Peoples which is recorganized in the Philippine jurisdiction as customary international law. (see Province of North Cotabato, et. Al., vs. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, et. Al., 558 SCRA 407, 2009).

> The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.[4]

The United Nations has established an international legal order in the pursuit for self-determination by peoples, beginning with the 1945 Charter of the United Nations which established an international trusteeship system where "colonized peoples" or "trust territories" may gain self-government or independence, among other things.[5] But the Charter did not address itself to the cause for self-determination of cultural or ethnic minorities in a State.

The Regimes of Self-Determination

"It is difficult," writes Quane, "to find any reference in the drafting history of the Charter which would support secession by national groups within the continuous boundaries of independent States to break away from these States."[6] They are not considered colonial peoples granted the right to self-determination, which are subjects of foreign powers or States by force of conquest and occupation or deeds of trusteeship as in the case of Non-Self-Governing Territories and Trust Territories."[7] The term "peoples" in the Charter afforded with the right to self-determination refer to States[8], not national minorities.

The introduction in 1966 of the two (2) International Bills of Rights--the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights, which provide the same provision granting "All peoples . . . the right to self-determination . . . (and) to freely determine their political status and freely pursue their economic, social and cultural development," did not improve on the principle as enunciated in the UN Charter. "All that one can state with certainty", notes Quane, "is that (the principle) applies to peoples organized as States and colonial peoples. This suggests that the International Covenants did not present any development on the scope or meaning of the legal right to self-determination. It also suggests that questions concerning the existence of a legal right to secession in the covenants are largely irrelevant if the right to self-determination can be invoked only by peoples organized as States and colonial peoples."[9] (Parenthesis supplied)

"Opinion in the literature", notes Quane, "seems to be overwhelming against admitting the possibility of secession."[10]

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of the Indigenous Peoples (UN DRIP for brevity) delimiting the right afforded

4 Section 2, Art. II, the Philippine Constitution.

5 Article 76 (b), Chapter XII, id.

6 Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, International and Comparative Law Quarterly, July 1998, Vol. 47, p. 547.

7 Id., p. 540.

8 Id., p. 551.

9 Id., p. 561-562.

10 Id., p. 547.

them to autonomy or self-government. Thus:

> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their official functions.[11]

This international legal instrument embodies customary international law[12] and thus forms part of the law of the land.[13]

In spite of these legal strictures on the right to self-determination, the Philippine Government (PHG for brevity) may concede to the Bangsamoro "their right to external self-determination" and allow them to establish their own sovereign and independent state or any political entity fully determined by them. In the North Cotabato case, the Supreme Court outlines the mechanism, thus:

> The constitutional provisions on autonomy and the statutes enacted pursuant to them have, to the credit of their drafters, been partly successful. Nonetheless, the Filipino people are still faced with the reality of an on-going conflict between the Government and the MILF. If the President is to be expected to find means for bringing this conflict to an end and to achieve lasting peace in Mindanao, then she must be given the leeway to explore, in the course of peace negotiations, solutions that may require changes to the Constitution for their implementation. Being uniquely vested with the power to conduct peace negotiations with rebel groups, the President is in a singular position to know the precise nature of their grievances which, if resolved, may bring an end to hostilities.
>
> The President may not, of course, unilaterally implement the solutions that she considers viable, but she may not be prevented from submitting them as recommendations to Congress, which could then, if it is minded, act upon them pursuant to the legal procedures for constitutional amendment and revision. In particular, Congress would have the option pursuant to Article XVII, Sections 1 and 3 of the Constitution, to propose the recommended amendments or revision to the people, call a constitutional convention, or submit to the electorate the question of calling such a convention.
>
> While the President does not possess constituent powers — as those powers may be exercised only by Congress, a Constitutional Convention, or the people through initiative and referendum — she may submit proposals for constitutional change to Congress in a manner that does not involve the arrogation of constituent powers.[14]

11 Article 3, UN DRIP.

12 The Province of North Cotabato, et. al., vs Government of R.P. Peace Panel on Ancestral Domain, et. al., 558 SCRA 407. Herein, the 1989 Indigenous and Tribal People Convention of the International Labor Organization was not discussed by the Supreme Court, probably because the said Convention was not signed by the PHG. Accordingly, the author skipped discussing it. Nevertheless, the UN DRIP grants more rights to the IPs than the ITPC.

13 Section 2, Article II, Philippine Constitution.

14 *Ponencia* on the Province of North Cotabato, *supra*, pp. 504-505.

x x x

> The sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any it wants, so long as the change is not inconsistent with what, in international law, is known as *Jus Cogens*. Respondents, however, may not preempt it in that decision.[15]"

Therein too, the Supreme Court defines a legal order where people may justifiably assert their right to external self-determination and secede from the State. Thus:

> The right to *external* self-determination can arise in exceptional cases, namely, where a people is under colonial rule, is subject to foreign domination or exploitation outside a colonial rule, and . . . is blocked from the meaningful exercise of its right to *internal* self-determination or deprived of the freedom to make political choices and pursue economic, social and cultural development.[16]

Constitutional Questions

Against this legal backdrop, I present this disquisition on the Framework Agreement on the Bangsamoro (FAB for brevity), subject to Constitutional and UN DRIP tests, and find out if it passes these tests.

For sure, despite the scant and general formulation of most provisions of the FAB and its being a largely unfinished document, legal scholars of Moro developments will find provisions in the Agreement to pick on or disagree with. These include the articles on--

***(a) the territory of the Bangsamoro and the disposition of its natural resources;* and**
(b) the asymmetrical relationship between the Bangsamoro Government and the Philippine Government, particularly the grant and devolution of some powers to the former and the extent of power sharing between the parties.

The questions may be then posed: Do these provisions cut into the domain of external self-determination? Or, do they keep to the prescription for self-government for indigenous peoples as defined in the UN DRIP? Or, do they establish an Associated State or a near-independent State for the Bangsamoro?

On the matter of ***territory and disposition of wealth***, the FAB contains the following provisions, thus:

> The core territory of the Bangsamoro shall be composed of: (a) the present geographical area of the ARMM; (b) the Municipalities of Balao, Munai,

15 Id., p. 505. The Supreme Court finds grave abuse of discretion in "the almost consummated act (by the Philippine Government Panel on Ancestral Domain) of guaranteeing amendments to the legal framework . . . not in the fact that they considered, as a solution to the Moro Problem. The creation of a state within a state, but in their brazen willingness to guarantee that congress and the sovereign Filipino people would give their imprimatur to their solution." (Id., p. 517, Parenthesis, supplied).

16 Id., p. 407.

> Nunungan, Pantar, Tagoloan and Tangkal in the province of Lanao del Norte and all other barangays in the Municipalities of Kabacan, Carmen, Aleosan, Pigkawayan, Pikit, and Midsayap that voted for inclusion in the ARMM during the 2001 plebiscite, (c) the cities of Cotabato and Isabela; and (d) all other contiguous areas where there is a resolution of the local government unit or a petition of at least ten percent (10%) of the qualified voters in the area asking for their inclusion at least two months prior to the conduct of the ratification of the Bangsamoro Basic Law and the process of delimitation of the Bangsamoro as mentioned in the next paragraph.[17]
>
> x x x
>
> The disposition of internal and territorial waters shall be referred to in the Annexes on Wealth and Power Sharing.[18]
>
> Territory refers to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain and the atmospheric space above it. Governance shall be as agreed upon by the parties in this agreement and in the sections on wealth and power sharing.[19]

The scope and scale of the ***political asymmetry*** between the Bangsamoro Government and the National Government are marked off, *albeit* hazy, in the FAB as follows:

> The government of the Bangsamoro shall have a ministerial form.[20]
>
> x x x
>
> The Central Government will have reserved powers, the Bangsamoro Government shall have its exclusive powers, and there will be concurrent powers shared by the Central Government and the Bangsamoro Government.[21]
>
> The Annex on Power Sharing, which includes the principles on intergovernmental relations, shall form part of this Agreement and guide the drafting of the Basic Law.[22]
>
> x x x
>
> The Central Government shall have powers on:

17 Paragraph 1 on Territory, Framework Agreement on the Bangsamoro.

18 Paragraph 4, id.

19 Paragraph 5, id.

20 Paragraph 2, on the Establishment of the Bangsamoro, id. Paragraph 4 states, thus: "The relationship of the Central Government with the Bangsamoro Government shall be asymmetrical."

21 Paragraph 2, on Powers, id.

22 Id.

a) Defense and external security
b) Foreign policy
c) Common market and global trade, provided that the power to enter into economic agreements already allowed under Republic Act No. 9054 shall be transferred to the Bangsamoro
d) Coinage and monetary policy
e) Citizenship and naturalization
f) Postal service

This list is without prejudice to additional powers that may be agreed upon by the Parties.[23]

x x x

The Parties recognize the need to strengthen the Shari'ah courts and to expand their jurisdiction over cases. The Bangsamoro shall have competence over the Shari'ah justice system. The supremacy of Shari'ah and its application shall only be to Muslims.[24]

x x x

The Bangsamoro Basic Law shall provide for justice institutions in the Bangsamoro. This includes:

a) The competence over the Shari'ah justice system, as well as the formal institutionalization and operation of its functions, and the expansion of the jurisdiction of the Shari'ah courts.[25]

x x x

The Bangsamoro may create its own auditing body and procedures for accountability over revenues and other funds generated within or by the region from external sources. This shall be without prejudice to the power, authority and duty of the national Commission on Audit to examine, audit and settle all accounts pertaining to the revenues and the use of funds and property owned and held in trust by and government instrumentality, including GOCCs.[26]

x x x

As a matter of principle, it is essential that policing structure and arrangement are such that the police service is professional and free from partisan political control. The police system shall be civilian in character so that it is effective and efficient in law enforcement, fair and impartial as well as accountable under the law for its action, and responsible both the Central Government

23 Paragraph 2, id.

24 Paragraph 3, id.

25 Paragraph 5, id.

26 Paragraph 5 on Revenue Generation and Wealth Sharing, id.

> and the Bangsamoro Government, and to the communities it serves.[27]
>
> x x x
>
> An independent commission shall be organized by the Parties to recommend appropriate policing within the area. The commission shall be composed of representatives from the parties and may invite local and international experts on law enforcement to assist the commission in its work.[28]
>
> x x x
>
> In a phased and gradual manner, all law enforcement functions shall be transferred from the Armed Forces of the Philippines (AFP) to the police force for the Bangsamoro.[29]

DISCUSSION

At this point, I take caveat and explain that this disquisition is an academic exercise. As it is, the FAB, to emphasize, is an unfinished document, many of its provisions open-ended, to be agreed upon later on or entrenched to acquire a "definable" form. And the process requires, as outlined in the framework, the creation of an independent Transition Commission to work on the draft of the Basic Law for the Bangsamoro Government and submit the same to Congress as an urgent bill certified to by the President.[30] Said Transition Commission shall be composed of fifteen (15) members all of whom are Bangsamoro. Seven (7) members shall be selected by the GPH and the eight (8) members, including the Chairman, selected by the MILF.[31]

But this early, I wish for the FAB to grow lilies under a clear blue sky. On the day of its signing at Malacañang, I was sorely tempted to beat the drum and summon the martyrs of the Moro Islamic Liberation Front (MILF for brevity) to frolic with me among the lilies of the field. Both the PHG Peace Panel and the MILF Peace Panel had doglegged the legal minespots of the Memorandum of Agreement on Ancestral Domain (MOA-AD for brevity) and crossed over without straying far from the roadmap to Moro self-determination.

Question of Territory and Disposition of Natural Resources

To begin with, the FAB is a legal organism that mutates from its MOA-AD beginnings, now shorn of associative characteristics that weighed down its forerunner.

It is in order at this juncture to recall antecedents and piece together the factual landscape to get a better perspective on the constitutional issues.

27 Paragraph 3, on Normalization, id.

28 Paragraph 4, id.

29 Paragraph 6, id.

30 Paragraphs 5-7 on Transition and Implementation, id.

31 Paragraph 5, id.

The Memorandum of Agreement on Ancestral Domain

On July 27, 2008 and after eleven (11) years of negotiation, often marked, nay, marred with interregna occasioned by disagreement over nomenclatures and outbreaks of hostilities, the PHG and the MILF concluded and initialed a framework agreement[32] known as the Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement of Peace of 2001 or the MOA-AD.

On the face of the Agreement is a recognition by the PHG and the MILF of the need, nay, obligation to negotiate and conclude a Comprehensive Compact where "the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out[33]. . ." including the "structure of governance" for the Bangsamoro Juridical Entity (BJE for brevity) and the relationship between the Central Government and the BJE.[34]

Any provision of the MOA-AD requiring amendments to the existing legal framework would 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.[35]

The Agreement was initialed by both Parties and was scheduled for ceremonial signing on August 5, 2008 in Kuala Lumpur, Malaysia, between the representatives of the MILF and the PHG.

Mohagher Igbal, the Minister of Information of the MILF and Head of its Peace Panel, was set to sign the Agreement for the Liberation Front. For the Government of the Republic of the Philippines, Secretary Rodolfo Garcia, the Chair of the PHG Peace Panel, was tasked to sign it. To stand as witness-signatory for the MOA-AD was Datuk Othman Bin Abd Razak, the Special Adviser to the Prime Minister of Malaysia. Dr. Alberto G. Romulo, Secretary of Foreign Affairs of the Republic of the Philippines and Dato Seri Utama Dr. Rais Bin Yatim, Minister of Foreign Affairs of Malaysia, were named in the Agreement too as signatories–witnesses. Also, the MOA-AD named Ambassador Sayed Elmasry, Adviser to Organization of the Islamic Conference (OIC) Secretary General and Special Envoy for Peace Process in Southern Philippines, as an endorser of the said Agreement and was tasked to sign it as such.[36]

Dignitaries and diplomats were invited to witness the occasion. Among those who arrived in Malaysia included the U.S. Ambassador to the Philippines, the Japanese Ambassador to the Philippines, the Australian Ambassador to the Philippines, the Libyan Minister Counselor to the Philippines, Presidential Adviser on the Peace Process Secretary

32 *See* Atty. Michael O. Mastura, Brief Commentary on MOA-AD, at www.luwaran.com.

33 Paragraph 6 on Concepts and Principles, MOA-AD and pars. 3, 5 and 6 on Territory, MOA-AD.

34 Paragraph 7 on Governance, MOA-AD.

35 Paragraph 7 on Governance, MOA-AD.

36 Nasser A. Marohomsalic, et. al., The Memorandum of Agreement on Ancestral Domain: A Commentary, Vol. 33 No. 2, September 2008, IBP Journal, p. 72.

Esperon, Jr., and Moro leaders including former Secretary Amina Rasul, among others.[37]

But the ceremonial signing did not happen. In the afternoon of August 4, 2008 and when everybody was in Malaysia for the purpose, the Supreme Court issued a *Temporary Restraining Order* commanding and directing public respondents the Philippine Government Peace Panel on Ancestral Domain and their agents to cease and desist from formally signing the MOA-AD.[38] The Government too disowned and disbanded in its present form and in any other form.

The TRO was issued pursuant to the Petition for Mandamus and Prohibition filed with the Supreme Court on July 23, 2008, docketed as G.R. No. 183591, by the Province of North Cotabato and its Vice-Governor Emmanuel Piñol, questioning the constitutionality of the MOA-AD with Prayer for the issuance of Writ of Injunction and TRO Order.[39] It was also issued in response to a similar petition, docketed as G.R. No. 183752, by the City Government of Zamboanga City Mayor Celso Lobregat, Rep. Ma. Isabelle Climaco and Rep. Erico Basilio Fabian.[40] Others followed suit and their petitions were docketed as G.R. No. 183893,[41] G.R. No. 183951,[42] G.R. No. 183962.[43] Various parties including the Muslim Legal Assistance Foundation intervened too and were granted leave of court to file their petition-in-intervention.

Petitioners in G.R. No. 183962 impleaded as respondent the MILF Peace Negotiating Panel represented by its Chairman Mohagher Iqbal.[44] But the revolutionary movement did not file any pleading.

On October 14, 2008, the Supreme Court sealed the fate of the MOA-AD and declared it as unconstitutional, drubbing in the main the Bangsamoro Juridical Entity (BJE for brevity) as an independent State or a near-independent State in the contemplation of the Agreement and thereby subverting the political unity of the country. Thus:

> 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 (or PHG) and the BJE, are unconstitutional for the concept presupposes that the assailed entity is a state and implies that the same is on its way to independence.[45] (Parenthesis supplied)

Particularly, the Supreme Court enumerated the following provisions which are consistent with the international concept of association but beyond the contemplation of the Constitution. Thus:

37 Id.

38 *Ponencia, supra,*, p. 437.

39 Id., p. 436.

40 Id.

41 Id., p. 437.

42 Id.

43 Id., pp. 437-438.

44 Id., 437-438.

45 Id. p. 521.

> The inclusion of the aerial domain and atmospheric space as part of the territory of the Bangsamoro Juridical Entity and its conferment on the BJE jurisdiction and control over, and the right of exploring for, exploiting, producing and obtaining all potential sources of energy, petroleum in *situ*, fossil fuel, mineral oil and natural gas, whether onshore or offshore, except in times of emergency, when public interest so requires, when the central government may during the emergency, for a fixed period and under a reasonable terms as may be agreed by both Parties, temporarily assume or direct the operations of such strategic resources; its investing of authority in the BJE to participate in international meetings and events and in official missions and delegations in the negotiation of borders agreements or protocols for environmental protection, equitable sharing of incomes and revenues in the area of sea, seabed and inland seas or bodies of water adjacent to or between islands forming part of the ancestral domain, in addition to those pertaining to fishing rights; and its provision for the Central Government and the BJE to exercise joint jurisdiction, authority and management over areas lying beyond the 15 kilometers internal waters and all natural resources living and non-living contained therein.

Moreover, the Supreme Court found Paragraph 7 on Governance of the MOA-AD inconsistent with the limits of the President's authority to propose constitutional amendments, it being a virtual guarantee that the Constitution and the laws of the Republic of the Philippines will certainly be adjusted to conform to all the "consensus points" enumerated in the Agreement. Hence, it struck down the MOA-AD as unconstitutional.[46]

On the Aerial Domain

In its *ponencia* in the Province of North Cotabato case, the Supreme Court held that the UN DRIP does not acknowledge the right of the indigenous peoples to the aerial domain and atmospheric space and that what it upholds in Article 26 thereof, is the right of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[47]

While it defines the territory of the Bangsamoro Government to include the aerial domain and the atmospheric space above it, the FAB leaves the issue of its governance to future discussion and arrangement between the parties[48] even as it treats the issue as a business or economic concern within the domain of property law, where ownership over real estate extends beyond possessory title thereof to include its enjoyment without impairment, whether for personal comfort or its use for economic activity, which right extends to the beneficial use of the airspace above it. This principle gained currency among our legal commentators since its articulation in the 1946 case of ***U.S. v. Causby*** by the U.S. Supreme Court, thus:

> We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive

46 Id., p. 509.

47 The province of North Cotabato case, supra, p. 497.

48 Paragraph 5 on Territory, FAB.

> control of the immediate reaches of the enveloping atmosphere. Otherwise, buildings could not be erected, trees could not be planted, and even fences could not be run. The principle is recognized when the law gives a remedy in case overhanging structures are erected on adjoining land. The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. See Hinman v. Pacific Air Transport, 9 Cir., 84 F. 2d 755. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material. As we have said, the flight of airplanes, which skim the surface but do not touch, it, is as much an appropriate of the use of the land as a more conventional entry upon it.[49]

Clearly then, if the right to the enveloping atmosphere above the territory of the Bangsamoro Government is confined within the economic aspect of property right as explained, the proposal, I submit, would come off constitutional.

Governance over the aerial and atmospheric domain is an issue we must keep tab on in the negotiations between the PHG and the MILF. The proposal may become problematic. My view is that if governance by the Bangsamoro over the enveloping atmosphere involves policing or environmental and ecological protection and conservation, then this governmental function should be shared with or devolved upon the Bangsamoro Government. The notion is in keeping with IPRA, which vests in the Indigenous Peoples like the Bangsamoro the "right to manage and conserve the natural resources within the territories (traditionally occupied, owned or used by them) and uphold the responsibilities for future generations, . . . the right to negotiate the terms and conditions for the exploration of natural resources in the area for the purpose of ensuring ecological and environmental protection and conservation measures, pursuant to national and customary laws."[50] (Parenthesis supplied)

Easily, one discerns the connection between the exploitation of natural resources on the ground and the surrounding and enveloping environs in ecological and environmental terms.

In Mindanao, the denudation of the mountains and hills by non-Mindanaoan concessionaires upsets weather condition and, during heavy downpours, landslides and flash floods ensue, claiming lives and destroying crops and properties in humongous number, not to mention soil erosion and river siltation, low water table and loss of arable lands, among others. Heavy manufacturing and chemical industries by foreign multinationals spew toxins and pollutants in the immediate environs, bringing diseases and health problems to people.

For sure, it is the Bangsamoro themselves who should determine what is good for themselves.

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49 U.S. vs. Causby, 328 U.S. 256 (1946). This is a new issue raised in Muslaf's Motion for Reconsideration which was ironically dismissed by the Supreme Court in a Minute Resolution on the ground that said Motion raised no new issue.

50 Section 7(b), IPRA.

On the Jurisdiction over and Disposition of Natural Resources

Unlike the MOA-AD, the FAB does not directly vest in the Bangsamoro Government the joint jurisdiction with the National Government over natural resources in the territory of the Bangsamoro Government beyond 15 kilometers from its internal waters. Neither does it vest in the Bangsamoro Government jurisdiction and control over strategic mineral and other sources of energy including their exploration and exploitation.

In fact, the FAB does away with these features of the MOA-AD that endowed the BJE with associative characteristics as it relates to natural resources; generally, it treats natural resources within the domain of the Bangsamoro Government as an object of property law, nay, an object of economic activity whose produce and by-products may be shared and divided among the economic actors and productive forces. This is clear from the following provisions of the FAB, thus:

> The Bangsamoro shall have a **just and equitable share** in the revenues generated through the exploration, development or utilization of natural resources obtaining in all the areas/territories, land or water, covered by and within the jurisdiction of the Bangsamoro, in accordance with the formula agreed upon by the parties.[51] (Emphasis supplied)
>
> x x x
>
> The details of the revenue and wealth sharing arrangements between the Central Government and the Bangsamoro Government shall be agreed upon by the Parties. The Annex on Wealth Sharing shall form part of this Agreement.[52]

The provision in the FAB relegating the matter of "the disposition of internal and territorial waters" to the Annexes on Wealth and Power Sharing and subjecting it to future discussion, I submit, does not do violence to my general propositions as just outlined.

Beneath the internal and territorial waters of the region are fossil energy and minerals and the disposition thereof could relate to the degree of participation of the Bangsamoro Government in its exploration and exploitation, not to mention in the revenues generated thereby; it could also relate to police regulation of its internal and territorial waters as a maritime or commercial byway, where fishing trawlers and poachers from neighboring countries ply at will and deplete and destroy living riches therein including corals and protected marine life. Indeed, what arrangement that may be forged to enforce maritime regulations and environmental policies that will not impinge upon the territorial integrity of the country and the ownership by the State of the natural resources of the country. To emphasize, on the part of the Bangsamoro Government, its share of the authority could come in the form of management, policing or environmental protection and conservation, utilization and disposition of its marine life, which duty is also allocated to the local government units with respect to their municipal waters.[53]

51 Paragraph 4 on Revenue Generation and Wealth Sharing, FAB.

52 Paragraph 6, id.

53 See Sections 16, Art. 1, Chapter II, Rep. Act 8550, otherwise known as The Philippine Fisheries Code of 1998. Also, Section 4 (58), Chapter I, id.

Such kind of power sharing or exercise of authority on the part of the Bangsamoro Government comes within the purview of the UN DRIP. Thus:

> The Declaration recognizes their ownership of the **lands, territories** and **resources** which they have traditionally owned, occupied or otherwise used or acquired, and the states are obliged to give legal recognition and protection to these lands, territories and resources with due respect to the customs, traditions and land tenure system of the indigenous peoples. They are empowered too to determine and develop[54] priorities and strategies for the development or use of their lands or territories and other resources.[55]

Obviously, for not arrogating ownership over the natural resources within its jurisdiction and territorial areas, the peace panels hewed to the concurring Opinion of Chief Justice Puno in Isagani Cruz case[56], holding that the right of ICCs/IPs to own, develop lands and natural resources within the ancestral domain does not deprive the State of ownership over the natural resources and control and supervision in their development and exploitation. This is the essence of a pertinent provision of the Constitution. Thus:

> Sec. 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law . . .[57]

In the Indigenous People's Rights Act (IPRA for brevity), what are ceded to the indigenous peoples consist of the right "**to manage and conserve the natural resources (not ownership) within the territories (traditionally occupied, owned, or used by them) and uphold the responsibilities for future generations; to benefit and share the profits from allocation and utilization of the natural resources found therein; the right to negotiate the terms and conditions for the exploration of natural resources in the area for the purpose of ensuring ecological, environmental protection and the conservation measures**, pursuant to national and customary laws."[58] (Parenthesis supplied)

In brief, despite their deprivation of ownership of the natural resources within their ancestral domain by constitutional fiat, the Bangsamoro Government is vested with

54 Art. 26, UN DRIP.

55 Article 32, id.

56 See Separate Opinion of Chief Justice Puno in Isagani Cruz, et. al. vs. DENR Secretary, et. al., G.R. No. 135385, Dec. 6, 2000.

57 Section 2, Article XII, Philippine Constitution.

58 Section 7 (b), IPRA.

usufruct thereof, not to mention the social responsibility imposed on it by the State, that is, to conserve them for future generations.

Ironically, in the Province of North Cotabato case the Supreme Court enumerated the associative characteristics of the BJE and included therein "the sharing of revenues (with the BJE) pertaining to the bodies of water adjacent to or between the islands that form part of the ancestral domain."[59] (Parenthesis supplied). The same provision is retained in the FAB.[60]

With all due respect, this part of the *ponencia* of the High Court is a bit overblown, if not an oversimplication.

Wealth or revenue sharing between the Bangsamoro Government and the Central Government is a settled issue. To emphasize, it certainly will not infringe on the ownership of the State over natural resources to cede part of incomes or revenues derived therefrom or elsewhere. The Constitution itself amply provides for it. By the mandate of the fundamental law, the Central Government allocates a just share in the national taxes to its political subdivisions.[61] Local government units are entitled to an equitable share in the proceeds of the utilization and development of the national wealth within their respective areas, in the manner provided by law, including sharing the same with the inhabitants by way of direct benefits.[62] Government imposes on mining corporations the obligation to pay royalty that is earmarked for social and economic amelioration projects for the cultural communities where they operate.[63]

In the MOA-AD, both parties were to forge an economic cooperation agreement or arrangement over the income and revenues that are derived from the exploration, exploitation, use and development of any resources for the benefit of the Bangsamoro[64] including royalties, bonuses, taxes, charges, custom duties or imposts on natural resources to be shared by the parties on a percentage ratio of 75:25 in favor of the Bangsamoro Juridical Entity.[65]

The provision is reiterated in the FAB in this wise, thus:

> The Bangsamoro shall have a just and equitable share in the revenues generated through the exploration, development or utilization of natural resources obtaining in all the areas/territories, land or water, covered by and within the jurisdiction of the Bangsamoro in accordance with the formula agreed upon by the Parties.[66]

59 Province of North Cotabato case, supra, pp. 480-481.

60 See paragraph 4 on Revenue Generation and Wealth Sharing, FAB.

61 Section 6, Article X, Philippine Constitution.

62 Section 7, Art. X, id.

63 Section 16, Chapter II of Rep. Act 7942, otherwise known as the Philippine Mining Act, provides, thus: "In the event of an agreement with an indigenous cultural community (who acceded to the opening of their ancestral lands to mining operations), royalty payment, upon utilization of the minerals shall be agreed upon by the parties. The said royalty shall form part of a trust fund under the socio-economic well-being of the indigenous cultural community." (Parenthesis supplied).

64 Paragraph 3 on Resources, MOA-AD.

65 Paragraph 6, id.

66 Paragraph 4 on Revenue General and Wealth Sharing, FAB.

x x x

> The details of revenue and wealth sharing arrangements between the Central Government and the Bangsamoro Government shall be agreed upon by the Parties. The Annex on Wealth Sharing shall form part of this Agreement.[67]

In Republic Act 9054, otherwise known as the Organic Act for the Autonomous Region in Muslim Mindanao, as Amended, the collections of a province or city from national internal revenue taxes, fees and charges, and taxes imposed on natural resources are distributed as follows: Thirty-five percent (35%) to the province or city; Thirty-five percent (35%) to the regional government; and Thirty-five percent (35%) to the central government or national government.[68] Until laws are enacted that provide otherwise, fifty percent (50%) of the revenues derived from the utilization and development of strategic minerals (uranium, coal, petroleum, other fossil fuels, mineral oils and all sources of potential energy) accrues to the Regional Government and the provinces, cities, municipalities and barangays in the autonomous region.[69]

Indeed, the Supreme Court committed a reversible error in opining in the Province of North Cotabato case that the provision in the MOA-AD that permits sharing of revenues between the PHG and the BJE pertaining to the bodies of water adjacent to or between the islands that form part of the ancestral domain of the Bangsamoro, is an attribute that makes the BJE an Associated State.

On the Moro Homeland as Part of the Territory of the Philippines

On the issue of Territory and Disposition of Wealth, one more pivotal issue to be clarified relates to the nature and character of the territory of the Bangsamoro Government.

At this point, the question may be posed: Does the FAB makes out for the Bangsamoro a territorial enclave outside of the political map of the country?

Both the MOA-AD and the FAB provide for the same territorial core of the Bangsamoro Government,[70] which consists of geographic areas in Mindanao including the present territorial limits of the Autonomous Region in Muslim Mindanao (ARMM for brevity) and those who voted in the 2001 plebiscite for the amended Organic Act of ARMM, Republic Act No. 9054.[71] These geographic areas traditionally constitute the ancestral domain and ancestral lands of the Bangsamoro, not to mention the outlying lands. However, in both documents vested property rights of non-Muslims including the other indigenous peoples are recognized.[72] Reparations will be provided for members of the Bangsamoro who were unjustly disposed of their territorial and proprietary rights and

67 Paragraph 6, id.

68 Sec. 9, Art. IX, RA 9054.

69 Sec. 1, Art. X, id.

70 Paragraph 2 (c) on Territory, MOA-AD; Paragraph 1 on Territory, FAB.

71 Id; Id.

72 Paragraphs 2-3 on Basic Rights, FAB; paragraph 2 (c), (d), (e) on Territory, MOA-AD.

customary land tenure.[73]

But the MOA-AD goes further and classifies the territorial boundary of the Moro homeland as a "territory under compact" (or *daru-ulma'hada*) or "territory under peace agreement" (or *daru-ul-sulh)*,[74] which modality, according to MILF Panel Member Atty. Michael Mastura, is a relative recent invention in treaty-making.[75]

With all due respect, this is not a new tool in the promotion of foreign relations, especially in the area of security and peace. During the nascency of political Islam in the City State of Madinah, the Prophet Muhammad (peace be upon him) established a commonwealth with non-Muslim tribes within its surrounding environs — the Jews in the oases of Maqna, Adhruh and Jarba to the south and the Christians of Aqaba, who were taken under the protection of the city state in consideration of a payment later called *jizyah*, which included land and head tax.[76] For all intent and purposes, these areas are territories under compact, each an associate state of Madinah.

Nevertheless, the point that is stressed here is that these features of the MOA-AD are done away with in the FAB, which means that the territory of the Bangsamoro Government, despite its being the ancestral land of the Bangsamoro, generally speaking, still form part of the country over which the PHG exercises political authority pursuant to the Regalian Doctrine defined in Section 2, Article XII of the Philippine Constitution.[77]

In fine, I find no constitutional infirmity in the provisions of the Framework Agreement on the Bangsamoro in relation to Territory and Disposition of Wealth.

Question of Political Asymmetry and Subsidiarity

The FAB provides that the relationship between the Central Government and the Bangsamoro Government shall be asymmetric.[78]

As it is, the existence of the Bangsamoro Autonomous Government in southern Philippines within the Philippine State is a case of political asymmetry. So does the presidential form of the Philippine Government and the ministerial form of government sought for the Bangsamoro Government under the FAB.[79] The allocation of powers between the National Government and the Bangsamoro Government is another instance of incongruency. The FAB clarifies more its sense of the legerdemain, thus:

> The Central Government will have reserved powers, the Bangsamoro Government shall have its exclusive powers, and there will be concurrent powers shared by the Central Government and the Bangsamoro Government.[80]

73 Paragraph 2 on Territory, FAB; See paragraph 2 (i), MOA-AD.

74 Paragraph 8 on Terms and Reference, MOA-AD.

75 Atty. Michael O. Mastura, Brief Commentary on MOA-AD, at www.luwaran.com.

76 See Philip K. Hitti, History of the Arabs. 1985: Chicago, p. 37.

77 See Section 2, Article XII, Philippine Constitution.

78 Paragraph 4 on the Establishment of the Bangsamoro, FAB.

79 Paragraph 2 on the Establishment of the Bangsamoro.

80 Paragraph 1 on Powers, id.

This is a general provision, its articulation and formulation into bits and pieces of legislative policy would touch off, for certain, legal luminaries especially the literalists among them, and question their validity or constitutionality.

Apparently, the validity of some issues on political asymmetry could be measured by the constitutional yardstick, what with the principles and policies in the fundamental law that define our form of government as unitary, afford preeminence in the Presidency in the structure of power and require exclusivity in the exercise of authority among independent national agencies of government.

Like any lawyer, I defer to legal arguments. But I see a better reality for my position also from the sociological perspective.

Like the IPRA, the Agreement is a social legislation, addressing not only the resolution of the political dimension of the insurgency of the Bangsamoro but the root causes of underdevelopment in the region as a whole that fueled their rebellion in the first place. And I do not wish to undercut the FAB by a perfunctory and strict legalistic scrutiny. And I shall elaborate myself as a I go along with my discussion on the issues.

On the Ministerial Form of Government

It may be in order to assume that a number of legal luminaries may not be taken to the use of the word, **asymmetrical**, to describe the relationship between the Bangsamoro Government and the Central Government, least of all the prescription for the Bangsamoro Government as "ministerial in form".[81]

To be sure, a ministerial form of government for the Bangsamoro Government is a political antagonism to the presidential system of government that underpins the collective political life of the nation. In a presidential form of government, the national leadership is elected by popular suffrage, while the contrary obtains in a ministerial and parliamentary form of government where, as is the practice in countries influenced by Great Britain, the mother and originator of the ministerial and parliamentary system, the head of government or the prime minister or chief minister is elected by an electoral body of deputies or a legal corporate that also wields the power of recall.

But this legal issue was anticipated by the 1987 Constitutional Commission that drafted the Constitution.

"[Autonomy]", notes Commissioner Jose Nolledo, who was the Chairman of the Committee which drafted the regional autonomy provisions of the 1987 Constitution, "is an indictment against the status quo of a unitary system that . . . has intellectually tied the hands of progress in our country . . . Our varying regional characteristics are factors to capitalize on to attain national strength through decentralization."[82] This proceeding in the Constitutional Commission was quoted by the Supreme Court with approval in the Disumangcop case. Therein, the High Court took a dig against the assimilationist character of the legislative policy of the Philippine Government. Thus:

81 Paragraph 4 on the Establishment of the Bangsamoro, id.

82 III Records, 182-183, 11 August 1986. In Disumangcop, et. al., vs DPWH, et. al., G.R. No. 149848, 2004.

> Autonomy, as a national policy, recognizes the wholeness of the Philippine society in its ethnolinguistic, cultural, and even religious diversities. It strives to free Philippine society of the strain and wastage caused by an assimilationist approach. Policies emanating from the legislature are invariably assimilationist in character despite channels being open for minority representation. As a result democracy becomes an irony to the minority group.[83]

The sultanic system of the Bangsamoro in olden times hewed closely to the ministerial and parliamentary system obtaining in the United Kingdom.

Then, in every *agama* in Lanao, which political unit is roughly equivalent to a town, executive power resided in an upper house called *Astana* (or roughly equivalent to the House of Lords) presided over by the Sultan. This House of Nobility is composed of a peerage of ascendant lineage. Law-making originates from a lower house of parliament called *Babaya-sa-Taritib* (literally, the Legislators) composed of datus of lesser ranks who kept regnancy over their own corners or barangays in the *agama*. In the Federal Principalities of Lanao -- Unayan, Bayabao, Masiu and Baloi (a 20th century addition) -- the *Astana* was composed of the respective heads of the paramount royal houses in every principality, 15 or 16 of them, and the House of the *Babaya-sa-Taritib* the respective heads of supporting royal houses to the former, 26 in all.

In the Sultanate of Sulu,[84] though the crown is hereditary, royal datus and commoners who rose to influence, wealth and prestige participated in the election or enthronement of the Sultan. Thus, the influence and power of a sultan in the realm depended in no small measure on the loyalty of the royalties and the mass leaders, many of whom composed the *Ruma Bichara*, the Legislature, presided over by the Rajah Muda, the heir apparent. In the parliament, decisions were reached by simple majority vote. Although no incident is known where the *Ruma Bichara* deposed a sultan, royal datus and members of the peerage of commoners had rose up in open rebellion against the Sultan over concerns and affairs of State.

Like Sulu, the sultanship in Maguindanao is a birthright. But politics also played a role as royal heirs fought for the throne and enlisted the support of royal datus and their blood and collateral kin. The legislative branch of the Sultanate is also called *Ruma Bichara*, composed of royal datus and allies of the Sultan who assumed importance in the polity by wealth and diadic relations, among other things.

Thus, in terms of experience in political democracy, among others, "the Bangsamoro", to quote the language of Commissioner Ople during the deliberations in the Constitutional Commission on the provisions of regional autonomy, "do not belong to the dominant national community."[85] "The Moro is not Filipino," to quote an American military-writer, "by any ties of race, government, or religion."[86]

Indeed, the ministerial and parliamentary form of government is a salutary proposal,

83 Disomangcop case, id.

84 See Cesar Adib Majul, Muslims in the Philippines. 1999: U.P. Press, Quezon City, p. 392

85 Disomangcop case, supra, p. 228.

86 Lt. Col. Joan D. Finley, The Mohammedan Problem in the Philippines. In the Journal of Race Development, Vol. 5, No. 4, April 1915, p. 353.

tailored-fit as it is as before to the Bangsamoro. It is also an affirmative articulation of a general policy in the Constitution that reads, thus:

> The State recognizes and promotes the rights of indigenous cultural community within the framework of national unity and diversity.[87]
>
> x x x
>
> The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to **human dignity, reduce social, economic, and political inequalities, and remove cultural inequalities**, **by equitably diffusing wealth and political power for the common good.**[88] (Emphasis supplied)

In fine, the proposal for a ministerial form of government for the Bangsamoro measures up to constitutional regulation even as it carries on the legacy of the past.

On the Expansion of the Jurisdiction of the Shari'ah Court

As early as 1977, the judicial system of the Bangsamoro called, *Shari'ah*,[89] was recognized by the Philippine Government as part and parcel of the whole legal system of the country, albeit limited in scope to Muslim personal laws and its application confined to Muslims. It is sought to be expanded in the FAB, its scope to extend to other branches of Islamic law and its application still restricted to Muslims. As defined in the FAB, the provision reads, thus:

> The Parties recognized the need to strengthen the Shari'ah courts and to expand their jurisdiction over cases. **The Bangsamoro shall have competence over the Shari'ah justice system**. The supremacy of Shari'ah and its application shall be only to Muslims.[90] (Emphasis supplied)

By this provision a Shari'ah judicial system is envisioned for the Bangsamoro that is asymmetrical to the Philippine judicial system which includes a system of appeal, a court hierarchy where the Supreme Court is the court of last resort and its power of judicial review and administrative supervision over all courts and the personnel thereof including the present Shari'ah courts, absolute and cannot be diminished.[91]

Presently, the Shari'ah justice system is a three-tiered court – the Shari'ah Municipal Court, the Shari'ah Municipal Circuit Court, and the Shari'ah District Court, which are equivalent to the Municipal Trial Court, Municipal Circuit Court and Regional Trial Court, respectively. Decisions of the Shari'ah District Court is appealable directly to the Supreme Court. With its members not Bangsamoro and without formal education and competence on Shari'ah, the Supreme Court would be deprived then of its review power

87 Sec. 22, Art. II, Philippine Constitution.

88 Sec. 1, Article XIII, Philippine Constitution.

89 Presidential Decree No. 1083, otherwise known as the Code of Muslim Personal Laws of the Philippines, Feb. 4, 1977.

90 Paragraph 3 on Powers, FAB.

91 See Secs. 1, 3, 4 (1), 5 and 6, Art. VIII, Philippine Constitution.

over decisions of the Shari'ah courts, not to mention its administrative supervision over all courts. By this scenario, the implementation of this feature of the FAB will require an amendment to the Constitution.

The Shari'ah law has its well-spring in Islam. Thus, no Muslim is truly a Muslim if he/she does not live by its tenets and injunctions, no society is Islamic that does not go by the regulations and the demands of Shari'ah. As a Muslim, Islam is the Bangsamoro's system of life, and this is sought to be incorporated into the Basic Law. The FAB provides, thus:

> The Basic Law shall reflect the Bangsamoro system of life and meet internationally accepted standards of governance.[92]

The importance of this proposal cannot be overemphasized. Suffice it to state, the deprivation of Muslims from practicing Islam as a way of life and in all its splendors is the main *raison d'etre* of their insurgency. At this point, it is apt to quote again an appraisal of an American military officer who served for 10 years as Governor of the District of Zamboanga, Moro Province, during the American occupation, thus:

> [I]t is well to remember that any solution of the Moro Problem by the American, or any other government, must count upon this element of his life (his religion), as the largest factor of the equation.[93] (Parenthesis supplied)

In my last talk with the Chairman of the MILF Ustaj Salamat on February 14, 1999 at Camp Abubacar, he shared with me his yearning for a Bangsamoro Homeland governed under Shari'ah, no nook for prostitutes and sex perverts, tipplers, gamblers, sorcerers, thieves, killers and rapists, where goodness reigns, every Muslim Bangsamoro harkening to the call of the muezzin to do good work.

No doubt, the grant of an "expansive" Shari'ah system of justice for the Bangsamoro will go a long way for the resolution of the so-called Moro Problem.

All things considered, it is well to widen our vista and look at the factual reality that amending the constitution is a long process, not to mention its attendant perils. In the meantime, the Shari'ah judicial system may be expanded within the present Philippine legal order without compromising its integrity. This can be done with the creation of a Shari'ah Division in the Court of Appeals and the Supreme Court, with the appointment of three (3) Muslim justices to the Court of Appeals and at least another three (3) Muslim justices to the Supreme Court to compose the majority in one of its three (3) Divisions. One Muslim legal luminary may be appointed as Deputy Court Administrator to supervise the Shari'ah courts.

To be sure, this provision for the expansion of the Shari'ah justice system in the country is an affirmative articulation of a general policy in the Constitution, thus:

> The State recognizes and promotes the rights of indigenous cultural community within the framework of national unity and diversity.[94]

92 Paragraph 3 on the Basic Law, FAB.

93 John D. Finley, *supra*, p. 356.

94 Section 22, Art. X, Philippine Constitution.

x x x

> The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequality by equitably diffusing wealth and political power for the common good.[95]

The proposal should therefore be accorded breadth and depth, and policy-makers including Congress should think out of the box and bootstrap the political arrangements defined in the FAB to their constitutional form and shape without sacrificing substance and content.

On the Police Force

The FAB provides for the creation of an "independent commission by the Parties to recommend appropriate policing within the area . . . composed of representatives from the parties, local and international experts on law enforcements (that they may invite) to assist the commission in its work." It envisions a "police force for the Bangsamoro" . . . that "is professional and free from partisan political control . . . civilian in character . . . fair and impartial as well as accountable under the law for its action, and responsible both to the Central Government and the Bangsamoro, Government, and to the communities it serves."[96] (Parenthesis supplied)

The Parties agree to continue negotiations on the form, functions and relationship of the police force of the Bangsamoro taking into consideration the results of the independent review process of the independent commission.[97]

It is premature then to measure the legal significance or validity of this provision of the FAB on the creation of the police force for the Bangsamoro Government.

To emphasize, the provision is open-ended and too sketchy to make out a definite body corporate with all its functional essentials. If at all, the FAB only conjures up an inchoate entity as of a larvae in a cocoon. Until defined, it is a formless entity.

On the Internal Audit System

At first glance, the unconstitutionality of the provision of the FAB authorizing the Bangsamoro Government to create its internal audit body for accountability over revenues and other funds generated within or by the region from external sources,[98] sticks out.

95 Sec. 1, Art. XIII, Philippine Constitution.

96 Paragraph 3, 6 on Normalization, FAB. (pls. check)

97 Paragraph 6 on Normalization, id.

98 Paragraph 5 on Revenue Generation and Wealth Sharing, FAB.

Already, legal luminaries have made the claim and suggested the need for the amendment of the Constitution to realize this point of consensus between the parties, it being contrary to the provision of the Constitution that mandates the creation of an independent Commission of Audit (COA for brevity)[99] "to examine, audit and settle all accounts pertaining to the revenue and receipts owned or held in trust by, or pertaining to the Government, or any of its subdivisions, agencies or controlled corporations . . ."[100] Another argument adduced relates to the nature of the Commission as an agency of government vested with "exclusive authority . . . to define the scope of its audit and examination, establish techniques and methods required therefor, and promulgate accounting and auditing rules and regulations, including those for the prevention and disallowance of irregular, unnecessary, excessive, extravagant, or unconscionable expenditures, or uses of government funds and properties."[101] And in the exercise of its authority, they argued, COA is nonpareil, an absolute monarch on its own, the fundamental law proscribing the passage of any law "exempting any entity of the Government or its subsidiarity in any guise whatsoever, or any investment of public funds from the jurisdiction of the Commission of Audit."[102]

However, on closer scrutiny, this grant of authority to the Bangsamoro Government may be in order, packing a wallop for the run-in, so to speak. For one reason, the grant of audit authority for the Bangsamoro Government to create an audit body is "without prejudice to the power, authority and duty of the national Commission on Audit to examine, audit and settle all accounts pertaining to the revenues and the use of funds and property owned and held in trust by any government instrumentality including GOCCs." This colatilla is a rendition of the power of COA under Section 1, Article IX of the Constitution.[103]

In brief, the audit body sought to be established in the region is internal to the Bangsamoro Government, a mere administrative tool for good housekeeping, nay, governance. It does not in anyway derogate upon the authority of COA, much less diminish its stature and nature as an independent national audit agency of the Philippine Government, of which the Bangsamoro Government is a bigger and specialized subsidiary.

A Case for Subsidiarity and Expediency

The grant of additional powers to the Bangsamoro Government keeps to the policy of decentralization or subsidiarity enshrined in the Constitution that guarantees autonomy for local government and the Bangsamoro. Thus:

> The territorial and political subdivisions shall enjoy local autonomy.[104]

In the grant of autonomy to the Bangsamoro, the Constitution leaves open the enumeration of the powers that Congress may provide for their autonomous region.

99 Sec. 1. Art. IX, Philippine Constitution.

100 Sec. 2 (1), Art. IX (D), id.

101 Sec. 2, Art. IX (D), id.

102 Sec. 3, Art. IX, id.

103 See note at 88.

104 Section 20, Art. X, Philippine Constitution.

Thus:

> Section 20. Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:
>
> 1) Administrative organization;
> 2) Creation of sources and natural resources;
> 3) Personal, family, and property relations;
> 4) Personal, family, and property relations;
> 5) Regional urban and rural planning development;
> 6) Economic, social, and tourism development;
> 7) Educational policies;
> 8) Preservation and development of the cultural heritage; and
> 9) **Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.**[105] (Emphasis supplied)

The principle of democracy and republicanism that underwrites the system of political life in the country and the constitutional recognition of the rights of the indigenous cultural communities[106] also behoove Congress to go for subsidiarity and entrench the Bangsamoro Government with more powers and political competencies.

"In accord with subsidiarity," writes Bosnich, "true democracy is a product of local institutions and self-reliance."[107]

The Philippine Government has gone strides in going by its affairs without orthodoxy. This, the government did by the allocation by the Legislature of powers to agencies not traditionally imbued with such authority owing to the nature of their office. This departure from the traditional allocation of powers is justified by expediency, or the need to respond swiftly and competently to the pressing problems of the modern world.[108] And there is no better exigency than the resolution of the Moro insurgency.

An Expression of *Parens Patriae*

I find sense too to adduce socio-legal arguments and bat for the utility of the principle of *parens patriae* in defense of the FAB. Lest I be misunderstood, I make a disclaimer that my presentation is not any argument of compassion but an appeal to justice.

The FAB is an expression of the doctrine of *parens patriae*[109] where the State serves as a great equalizer, enjoined to give succor and comfort to the least of its constituency,

105 Section 20, Art. X, Philippine Constitution.

106 Section 22, Art. II, id.; Sections 15-21, Art. X, id.

107 David A. Bosnich, The Principle of Subsidiary, at www.actionorg./pub/religion_liberty/ volume 6 numbers-4/ principle-subsidiarity.

108 See Oscar Baditto, et. al. vs. CA, et. al., G.R. No. 131193, June 26, 2008, 555 SCRA 448, where the principle is enunciated.

109 The doctrine is first articulated in Government of P.I. vs. Monte de Piedad, 35 Phil. 747-748, 1916. See also Vasco vs. CA, 81 SCRA 766, 1978.

whether political units or a sector of its population, to keep them abreast with the rest of the nation in the march to development or to alleviate their economic condition and make them an effective partner in nation-building.

The epic struggle of the Bangsamoro against foreign colonization: first, against Spain and its Filipino conscripts for more than 300 years, then against America and its Filipino allies for 50 years and then against the Philippine Government at the onset of the 1970s, left them impoverished and lagging behind the rest of the country in all facets of development.

Dislocated and marginalized by war and unjust government policy, their region has become the poorest in the country. ARMM is the only region in the country that still has a poverty incidence level above 50% as of 2003.[110] In the Philippine Human Development Report of 2005, four of the five ARMM provinces occupy the last four slots among the bottom ten provinces in the Human Development Index Ranking.[111] In the Summary of the Poorest of the Poor in 2003 by the National Anti-Poverty Commission, 23 out of 40 municipalities are from Muslim Mindanao. The region had the poorest health situation in terms of life expectancy, infant mortality and access to public health services.[112] Its simple literacy rate is 70.2%, significantly lower than the national average of 93.4.[113]

Despite the introduction of electoral democracy and the "political integration" of the Bangsamoro into the larger body politic, the Bangsamoro keeps faith with their past, abiding by the spirit of freedom of their ancestors, the revolutionaries among them including the MNLF and the MILF still carrying on the struggle for self-determination by open rebellion against government since the onset of the 1970s.

In 1987, Emmanuel Pelaez, Chair of the GRP Peace Panel, apologized for the historical injustices committed by the Christian Filipino majority against the Bangsamoro. Thus:

> In all frankness, it is high time that the Christian Filipino majority should rectify more vigorously its serious mistakes in regarding the Muslim minority as being somehow inferior in their faith, culture and way of life. For this attitude and prejudice stem from our ignorance of Islam and of the great achievements of Islamic civilization and its contributions to the world as a whole. Moreover, until now many Filipinos do not appreciate the reality that poverty and underdevelopment in the Moro lands are traceable in part to the Moro's historic and nationalistic resistance to Western Imperialist powers, to defend their freedom and to keep their faith and way of life as distinctive ethno-religious minority. Similarly, after independence they expended great time and resources to fend the continuance of the universalistic policies of political integration, cultural assimilation and national development that were applied without regard to the distinctive characteristics of the Islamic and Moro cultures in Mindanao.[114]

110 In Amina Rasul's Broken Peace? Assessing the 1996 GRP-MNLP Final Peace Agreement, 2007, p. 82.

111 Id.

112 Id., p. 85.

113 Id., p. 90.

114 Nasser Marohomsalic, Aristocrats of the Malay Race: A History of the Bangsamoro in the Philippines. 2001: Quezon City, *p. 293.*

In his memoirs, *Dreams of my Father*, President Obama quotes with approval Faulkner --

> The past is never buried; it isn't even past.

The past is indeed well-secured in the hearts and minds of the Bangsamoro. And it is pure obstinacy if not rank insensitivity not to restore to them the things that were unjustly and forcibly taken from them -- their right to dignity and their rightful place under the Philippine sun.

A Shaky Promise?

The exercise of the right to self-determination has no statute of limitations or prescriptive period. Neither does the social debt memorialized in history. And whether the FAB, if entrenched, or the Basic Law for the Bangsamoro Government, if enacted, pays off the moral indebtedness is the question at the end of the day.

The peace negotiation between the PHG and the MILF has been a long and difficult journey, 14 years to date, and their ticket for passage is set to expire by 2015 or 2016 when the term of President Benigno Aquino ends. But the Parties have yet to draw up and submit the bill to Congress. Through the legislative mill, the bill can come out to be any story book deviating from the plotline of the FAB and thereby throw a monkey wrench on the peace process. Mostly a mixed bag of the wealthy and the moneyed, Congress is a risky vehicle for the legislation of such a monumental public interest policy.

Another obstacle stands in the way. Both parties recognized that there are proposals to end the conflict that run afoul of the Constitution and that the Constitution has to be amended accordingly for their accommodation. The FAB has prescribed a transitional modality to iron out the legal kinks to include the creation of a Transition Commission to work not only on the drafting of the Bangsamoro Basic Law but "to work on proposals to amend the Philippine Constitution for the purpose of accommodating and entrenching in the constitution the agreements of the Parties without derogating from any prior peace agreements."[115]

Amending or revising the Constitution is a tall order. The process is another long, winding journey. From the negotiation between the PHG and the MILF, one draws the wisdom that the paradigm is a precarious tool and shakes the faith in the capacity, if not sincerity, of the Christian leadership in the country to render plumb justice to the aspiration for self-determination of the minority Bangsamoro. This calls to mind the warning of the 1935 Dansalan Declaration, a petition of Moro datus from Lanao addressed to the American Colonial Government expressing their aspiration to be granted independence apart from the Filipinos. Thus:

> We would like to inform (you) (i.e., U.S. Congress) that because we have learned that the U.S. is going to give the Philippines an independence . . . we want to tell you that the Philippines as it is known to the American people are populated by two different peoples with different religious, practices and tradition. The Christian Filipinos occupy the islands of Luzon and the Visayas. The Moros predominate in the islands of Mindanao and Sulu.

115 Paragraphs 1-3, 4 (a) (b) on Transition and Implementation, FAB.

> With regard to the forthcoming Philippine Independence, we foresee what the condition we will be in and our children when independence is granted these islands. This condition will be characterized by unrest, suffering and misery . . .
>
> Our Christian associates have for many years shown their desire to be the only ones blessed with leadership and progressive towns without sharing with us the advantages of having good towns and cities. One proof of this is that, among us who were capable of participating in managing and administering the government have not been given the chance to demonstrate their ability. Another proof is that Christian Filipinos have taken control of our Insular funds in which by right we must have equal share. Most of the funds are annually appropriated for the provinces of Luzon and the Visayas and little are appropriated for the so-called Moro Province in the islands of Mindanao and Sulu. As a result their provinces progressed by leaps and bounds and ours lagged behind . . .
>
> One more discriminatory act of our Christian Filipino associates is shown in the recent Constitution of the Philippine Commonwealth. In this Constitution, no provision whatsoever is made that would operate for the welfare of the Christian Filipinos and nothing for the Moros. As proof of this, our delegate did not sign the Constitution. We do not want to be included in the Philippine Independence [for] once an independent Philippines is launched there will be trouble between us and the Christian Filipinos . . . One proof of this is when Lanao had its (Christian) Filipino Governor many leading Moro Datus were killed for no apparent reasons . . .
>
> Should the American people grant the Philippines Independence, the islands of Mindanao and Sulu should not be included in such independence. Our public land must not be given to other people other than the Moros. We should be given time to acquire them, because most of us have no lands . . . Where shall we obtain the support of our family if our lands are taken from us. It will be safe to us that a law should be created restricting (the acquisition) of our lands by other people. This will avoid future trouble.
>
> Our practices, laws and decisions of our Moro leaders should be respected... Our religion should not be curtailed in any way... All our practices which are incidental to our religion of Islam should be respected because these things are what a Muslim desires to live for…Once our religion is no more, our lives are no more.[116]

For certain, in the eyes of the Bangsamoro the 40-year-old Moro insurgency marks off the Filipino Christian majority for xenophobic antagonism towards them. Into the run-in of the peace talks, the opportunity is still flung open and wide for the majority to mend the fences and span the divide between Christian and Bangsamoro. Until then, to borrow the words of a great litterateur, "life is a minefield" for everybody.

...⚖...

116 Nasser A. Marohomsalic, *supra*, pp. 145-146.

Constitutional Dilemmas in the Creation of the Bangsamoro Autonumous Political Entity

*Merlin M. Magallona**

The object and purpose of the Framework Agreement pertain to the creation of the "Bangsamoro … [as] the new autonomous political entity (NPE)", in replacement of the Autonomous Region in Muslim Mindanao (ARMM). By virtue of the Agreement, the Central Government has expressed consent to be bound by the principles and methods it sets forth, by which the NPE is to be created. Among these principles and methods, the following are estimated to effect major shifts in constitutionalism as now established in the present fundamental law.

I. Principles and Methods of the Framework Agreement.

First. The Framework Agreement appears to limit the powers of the Central Government in its relation to the NPE. In Part III, paragraph 2, it is provided that The Central Government shall have powers in:

a.) Defense and external security
b.) Foreign policy
c.) Common market and global trade, provided that the power to enter into economic agreements already allowed under Republic Act No. 9054 shall be transferred to the Bangsamoro
d.) Coinage and monetary policy
e.) Citizenship and naturalization
f.) Postal service

It seems to be the intention of the Parties to the Agreement that this limitation of powers is exclusive: the Central Government shall not exercise powers that are not thus listed. This intent is expressed in the last sentence of the same paragraph 2, as follows:

This list is without prejudice to additional powers that may be agreed upon by the Parties.

This sentence has the effect of giving emphasis to the following propositions:

1. The powers listed above are granted by the joint will of the Parties to the Agreement. This implies that the exercise of such powers by the Central Government becomes merely contractual.

2. Any other powers may be exercised by the Central Government only upon agreement of the Parties, which obviously may be quite apart from the Framework Agreement. But the authority of the Parties to grant such additional powers springs from the Agreement. If the Parties may agree to add more powers, may they agree to subtract from those listed?

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In this respect, the subject-matter of the Agreement pertains to or involves the powers of the Philippine State and are essential elements of statehood. It is a forbidden area for bargaining in the relations with other States; it is an utter anomaly to subject State powers to the freedom of stipulation on the part of the State's regional or local government.

The powers of the State in question are the core content in the making of the fundamental law; it is the essence of the Constitution that it allocates these powers to the main departments of the Government, evidencing that the sovereign function of determining the structure and substance of power is the supreme prerogative of constitution-making. Does the Framework Agreement envisage that its principle on power relations referred to above be incorporated into the Constitution by necessary amendment? This gives the impression that the Agreement operates over and above the Constitution. Concomitantly, it does not make reference to the Constitution, save by way of the prospect of its amendment, as pointed out below.

Second. The grant of powers to the Central Government under the Agreement involves the constitutional concept of power that "Sovereignty resides in the people and all government authority emanates from them."[1] Does the Agreement then entails a transfer of the sovereign powers of the people to the contractual arrangement between the Parties? While it is to be hoped that such unimaginable situation is not intended, it gives rise to the thought that the Parties are mindless of the Constitution.

Third. Does the Agreement intend to constitutionalize its definition of State powers by amendment or revision of the fundamental law? It may be assumed that it marks a radical shift from the Constitution. However, it would be fair to interpret the Agreement as contemplating that the Constitution be adjusted to its requirements. Thus, in enumerating the functions of the Transition Commission in Part III, paragraph 4(b), the Agreement provides:

> *To work on proposals to amend the Philippine Constitution for the purpose of accommodating and entrenching in the constitution* ***the agreements of the Parties whenever necessary*** *without derogating from any prior peace agreements.*[2]

It may be assumed that reference to "the agreements of the Parties" includes the Framework Agreement in the first place. Overall, it is the Constitution that is tailored to suit the Agreement and the joint will of the Parties bending the fundamental law to their Procrustean bed.

By its commitment to empower the Transition Commission to propose amendment to the Constitution, has the Central Government departed from the Supreme Court's directive in the MOA-AD case that it has no authority by itself to propose such amendment? It appears that in this regard the Central Government has avoided the constitutional minefield by a carefully composed text of the provision in question; it reads "*To work out proposals* to amend the constitution," not "To amend or to propose to amend." However, the fine line may be breached by the provision of the Framework Agreement in Part VII, paragraph 3 that

1 Section 1, Article II.

2 Emphasis added.

There shall be created a Transition Commission through an Executive Order and supported by Congressional Resolutions.

Inevitably by this provision when translated into official action, the creation of the Transition Commission, *together with the function of working out proposals for amending the Constitution*, as embodied in the Executive Order, becomes an act of the President of the National Government. Note that the Agreement does not deal with any modality as to what to do with such proposed amendments. Proceeding as they do from his Executive Order, these proposals, would likely be left to his discretion, the exercise of which would likely be under pressure from the NPE. But the President is subject to the process of amendment or revision as prescribed by the Constitution, culminating in a plebiscite on the part of the entire national community, certainly not only on the part of the Bangsamoro people. Hence, the President may have to sponsor the proposals of the Transition Commission to amend the Constitution as his commitment under the Agreement.

Fourth. As pointed out above, the powers granted to the Central Government under the Framework Agreement are provided as exclusive. This is in sharp contrast to the method by which the present Constitution structures the powers of autonomous regions, such as the Autonomous Region of Muslim Mindanao (ARMM). What is subject to exclusivity are the powers granted to them; they have only such powers as are expressly provided. Thus, under Section 17, Article X, the Constitution has established that

All powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government.

Accordingly, subject to the provisions of the Constitution and national laws" legislative powers of autonomous regions are limited by Section 20, Article X of the Constitution to the following:

(1) Administrative organization;
(2) Creation of sources of revenue;
(3) Ancestral domain and natural resources;
(4) Personal, family, and property relations;
(5) Regional urban and rural development;
(6) Economic, social, and tourism development;
(7) Educational policies;
(8) Preservation and development of the cultural heritage; and
(9) Such other matters as may be authorized by law for the promotion of general welfare of the people of the region.

Even as these powers are limited, it must be emphasized that their exercise is still subject to national laws and therefore to the legislative power of Congress.

On the other hand, in re-structuring the power relations between the Central Government and the NPE, the Agreement stipulates that "the Bangsamoro shall have its exclusive powers", which means powers exercisable only by itself and may be understood as precluding the intervention by the Central Government.

The reversal of the constitutional order in the structure of governmental powers will

generate difficulties in making space for the necessary constitutional changes.

Fifth. The principles and methods embodied in the Agreement would not become operational by themselves. Because of their radical shift from the existing constitutional system they may be rejected as unconstitutional in the sphere of legitimation, unless they gain assimilation as amendments to the Constitution or as legislative enactments into the Basic Law of the NPE. For this reason, Executive action for implementation would be accordingly circumscribed.

As the substantive content of the Agreement, these principles and methods have been transformed into official policies of the Executive Department which is now committed to enforce or carry them out to the end that they are translated into constitutional amendments or legislative enactments. Insurmountable as the political and constitutional challenges may appear to be, the Executive Department perforce must adopt as its own proposals for constitutional amendments and for legislative enactments the principles and modalities of the Agreement.

Sixth. Coming back to the problem of the Agreement granting limited powers to the Central Government, the following consequences would ensue:

> There may arise two categories of State or governmental powers in their exercise over local governmental units. The first category would consist of the NPE, together with its constituent units, in relation to which the Central Government has limited powers under the Agreement. The second category would involves the rest of all the other government units, which will remain as they are in their present constitutional status. The first category would entail the asymmetric relation between the Central Government and the NPE, but the entire constitutional order would maintain its normal symmetry only with respect to the other local government units.

Will constitutional normalization be desirable by restoring equal status on government units? Their equality may be achieved by the elimination of such categorization of local government units, either by the transformation of all local government units on the basis of the NPE model, or restoring all local government units or autonomous regions to their present constitutional status.

It would be the height of absurdity to aim at constitutional amendments by which all local government units or regions would be established in equality with the NPE model. It may prove to be merely a conceptual absurdity, but in practice it may spell the dismantling of the State.

Seventh. The Agreement stipulates that the NPE "shall be governed by a Basic Law."[3] Presumably, this will serve as the constitution of the NPE; it shall be "consistent with all agreements of the Parties,"[4] giving primacy to Framework Agreement. To be drafted by the Transition Commission, the Basic Law is at the same time subject to the requirement that "It shall be formulated by the Bangsamoro people" under Part II, paragraph 4 of the Framework Agreement. Although to be appointed by the President, will the members of

3 Part II, paragraph 1.

4 Part II, para. 2.

the Transition Commission represent the Bangsamoro people in drafting the Basic Law, or an agency of the Executive Department?

In representation of the Central Government as Party to the Framework Agreement, the President is to "work … to ensure the widest acceptability of the Bangsamoro Basic Law *as drafted by the Transition Commission*".[5] As "*submitted by the Transition Commission*", the President is committed to certify the Basic Law "as an urgent bill," as a requirement under the Framework Agreement.[6] Will the President have the discretion to make changes in the Basic Law as a bill prepared by the Transition Commission before he certifies it as urgent? On the assumption that the core content of the bill embodies the principles and modalities of the Framework Agreement, the President would have little room of discretion within his commitments as thus provided. The other side of the dilemma would be transmitted to Congress as a political battleground. How will the President enforce his commitments under the Framework Agreement as built into the bill providing for the Basic Law, upon Congressmen and Senators. Will Congress exercise its plenary powers in changing the content of the bill, without breaching the commitments of the Central Government under the Framework Agreement? This Agreement requires that the Basic Law be "ratified by the qualified voters within the territory"[7]; would ratification — and therefore effectivity — of the Basic Law be achieved if the Basic Law in the course of its passage in Congress, if at all, suffer amendments objectionable to the Transition Commission and in breach of the President's commitments? It is unlikely that the principles and methods contained in the Agreement would be incorporated into the Constitution as amendments, at the time the Basic Law would come to Congress for enactment. In which case, Congress would measure its validity against the Constitution as it stands unamended. In the first place, unless the Basic Law would not depart from the Constitution, the necessary constitutional changes must be in place before the Basic Law could come to Congress for enactment. May the President find it necessary to move Congress to make such changes as a precedent to the enactment of the Basic Law? Then the Basic Law, infused by the principles of the Framework Agreement, would be exposed to the risk of a failed adventure.

II. The Interpretive Creativity of the Constitution

Remarkable is the outlook that dictated the entire process and agenda of the peace negotiations that produced the Framework Agreement. It has been characterized by the absence of concern as to how the Constitution may be something of value in resolving the long-drawn crisis that has acquired the dimension of a festering social cancer. Revealed by the principles and modalities embodied in the Framework Agreement is the process of negotiations in search of peace and justice, upheld approvingly by reason of their shift from the Constitution and thus giving rise to the urgent need of overhauling the fundamental law. Since the approaches to peace settlement pervade the whole constitutional system, the Framework Agreement may typify the case of the tail wagging the dog.

The second part of this paper outlines the interpretive potential of the Constitution as an alternative mechanism by which the crisis may have been approached and resolved.

At the outset, the Constitution addresses itself to the historic problem by defining a broad context in which its relevant powers and functions may be interpreted and applied:

5 Part V, para. 2.

6 Part VII, para. 7

7 Part II, para. 4.

> *There shall be created autonomous regions in Muslim Mindanao … consisting of provinces, cities, municipalities and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics within the framework of this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines.*[8]

Assuming the accuracy of the way by which the Framework Agreement describes the identity of the Bangsamoro people in Part I, paragraph 5, its reference to them as "Those who at the same conquest and colonization where considered natives or original inhabitants of Mindanao and the Sulu archipelago … and their descendants … ." are all synthesized or subsumed under the constitutional text on "sharing common and distinctive historical and cultural heritage, economic and social structure, and other relevant characteristics." In terms of the unifying socio-cultural forces, this text is far richer as a basis for interpretation into reality.

The complex of problems relating to the Bangsamoro identity pertains to the power relations between the National Government and the Bangsamoro. It is true that the powers of an autonomous region are restricted by the Constitution and the national law, as pointed out above. However, the range of interpretation of the constitutional text may prove to be broader in application. Note, for example, the terms of Section 17, Article X of the Constitution, providing that "[a]ll powers and functions … not granted by the Constitution *or by law* for the autonomous regions shall be vested in the National Government." Again, as previously shown, while Section 20, Article X of the Constitution is specific in limiting the legislative powers of autonomous region, their exercise is "subject to the provisions of … national laws." In both situations, the exercise of the plenary powers of Congress may have an intended expansive interpretation of such powers, in particular in the context of the integrity and independence of the Bangsamoro. Translated into executive action and legislative enactments, the limited definition of powers of autonomous regions is highly open to interpretation in terms of actualizing "the Bangsamoro system of life" drawn up in the Framework Agreement. In the restricted catalogue of legislative powers of autonomous regions, in Section 20, Article X of the fundamental law, such concepts as "ancestral domain", "sources of revenue", "social development", "economic development", urban planning", "educational policies", and "preservation and development of cultural heritage" are general policy areas that invite creative translation into specific programs of action not only in terms of regional regulatory system but as national legislation. Such expansive view of the powers of autonomous regions is envisaged by the Constitution in Section 20(9), Article X, which adds the following basket stipulation to the catalogue of legislative powers:

> *Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.*

Peace negotiations may serve the paramount function of canalizing the vast reservoir of state powers into the desired formation of a Bangsamoro region transformed into a new autonomy as crafted by the powers of the Constitution not by the novelty of departure from them.

Constitutional jurisprudence provides a plenitude of principles in the interpretation of power relations in the relevant context. In the task of achieving the purpose and intent

8 Section 5, Article X.

of peace negotiations, the vast expanse of State powers is ranged before the negotiators not only in the language of the textual specificity of the Constitution; the broad generalization of principles in their necessary implications is a rich supply of conceptual materials that may assume concrete possibilities in policy and legal exchanges. Consider the potential value of Section 5, Article II of the Constitution which reads:

> *The maintenance of peace and order, the protection of life, liberty, and property, and the promotion of the general welfare, are essential for the enjoyment by all people of the blessings of democracy.*

Combine its import with the provision that the "prime duty of the Government is to serve and protect the people".[9] What problems in power relations would reasonably be excluded from the purview of such constitutional principles? The general character of these principles does not render them meaningless. Says the Supreme Court in interpreting their implications in terms of Presidential action:

> *Admittedly, service and protection of the people, the maintenance of peace and order, the protection of life, liberty and property, and the promotion of the general welfare are essentially ideals to guide government action. But such does not mean that they are empty words, thus in the exercise of presidential functions, in drawing a plan of government, and in directing implementing action for these plans, or from another point of view, in making any decision as President of the Republic, the President has to consider these principles, among other things, and adhere to them.*[10]

Should the capability of building a new autonomous entity be entrusted to the dimension of governmental powers as determined by the Constitution? Does the Constitution suffer from a power shortage in dealing with the national crisis involved in the Bangsamoro complex of problems? In particular, as to the power of the President in resolving the crisis, it is true that absent from the Constitution is a specific grant of power to build an autonomous region of a new type. But the Supreme Court affirms in *Marcos vs. Manglapus*[11] that

> *…although the 1987 Constitution imposes limitations on the exercise of* ***specific*** *powers of the President, it maintains intact what is traditionally considered as within the scope of "executive power". Corollarly, the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. In other words, executive power is more than the sum of specific powers so enumerated.*

As to the nature of legislative power, we are guided by the characterization of the Supreme Court in *Ocampo vs. Cabangis*[12] that a "grant of the legislative power means a grant of all legislative power." On the whole, the Constitution defines governmental powers in the fullness of breadth.

Moreover, the synthesis of Chief Justice John Marshall of the U.S. Supreme Court expresses the doctrine of implied powers — implied from specific powers: "Let the

9 Constitution, Sec. 4, Art. II.

10 Marcos vs. Manglapus, 177 SCRA 668, 693 (1989).

11 177 SCRA 668, 691-92 (1989). Emphasis in the original.

12 15 Phil. 626, 631 (1910).

end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[13]

III. Concluding Remarks

In reality, the Central Government as a Party to the Framework Agreement pertains only to the Executive Department. It must be stressed that in no way has the Agreement acquired binding force with respect to the Legislature and the Judicial Department. Axiomatic is the politico-legal premise that the Philippines is a republican State and thus decisive is the expression of the people's will through the Congress. On appropriate procedure, the Agreement may have to submit the test of its final validity to the power of review of the Supreme Court.

This conditionality would be the price the Framework Agreement may have to pay in avoidance of the fundamental law.

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13 17 U.S. McCulloch vs. Maryland 316, 421 (1819).

Philippine Cases on Autonomous Regions and their Implications on the GPH-MILF Peace Negotiations

*Soliman M. Santos, Jr.**

"We are under a Constitution, but the Constitution is what the judges say it is…"

-- Chief Justice Charles Evans Hughes
United States Supreme Court, 1907

Introduction

In voiding the Memorandum of Agreement on Ancestral Domain (MOA-AD),[1] the Philippine Supreme Court (SC) ruled that the peace negotiations between the Philippine Government (PHG) and the Moro Islamic Liberation Front (MILF) must operate within the "existing legal framework". It is therefore not surprising that many sectors are weighing on the Framework Agreement on Bangsamoro (FAB) signed by the Philippine Government and the Moro Islamic Liberation Front on October 15, 2012 based on this pronouncement.

It is important to note that the phrase "existing legal framework" encompasses all sources of Philippines law. In the context of the peace negotiations with the MILF, the phrase includes the 1987 Constitution, the second Organic Act for the Autonomous Region in Muslim Mindanao (ARMM),[2] other national laws, other ARMM laws,[3] generally accepted principles of international law,[4] and ratified treaties and international agreements.[5] It also includes decisions of the Philippine Supreme Court applying or interpreting the laws or the Constitution.[6]

In as much as the Supreme Court's interpretation of a constitutional provision occupies the same level as the Constitution in the legal hierarchy, Philippine jurisprudence on autonomous regions thus bears relevance to the peace negotiations and to the debate

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1 Province of North Cotabato v. Government of the Republic of the Philippines, G.R. No. 183591,October 14, 2008.

2 Republic Act (RA) No. 9054.

3 Called Muslim Mindanao Autonomy (MMA) Acts.

4 Under the Constitution's Art. II, Sec. 2, known as the "incorporation clause."

5 Under the Constitution's Art. VII, Sec. 21, known as the "treaty clause."

6 Civil Code of the Philippines, Art. 8. "Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines." Note however that only the decisions of the SC and unreversed decisions of the Court of Appeals on cases of first impression establish jurisprudence or doctrines in the Philippines. See *Miranda, et al. v. Imperial, et al.*, 77 Phil. 1066.

on the legality of the FAB. In this light, this Note surveys ten decisions of the Supreme Court from 1989 to 2011 that may have reverberating implications on the ongoing peace negotiations between the GPH and the MILF "for the creation of a new autonomous political entity in place of the ARMM"[7] in order "to solve the Bangsamoro problem."[8]

Kida v. Senate
G.R. No. 196271, October 18, 2011
En Banc Decision (8-7)[9]
Justice Arturo D. Brion, *ponente*

This case involves the constitutionality of Rep. Act No. 10153, postponing the scheduled ARMM elections so as to synchronize it with the 2013 national and local elections and every three years thereafter, and allowing the President to appoint officers-in-charge (OICs) to take care of the regional government in the interim.

1. Schedule of ARMM Elections

In upholding the constitutionality of the postponement of the ARMM elections, Supreme Court ruled that *regional autonomy*, while a recognized constitutional mandate, is "subject to" the limitations of another constitutional mandate of national concern: the synchronization of elections. According to the Court, the regional autonomy granted to the ARMM, "cannot be used to exempt the region from having to act in accordance with a national policy mandated by no less than the Constitution."

The majority clearly treated regional autonomy as a mere "regional concern" instead of seeing it also as a national policy and concern. To be sure, the actualization of regional autonomy, which is of greater and substantive significance, should take precedence over concerns on the timing of elections.

On the other hand, in his dissenting opinion, Associate Justice Antonio Carpio argued that the postponement of the ARMM elections and the appointment of OICs of its regional government defeat "the Constitution's guarantee that the executive and legislative offices of the autonomous region shall ***'be elective and representative of the constituent political units',***" as provided in Sec. 18, Art. X of the Constitution. He considered it "a terribly dangerous precedent" for the Court to legitimize the postponement of elections and appointment of OICs "for the purpose of reforming ARMM society and curing all social, political and economic ills plaguing it." Following Justice Carpio's line of reasoning, *if ARMM reform per se does not justify postponing the ARMM elections and appointing of OICs, then so would advancing the peace process per se not justify it.*

7 "GPH-MILF Decision Points on Principles as of April 2012," 24 April 2012.

8 MILF Technical Committee on Agenda Setting, "Agenda: To Solve the Bangsamoro Problem," 25 February 1997.

9 Joining Associate Justice Brion in the majority are Justices Diosdado M. Peralta, Lucas P. Bersamin, Mariano C. del Castillo, Martin S. Villarama Jr., Jose Catral Mendoza, Bienvenido L. Reyes, Estela M. Perlas-Bernabe. Chief Justice Renato C. Corona. Associate Justices Antonio T. Carpio, Presbitero J. Velasco Jr., Jose Portugal Perez, Maria Lourdes P.A. Sereno, Teresita J. Leonardo-De Castro, and Roberto A. Abad *dissented.*

2. Interim Measures for Transitions Involving Local Governments

The Court also allowed the appointment of OICs for the ARMM regional government as an "***interim measure***" for "the problem of ***how to provide the ARMM with governance in the intervening period*** between the expiration of the term of those elected in August 2008 and the assumption to office – twenty-one (21) months away – of those who will win in the synchronized elections on May 13, 2013." Particularly instructive is this passage of the Decision (citations omitted):

> The creation of local government units also represents instances when interim measures are required. In the creation of Quezon del Sur and Dinagat Islands, the creating statutes [R.A. 9495 and R.A. 9355, respectively] authorized the President to appoint an interim governor, vice-governor and members of the *sangguniang panlalawigan* although these positions are essentially elective in character; the appointive officials were to serve until a new set of provincial officials shall have been elected and qualified. A similar authority to appoint is provided in the transition of a local government from a sub-province to a province [under the Local Government Code].
>
> In all these, **the need for interim measures is dictated by necessity; out-of-the-way arrangements and approaches were adopted or used in order to adjust to the goal or objective in sight in a manner that does not do violence to the Constitution and to reasonably accepted norms**. Under these limitations, the choice of measures was a question of wisdom left to congressional discretion. **[Emphases supplied]**

The latter guidance should be helpful in crafting "dictated by necessity, out-of-the-way" (but "under these [constitutional] limitations") interim measures for "the creation of a new autonomous political entity in place of the ARMM" as already agreed in principle by the PHG and MILF.

3. Voting and Plebiscite Requirement to Amend the ARMM Organic Act

The phrase "in place of the ARMM" connotes an amendment or repeal of the current ARMM Organic Act (Rep. Act No. 9054), if not an amendment of the constitutional provisions on autonomous regions. However, it is apparent that the PHG's position is that "many elements of the [MILF] contemplated sub-state" or "most of the demands of the MILF for self-governance can be accommodated within the present Constitution… By passing a new Organic Act…"

Let us assume for now that this PHG track (amendment or repeal of R.A. 9054) is the right track. The *Kida* Decision has clarified that the supermajority (2/3) voting requirement in R.A. 9054 for Congress (with the House of Representatives and the Senate voting separately) to amend or revise R.A. 9054 "has to be struck down [as unconstitutional] for giving R.A. 9054 the character of an irrepealable law by requiring more than what the Constitution demands." Note however that the Decision did *not*

actually strike it down as such in its dispositive portion. The Decision dealt similarly with the plebiscite requirement in R.A. 9054 for any amendment or revision of it to become effective, considering this as "excessive to [the] point of absurdity and, hence, a violation of the Constitution" but *not* also striking it down in its dispositive portion. The Decision cited Sec. 18, Art. X of the Constitution which "states that the **plebiscite is required only for the creation of autonomous regions and for determining which provinces, cities and geographic areas will be included in the autonomous regions**." [Emphases supplied] A plebiscite is not "required for *every* statutory [*i.e.*, legislative] amendment."

In addition, the Decision most significantly clarified that "only amendments to, revisions of, the Organic Act constitutionally-essential to the creation of autonomous regions – *i.e.*, those aspects specifically mentioned in the Constitution which Congress must provide for in the Organic Act – **require ratification through a plebiscite. These amendments to the Organic Act are those that relate to: (a) the basic structure of the regional government; (b) the region's judicial system, *i.e.*, the special courts with personal, family and property law jurisdiction; and (c) the grant and extent of the legislative powers constitutionally conceded to the regional government** under Section 20, Article X of the Constitution." [Emphases supplied]

Presumably a wholesale repeal of R.A. 9054 in order to replace the existing ARMM with "a new autonomous political entity," which in effect creates a new autonomous region in Muslim Mindanao, **would require ratification through a plebiscite**, as would amendments to R.A. 9054 which would expand the ARMM's geographic areas and which would affect the basic structure of the regional government (*e.g.,* a shift to "a ministerial form of government"), the region's judicial system (*e.g.,* "to strengthen the Shari'ah courts and to expand their jurisdiction over cases"), and the extent of regional legislative powers (e.g. as a result of "power-sharing and wealth-sharing between the National Government and the new political entity").

Whatever new Organic Act, if it will indeed be that, providing for "a new autonomous political entity," it would seem from the *Kida* Decision that there can be no imposition of a supermajority (2/3) voting requirement in order for Congress to amend or revise it. **A super-majority voting requirement is meant to enhance or protect the autonomy of the autonomous region from being too easily subject to the will of the national Congress – but it seems that this is not to be the case under the existing constitutional framework.** Even the Carpio dissenting opinion argued that "[t]here is no merit in the proposition that [the super-majority voting requirement] is an 'additional safeguard to protect and guarantee' the autonomy of the ARMM… To say that autonomy means shackling the hands of Congress in improving laws or passing remedial legislation betrays a gross misconception of autonomy."

4. The Autonomous Region as a Local Government

The discussion in the *Kida* Decision on synchronization of national and local

elections and on interim measures for transitions involving local governments involve a clear premise and ruling that "[f]rom the perspective of the Constitution, autonomous regions are considered one of the forms of local governments, as evident from Article X of the Constitution entitled 'Local Government.' Autonomous regions are established and discussed under Sections 15 to 21 of this Article – the article wholly devoted to Local Government." Thus, ARMM elections, "although called regional elections," should be included among local elections "based on the wording and structure of the Constitution." Even the Carpio dissenting opinion supported this view, adding that "the ARMM is a local government unit just like provinces, cities, municipalities, and barangays…. Thus, elective officials of the ARMM are local officials…. And elections in the ARMM, a local government unit, are 'local elections'." He also referred to "**the Local Government Code, which applies suppletorily to the ARMM**" [Emphases supplied] citing Sec. 4 thereof on its Scope of Application to include "**other political subdivisions as may be created by law**."

This implies that the *terms of reference for the governance of autonomous regions as local governments* are not just the constitutional provisions on autonomous regions, their supporting jurisprudence and the Organic Act but also the constitutional provisions on local governments, their supporting jurisprudence and the Local Government Code. These are all part of the existing constitutional framework that would govern any "new autonomous political entity" *created within that framework*, the preferred path of the GPH.

Sec. 16, Article X of the Constitution provides that "The President shall exercise general supervision over autonomous regions…" Former President Arroyo had issued Administrative Order (A.O.) No. 273-A in December 2009 delegating that supervision over the ARMM to the Department of Interior and Local Government (DILG), in the aftermath of the Maguindanao Massacre. Thus, then DILG Sec. Ronaldo Puno was tasked to oversee the handling of the state of emergency in the Provinces of Maguindanao and Sultan Kudarat and the City of Cotabato. A.O. 273-A has not been repealed by incumbent President Aquino and so that delegation of general supervision over the ARMM was passed on to the late DILG Sec. Jesse Robredo. It was then his task to oversee President Aquino's ARMM reform initiative -- his administration's rationale for R.A. 10153 (which rationale, as we noted above, Justice Carpio criticized as "a terribly dangerous precedent" for postponing elections and appointing OICs). By all accounts, Robredo was doing a good job of it. In fact, it may be said that whatever reforms in ARMM governance are introduced would redound to the benefit of any "new autonomous political entity."

As we all know, Sec. Manuel Roxas has now succeeded Robredo as DILG Secretary, presumably including into the tasks of delegated supervision over the ARMM and oversight of the still ongoing ARMM reform initiative. Very interesting, considering that Sec. Roxas was among the most vocal opponents of the 2008 GPH-MILF Memorandum of Agreement on Ancestral Domain (MOA-AD) which sought to provide a higher degree of Bangsamoro self-governance. Whatever "new autonomous political entity" is arrived at as a result of the peace negotiations, it will have to reckon with the ARMM which is in place and which is to be replaced, an ARMM which is now under the general supervision of Sec. Roxas.

5. The Autonomous Region's Relationship to the National Government

In the very rationale for the *Kida* Decision upholding the constitutionality of R.A. 10153, the sense is one of **almost automatic or blanket subordination of regional autonomy to national policies and concerns**: "In other words, the autonomy granted to ARMM cannot be invoked to defeat national policies and concerns. Since the synchronization of elections is not just a regional concern but a national one, the ARMM is subject to it; the regional autonomy granted to the ARMM cannot be used to exempt the region having to act in accordance with national policy mandated by no less than the Constitution."

Furthermore, the *Kida* Decision states: "In other words, the Constitution and the supporting jurisprudence, as they now stand, reject the notion of *imperium et imperio* [an empire within an empire] in the relationship between the national and the regional governments." It goes on to state that "while autonomous regions are granted political autonomy, the framers of the Constitution never equated autonomy with independence. The ARMM as a regional entity thus continues to operate within the larger framework of the State and is still subject to the national policies set by the national government, save only for those specific areas reserved by the Constitution for regional autonomous determination."

Speaking of the Constitution, the *Kida* Decision specifically points out that: "The totality of Sections 15 to 21 of Article X should likewise serve as a standard that Congress must observe in dealing with legislation touching on the affairs of the autonomous regions. The terms of these sections leave no doubt on what the Constitution intends – the idea of self-rule or self-government, in particular, the power to legislate on a wide array of social, economic and administrative matters. But equally clear under these provisions are *the permeating principles of national sovereignty and the territorial integrity of the Republic*…" In other words, **the foregoing guidance would apply to any "new autonomous political entity" for Muslim Mindanao (even if no longer called "ARMM") if created within the existing constitutional framework**. [***Questions***: Is this kind of "new autonomous political entity" something that the MILF and its Bangsamoro constituency can live with? Without being "holier than thou," will such an entity "establish a system of life and governance suitable and acceptable to the Bangsamoro people"? In short, will it "solve the Bangsamoro problem"?]

That existing constitutional framework is more precisely indicated in the *Kida* Decision to be "**the Constitution and its established supporting jurisprudence**" (boldface type supplied) which is not limited to the jurisprudence on autonomous regions (like the *Kida* Decision) and on local governments (like *Basco v. PAGCOR*, 197 SCRA 52[1991]), but includes the whole caboodle of constitutional jurisprudence. In other words, **whatever agreements on "power-sharing and wealth-sharing between the National Government and the new political entity," *if these are agreed within the existing constitutional framework*, then such power-sharing and wealth-sharing *would still be subject to the Constitution, its "permeating***

principles," and "its established supporting jurisprudence." **Thus, any listing of "exclusive powers" of the "new political entity" would not necessarily be fully controlling in itself nor would it stand alone in isolation from any relevant constitutional jurisprudence.**

For example, the said *Basco* Decision referred to "**a unitary system of government, such as the government under the Philippine Constitution**" (bold-face type supplied) [***Questions***: Is this unitary system of government under the Constitution not part of the "status quo" which is "unacceptable" to the MILF? Would changing that "unacceptable status quo" not entail changing the existing constitutional framework underlying it, at least in so far as it impacts on a truly "new autonomous political entity"?]

Speaking of national-regional structural relationships, very interesting is this statement of a key member of the MILF peace secretariat, "We want a relationship with the Constitution, not with the executive, not with the legislature, but with the Constitution." Again, without being "holier than thou," this would appear to necessitate a restructuring of the present relationship (the "status quo") with the Constitution. The result would be a new constitutional framework for "a new autonomous political entity" for the Bangsamoro people not to be unduly shackled to a unitary system which may still obtain for the rest of the country, which is not clamoring for a change in this status quo.

6. Extent of Powers of Autonomous Regions

The *Kida* Decision clarified the reserved powers of the National Government vis-à-vis the enumerated powers of the autonomous regions under Sec. 20, Art. X of the 1987 Constitution. The reinstatement of the earlier removed Sec. 17, Art. X ["All powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government."] was made by the framers in order to "make it clear, once and for all, that these are the limits of the powers of the autonomous government. **Those not enumerated are actually to be exercised by the national government.**" Only enumerated under Sec. 20 are legislative powers of autonomous regions over: "(1) Administrative organization; (2) Creation of sources of revenues; (3) Ancestral domain and natural resources; (4) Personal, family, and property relations; (5) Regional urban and rural planning development; (6) Economic, social, and tourism development; (7) Educational policies; (8) Preservation and development of the cultural heritage; and (9) Such other matters as may be authorized by law for the promotion of the general welfare of the region."

Without going now too deeply and in much detail about it, this *Kida* pronouncement ("**Those not enumerated are actually to be exercised by the national government.**") **appears to water down or lessen the more expansive thrust regarding powers of autonomous regions as espoused in *Disomangcop v. Datumanong***, 444 SCRA 203 (2004). In that previous SC Decision, with regards to the "subjects over which autonomous regions have powers, as specified in Sections 18 and 20, Article X of the 1987 Constitution," the Decision noted that "Expressly not included therein are powers over certain areas. **Worthy of note is that the area**

of public works is not excluded and neither is it reserved for the National Government." So then, if "not excluded" for autonomous regions but not "reserved for the National Government," like public works, autonomous regions may still have power over it. But now, if "not enumerated" among the powers of autonomous regions, for example again public works, then those powers "are actually to be exercised by the national government."

This discussion is of course most relevant to the "power-sharing" agenda in the peace negotiations. For example, can the negotiating parties agree on what "matters are reserved for the competence of the National Government" in a way that diminishes the *Kida* pronouncement that "**Those not enumerated** [under Sec. 20, Art. X of the 1987 Constitution] **are actually to be exercised by the national government.**"?

There seems to be a gradual (as shown by split decisions) but definite moving away from the progressive thrust of the *Disomangcop* Decision, especially with the departure of its *ponente* Justice Dante O. Tinga from the SC, to the more conservative thrust of the *Sema v. Comelec* (G.R. No. 77597, July 16, 2008) and *Kida* Decisions. The prominence of Justice Carpio in the latter two Decisions (though he also concurred with the *Disomangcop* Decision) might be indicative of the conservative "wave of the future" of Philippine jurisprudence on the autonomous regions and, for that matter, on peace agreements (noting also that his was the strongest Concurring Opinion to the SC Decision declaring the MOA-AD as unconstitutional).

On the other hand, the enumerated legislative power of autonomous regions over "(9) Such other matters as may be authorized by law for the promotion of the general welfare of the region" has potential for more expansive legislative powers of autonomous regions – but is of course also expressly "subject to the provisions of this Constitution and national laws." Regional laws are subject not only to the Constitution but also to national laws, in a practically blanket manner, precisely as a function or feature of the unitary system of government.

7. ARMM as the Constitutionally-Mandated Solution to the Bangsamoro Problem

The *Kida* Decision did not deal with this but the Carpio dissenting opinion **contextualized the autonomous regions under the 1987 Constitution in relation to the solution of the Bangsamoro problem in** this way: "One has to see the problem in the Muslim South in the larger canvass of the Filipino Muslims' centuries-old struggle for self-determination. The Muslim problem in southern Mindanao is rooted on the Philippine State's failure to craft solutions sensitive to the Filipino Muslims' 'common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics,' **The framers of the 1987 Constitution**, for the first time, recognized these causes and **devised a solution by mandating the creation of an *autonomous region* in Muslim Mindanao**, a political accommodation radically vesting State powers to the region, save those withheld by the Constitution and national laws…. **It is the duty of this Court to uphold the**

genuine autonomy of the ARMM as crafted by the framers and enshrined in the Constitution. Otherwise, our Muslim brothers in the South who justifiably seek genuine autonomy for their region would find no peaceful solution under the Constitution." [Emphases supplied]

In fine, following Justice Carpio's line of thinking (which is standard enough on the GPH side), unless that constitutionally-mandated autonomous regions solution to the Bangsamoro problem is changed, the Philippine government, including its SC, is bound to follow that course. On the other hand, there is precisely a continuing Moro rebellion because our Muslim brothers in the South cannot find a peaceful solution under the Constitution to the centuries-old Bangsamoro problem.

As for the constitutionally entrenched provisions on autonomous regions which Justice Carpio regards "a solution" to the Bangsamoro problem, this in turn is what then Justice Minita Chico-Nazario had to say in her Dissenting Opinion in the MOA-AD case of *Province of North Cotabato v. GRP Peace Panel*, 568 SCRA 402 (2008): "It must be noted that the Constitution has been in force for three decades now, yet, peace in Mindanao still remained to be elusive under its present terms. There is the possibility that the solution to the peace problem in the Southern Philippines lies beyond the present Constitution. Exploring this possibility and considering the necessary amendment of the Constitution are not *per se* unconstitutional…"

Even the majority Decision therein, to which Justice Carpio concurred, had this to say along the same lines: "If the President is to be expected to find means for bringing this conflict to an end and to achieve lasting peace in Mindanao, then she must be given the leeway to explore, in the course of peace negotiations, solutions that may require changes to the Constitution for their implementation." **This is the clear context of the discourse for the negotiating parties "to think out of the box" – thinking outside the box of the Constitution, as appears to be necessary, and not be limited to thinking only within that box. To speak now of thinking "out of the box, but within the Constitution," even with "looking into its flexibilities," would ultimately handicap and thus not render justice to the earnest search for "a just, lasting and comprehensive solution to the Bangsamoro problem.**"

Limbona v. Mangelin
G.R. No. 80391, February 28, 1989; 170 SCRA 786
En Banc Decision (Unanimous)
Justice Abraham Sarmiento, *ponente*

The case involves the extent to self-government given to the two autonomous governments of Regions IX and XII (before the 1987 Constitution's provisions on autonomous regions) and the jurisdiction of the national courts over these autonomous regions. The case arose from the Resolution of the Sangguniang Pampook of Autonomous Region XII (Central Mindanao) expelling Limbona as a member and its Speaker.

The Supreme Court distinguished between autonomy that is "decentralization of

administration" and autonomy that is "decentralization of power" but did not rule on which kind of autonomy applied to the autonomous regions under the 1987 Constitution since what was involved in this case was a local government unit constituted prior to this Constitution. The Court ruled that it could "unarguably" assume jurisdiction over an autonomous government organized by PD 1618 because this is clearly "under the supervision of the national government acting through the President (and the Department of Local Government)" while the its legislative arm, the Sangguniang Pampook, "is made to discharge chiefly administrative services." In effect, the Court treated the autonomous government organized by PD 1618 as in the category of autonomy that is "decentralization of administration," not autonomy that is "decentralization of power."

Relating this decision to the autonomous regions under the 1987 Constitution, the latter in its Art. X, Sec. 16 also provides that "The President shall exercise general supervision over autonomous regions to ensure that laws are faithfully executed." And the legislative powers of autonomous regions enumerated under Art. X, Sec. 20 of the 1987 Constitution turn out to be not much different from the "local legislative powers" of the Sangguniang Pampook enumerated under Sec. 7 of PD 1618 which the SC described as "made to discharge chiefly administrative services." This is not surprising since the enumerated powers in Sec. 7 of PD 1618 was the main reference for the enumerated powers in Art. X, Sec. 20 of the 1987 Constitution.[10] All these would tend to imply that the autonomous regions under the 1987 Constitution are also subject to the jurisdiction of national courts AND that the kind of autonomy that applies to them (just like to the autonomous governments under PD 1618) is "decentralization of administration" more than "decentralization of power." BUT the latter is definitively clarified in the subsequent SC Decision of *Cordillera Broad Coalition v. Commission on Audit* (see below).

Abbas v. Comelec
G.R. No. 89651, November 10, 1989; 179 SCRA 287
En Banc (Unanimous)
Justice Irene Cortes, *ponente*

The case involves the constitutionality of Rep. Act No. 6734 (the first Organic Act of ARMM). Among others, it was argued that Rep. Act No. 6734 conflict with the provisions of the 1976 GRP-MNLF[-OIC] Tripoli Agreement.

The Supreme Court ruled that it is "neither necessary nor determinative of the case to rule on the nature of the Tripoli Agreement and its binding effect on the Philippine Government whether under public international or internal Philippine law." As it is the Constitution itself that provides for the creation of an autonomous region in Muslim Mindanao, the Constitution should be the yardstick for any inquiry into the validity of Rep. Act. No. 6734. Any conflict between the provisions of R.A. No. 6734 and the provisions of the Tripoli Agreement will not have the effect of enjoining the implementation of the Organic Act.

10 *See* Joaquin G. Bernas, S.J., *The Intent of the 1986 Constitution Writers* (Manila: Rex Book Store, Inc., 1995) 757, citing III RECORD OF THE CONSTITUTIONAL COMMISSION [hereinafter "RECORD"] 556.

The Court also said that even assuming that the Tripoli Agreement is a binding treaty or international agreement, it would then constitute part of the law of the land. But as internal law, it would not be superior to Rep. Act No. 6734, an enactment of the Congress of the Philippines rather it would be in the same class as the latter. If at all, the Court said, Rep. Act No. 6734 would be amendatory of the Tripoli Agreement, being a subsequent law.

On the issue involving the voting requirements in the plebiscite for the creation of autonomous regions under the Constitution, particularly Art. X, Sec. 18, second paragraph, the Court said that

"it will be readily seen that the creation of the autonomous region is made to depend, not on the total majority vote in the plebiscite, but on the will of the majority in each of the constituent units [i.e. "provinces, cities and geographic areas," although the latter is not specified]… For if the intention of the framers of the Constitution was to get the majority of the totality of the votes cast, they could have simply adopted the phraseology as that used for the ratification of the Constitution [Art. XVIII, Sec. 27], i.e. 'the creation of the autonomous region shall be effective when approved by a majority of the votes cast in a plebiscite called for the purpose.'"

Relating this decision to the autonomous regions under the 1987 Constitution, as well as to the ongoing GPH-MILF peace negotiations, a GPH-MILF Comprehensive Compact (or more precisely, its core political framework) that is not given constitutional status would, *at most* (such as IF considered "a binding treaty or international agreement"), "be in the same class as" an enactment of Congress, *i.e,*. a national law. In which case, any "subsequent law," including a new Organic Act for the ARMM, could be "amendatory of the [Comprehensive Compact]." Unless there are certain effective safeguards or guarantees, the Comprehensive Compact could be at the mercy, as it were, of enactments by Congress. As for voting requirements in the plebiscite for the creation of autonomous regions or whatever new autonomous political entity in place of the ARMM under a correspondingly amended Constitution, there could be an option of its creation by approval of a majority of the totality of the votes cast in a plebiscite called for the purpose, if this is desired, along with other possible constitutional changes.

Cordillera Broad Coalition v. Commission on Audit
G.R. No. 79956, January 29, 1990; 181 SCRA 495
En Banc (Unanimous)
Justice Irene Cortes, *ponente*

At issue in this case is the constitutionality of Executive Order No. 220 creating the Cordillera Administrative Region (CAR), which was assailed on the ground that it pre-empts the enactment of an organic act by the Congress. It is also argued that the creation of the autonomous region in the Cordilleras is conditional on the approval of the organic act through a plebiscite.

The Supreme Court sustained the constitutionality of Exec. Order No. 20, ratiocinating that "what it actually envisions is the consolidation and coordination of

the delivery of services of line departments and agencies of the National Government in the areas covered by the administrative region as a step preparatory to the grant of autonomy to the Cordilleras. It does not create the autonomous region contemplated in the Constitution. It merely provides for transitory measures in anticipation of the enactment of an organic act and the creation of an autonomous region. In short, it prepares the ground for autonomy. This does not necessarily conflict with the provisions of the Constitution on autonomous regions…"

The Court further ruled that "[T]he CAR is not a public corporation or a territorial and political subdivision. It does not have a separate juridical personality, unlike provinces, cities and municipalities… the CAR may be considered a more sophisticated version of the regional development council." On the other hand, the Court notes that "the creation of autonomous regions in Muslim Mindanao and the Cordilleras, which is peculiar to the 1987 Constitution, contemplates the grant of *political* autonomy and not just administrative autonomy to these regions. Thus, the provision in the Constitution for an autonomous regional government with a basic structure consisting of an executive department and a legislative assembly and special courts with personal, family and property law jurisdiction in each of the autonomous regions [Art. X, sec. 18]."

The Court's decision in this case is most significant as it clarified that the autonomous regions under the 1987 Constitution are of the category of autonomy that is "decentralization of power," not just "decentralization of administration." It also bears emphasis that rather than an Act of Congress, an Executive Order is used "for transitory measures" to "prepare the ground" for "the grant of *political* autonomy." The Court also related the CAR, as a "transitory coordinating agency," with the concept of regional development councils under Art. X, Sec. 14 of the Constitution. This interpretation is somewhat reminiscent of the Southern Philippines Council for Peace and Development (SPCPD) as the "transitional implementing mechanism and structure" under the 1996 GRP-MNLF[-OIC] Final Peace Agreement. But whether that really worked out is another matter altogether.

Pandi v. Court of Appeals
G.R. No. 116850, April 11, 2002
Third Division (Unanimous)
Justice Antonio T. Carpio, *ponente*

The case involves the conflicting designations of two different persons as the Officer-in-Charge of the Provincial Health Office of Lanao del Sur, one by the ARMM Department of Health Secretary and the other by the Lanao del Sur Provincial Governor. The issue was whether or not the ARMM Organic Act of 1989, R.A. 6734, is an exception to the Local Government Code of 1991, R.A. 7160, and whether the former prevails over the latter.

In resolving the case, the Supreme Court reviewed the historical development of the ARMM spanning no less than five periods: (1) Prior to the Organic Act of 1989; (2) After the Organic Act of 1989; (3) After the Local Government Code of 1991; (4) After the

ARMM Local Government Code; and (5) The Organic Act of 2001. Under the second period, the SC noted:

> The Revised Administrative Code of 1987, however, applies to the ARMM on matters not covered by the devolution under the Organic Act of 1989. These matters are: (a) foreign affairs; (b) national defense; (c) postal service; (d) coinage and fiscal and monetary policies; (e) administration of justice; (f) quarantine; (g) customs and tariff; (h) citizenship; (i) naturalization, immigration and deportation; (j) general auditing, civil service, elections; (k) foreign trade; (l) maritime, land and air transportation and communications affecting areas outside of the ARMM; (m) patents, trademarks, trade names, and copyrights.[11] Still, nothing in the Revised Administrative Code of 1987 can reduce or diminish powers and functions devolved or to be devolved to the ARMM under the Organic Act of 1989.

On the appointment of provincial health officers in the ARMM, the Court determined the present state of the law to be as follows:

> The passage of the Organic Act of 2001 means that the powers and functions of a Provincial Governor under the 1991 LGU Code are now enjoyed, as a minimum, by a Provincial Governor in the ARMM. Thus, the Provincial Governor appoints the provincial health officer if the latter's salary comes from provincial funds. If the provincial health officer's salary comes mainly from regional funds, then the ARMM Local Code applies, in which case the Regional Governor is the appointing power but he must appoint only from among the three nominees of the Provincial Governor. Moreover, the Provincial Governor exercises supervision and control over the provincial health officer because the ARMM Local Code has classified him as a provincial government official. This is now the present state of the law on the appointment of provincial health officers in the ARMM. This is actually the same as the law after the effectivity of the ARMM Local Code but prior to the passage of the Organic Act of 2001. The only difference is that the Regional Assembly cannot amend the ARMM Local Code to reduce or diminish this power of the Provincial Governor because this devolved power, emanating from the 1991 LGU Code, is now part of the Organic Act of 2001.

The above-quoted list of reserved powers of the National Government per the Administrative Code is not much different from the list in Sec. 4 of PD 1618, which was noted by the 1986 Constitutional Commission to be not included in the enumerated powers of autonomous regions.[12] Both lists, although *statutory* in origin, might thus be said to be the *constitutionally* or *jurisprudentially* established lists of reserved powers of the National

11 Citing Section 2 (9), Article V of the Organic Act of 1989, R.A. 6734. The counterpart of this is Section 3, Article IV of the Organic Act of 2001, R.A. 9054.

12 *See* Joaquin G. Bernas, S.J., *The Intent of the 1986 Constitution Writers* (Manila: Rex Book Store, Inc., 1995) 757, citing III RECORD 557; and Joaquin G. Bernas, S.J., *The 1987 Constitution of the Republic of the Philippines: A Commentary* (Manila: Rex Book Store, inc., 2009 ed.) 1141, citing III RECORD at 553, 559-560.

Government. It *may* therefore have to take a constitutional amendment to make any delisting therefrom in favor of a new autonomous political entity in place of the ARMM. The other thing to note from the above discussion of this decision is the interplay of the Organic Act for the ARMM, the Local Government Code and the ARMM Local Government Code. More on these points – the established list of reserved powers of the National Government, and the interplay of the Organic Act for the ARMM and the Local Government Code – would be said in the later case of *Kida v. Senate*.

Disomangcop v. The Secretary of Public Works and Highways
G.R. No. 149848, November 25, 2004; 444 SCRA 203
En Banc (Unanimous)
Justice Dante Tinga, *ponente*

The case involves the constitutionality and validity of Rep. Act No. 8999 establishing an engineering district of the province of Lanao del Sur.

The ruling of Supreme Court in this case is arguably ***the leading, as well as most progressive, jurisprudence on the autonomous regions under the 1987 Constitution.*** The Court recalls the rationale for the creation of ARMM by quoting the deliberations of the 1986 Constitutional Commission, including phrases like "an indictment against the *status quo* of a unitary system," "allow the separate development of peoples with distinctive cultures and traditions," "free Philippine society of the strain and wastage caused by the assimilationist approach," "achieving parity with the rest of the country," "meaningful and authentic regional autonomy… This, too is a plea for national peace," and "give constitutional permanence to the just demands and grievances of our fellow countrymen in the Cordilleras and in Mindanao." It co-relates the autonomous regions like the ARMM with the international law right to self-determination (RSD) of peoples, particularly the Bangsa Moro. "Regional autonomy is the degree of self-determination exercised by the local government unit vis-à-vis the central government… However, the creation of autonomous regions does not signify the establishment of a sovereignty distinct from that of the Republic." "The aim of the Constitution is to extend to the autonomous peoples… the right to self-determination… within the framework of the sovereignty and territorial integrity of the Philippine Republic."

The Court notes that section 16, Article X of the Constitution limits the powers of both the President and Congress over the autonomous regions. "Consequently, Congress will have to re-examine national laws and make sure that they reflect the Constitution's adherence to local autonomy. And in case of conflicts, the underlying spirit which should guide its resolution is the Constitution's desire for genuine local autonomy." With regards to the "subjects over which autonomous regions have powers, as specified in Sections 18 and 20, Article X of the 1987 Constitution," the Decision noted that "Expressly not included therein are powers over certain areas. **Worthy of note is that the area of public works is not excluded and neither is it reserved for the National Government.**" **[Emphases supplied]**

The Cour further states: "[E]vidently, the intention is to cede some, if not most, of the

powers of the national government to the autonomous government in order to effectuate a veritable autonomy. The continued enforcement of R.A. 8999, therefore, runs afoul of the ARMM Organic Acts and results in the recall of powers which have previously been handed over. This should not be sanctioned, elsewise the Organic Acts' desires for greater autonomy for the ARMM in accordance with the Constitution would be quelled. It bears stressing that national laws are subject to the Constitution one of whose state policies is to ensure the autonomy of autonomous regions." Relatedly, "While they are classified as statutes, the Organic Acts are more than ordinary statutes because they enjoy affirmation by plebiscite. Hence, the provisions thereof cannot be amended by an ordinary statute, such as R.A. 8999 in this case. The amendatory law has to be submitted to a plebiscite."

This relatively progressive jurisprudence may be helpful, including for whatever transition arrangements, *though it might also be countervailed by relatively conservative subsequent jurisprudence*. The way the Decision goes about "building the bridge from ARMM to RSD" reflects a salutary framing or re-framing. And indeed "worthy of note" is the point about governmental powers "not excluded [for the autonomous region] and neither reserved for the National Government." This brings to mind the notions in legal and constitutional interpretation that, where there are no restrictive words like "only" regarding an enumeration of subjects, then one's hands are not tied or limited to those subjects alone, and that what is not directly or expressly prohibited may be deemed allowed.[13]

Atitiw v. Zamora
G.R. No. 143374, September 30, 2005; 471 SCRA 329
En Banc (Unanimous)
Justice Dante Tinga, *ponente*

Among others, the central issue in this case is whether or not the Philippine government, through Congress, can unilaterally amend/repeal Executive Order No. 220 creating the Cordillera Administrative Region (CAR). Petitioners contend that E.O. No. 220 is a product of peace negotiations and is in the nature of a social and political contract, and that the Republic is bound to fully implement its provisions; otherwise, the Republic would be guilty of a breach of its peace agreement with the Cordillera People's Liberation Army (CPLA).

The unanimous Court, while sympathetic to "the dream of local autonomy of the Cordillera people," ruled that "there are fundamental prerogatives that have to be upheld, particularly the powers of Congress over the national purse and to legislate, both of which it exercises in representation of the sovereign people. Neither the goal of regional autonomy nor the unique status of the Cordillera people cannot [sic, it should be "can"] hinder the rule of law and the Constitution." The Court also ruled that petitioners cannot charge the Government of reneging on its obligation under the peace agreement since the Government had come out with the Organic Act for the Cordillera Autonomous

13 Notions articulated by MSU-General Santos City senior law student Benjamin Sumog-oy in his recent law thesis on "Legal Requirements for the Establishment of the Moro Sub-state in Mindanao," particularly in construing Art. X, Sec. 18 of the Constitution vis-à-vis the question whether Congress can authorize the creation of special courts with criminal jurisdiction within the proposed Sub-state. This kind of legal reasoning might be likened to the Islamic jurisprudential concept of *ijtihad* (creative reasoning effort).

Region and submitted the same for ratification by the people. The Government, however, "was not called upon to ensure the ratification of the Organic Act by the people." As its epilogue, the Court notes:

> The Court is sympathetic to the pleas of petitioners. The institution of the instant petition underscores the pressing need for regional autonomy of the Cordillera people, a number of whom have fought hard and sacrificed their lives if only to advance their cause of autonomy and self-determination. From the standpoint of policy, regional autonomy is also a means of solving existing serious peace and order problems and secessionist movements. Establishing a system of governance for the Cordillera people that promotes their way of life and heritage, recognizes their indigenous rights, and allows them to chart their destiny as a people within the framework of national sovereignty still remains an unanswered call. It is hoped that Congress will pass another Organic Act which is finally acceptable to the people of the Cordilleras.

The case appears to be the ***start of a trend with recent SC Decisions tending towards primacy of national concerns over autonomous region concerns***. One also sees here important questions of fidelity, good faith and confidence-building (or perceptions of otherwise) regarding a peace agreement that one also sees regarding the 1996 GRP-MNLF[-OIC] Final Peace Agreement, that also have bearing on the GPH-MILF peace negotiations. It is interesting to note how the last two sentences of the quoted Epilogue is similar in wording, if not in spirit, to this MILF formulation of "the end in view of establishing a system of life and governance suitable and acceptable to the Bangsamoro people."[14]

Sema v. Comelec
G.R. No. 77597, July 16, 2008; 558 SCRA 700
En Banc. (8-6, with 1 taking "No part.")
Justice Antonio T. Carpio, *ponente*

The case involves the constitutionality and validity of R.A. 9054, Art. VI, Sec. 19 granting the ARMM Regional (Legislative) Assembly the power to create provinces and cities, and Muslim Mindanao Autonomy (MMA) Act No. 201 creating the province of Shariff Kabunsuan.

The Supreme Court declared Section 19, Art. VI of R.A. 9054 as unconstitutional and MMA Act No. 201 as void, thus:

> Only Congress can create provinces and cities because the creation of provinces and cities necessarily includes the creation of legislative districts, a power only Congress can exercise under Section 5, Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution. The ARMM Regional assembly cannot create a province without a legislative

14 MILF Technical Committee on Agenda Setting, "Agenda: To Solve the Bangsamoro Problem," 25 February 1997.

> district because the Constitution mandates that every province shall have a legislative district. Moreover, the ARMM Regional Assembly cannot enact a law creating a national office like the office of a district representative of Congress because the legislative powers of the ARMM Regional Assembly operate only within its territorial jurisdiction as provided in Section 20, Article X of the Constitution.

Associate Justice Dante Tinga penned a strongly worded dissenting opinion slamming the majority ruling. He said that "[w]ith this ruling, the Court has dealt another severe blow to the cause of local autonomy." Aside from reiterating his earlier majority *ponencia* in the earlier *Disomangcop* case, Justice Tinga made several fine points. He described local autonomy rule for Muslim Mindanao and the Cordillera region as a "new paradigm [that] is crystallized under Article X of the Constitution… such a paradigm partakes of a constitutional mandate." He noted the background of the R.A 9054 grant to the Regional Assembly the power to create provinces and cities, as follows: "It was, in fact, among the terms negotiated with care by the Philippine Government with the leading armed insurgency group in Muslim Mindanao towards the higher purpose of providing a permanent peace agreement in the strife-torn region. It does come with a measure of surprise and disappointment that the Solicitor General has reached a position that rejects the Final Peace Agreement negotiated by the Government and the MNLF." He further made the progressive point that "if there is no constitutional bar against the exercise of the powers of government by the autonomous government in Muslim Mindanao, particularly by the Regional Assembly, then there is no basis to thwart the constitutional design by denying such powers to that body."[15]

This Decision is the first one where an ARMM law is elevated to the SC which voided it, thus in effect showing that the autonomous regions under the 1987 Constitution are subject to the jurisdiction of national courts. This is also the first among the surveyed SC Decisions here that is not unanimous, in fact the voting here was close, a near split. The rationale for the herein Decision shows how the autonomous regions are still very much tied up to (and tied down by) "the *status quo* of a unitary system," contrary to the thrust indicated in the earlier *Disomangcop* Decision. The very strong Dissenting Opinion of Justice Tinga indeed shows the vulnerabilities of regional autonomy, notwithstanding its constitutional status, as well as the vulnerabilities of peace agreements,[16] when subjected to "the tri-branch system of government under our Constitution."

AMPATUAN V. PUNO
G.R. No. 190259, June 7, 2011; 651 SCRA 228
En Banc (Unanimous)
Justice Roberto Abad, *ponente*

The issues in this case are as follows: [1] Whether or not presidential Proclamation No. 1436, placing the provinces of Maguindanao and Sultan Kudarat and the City of Cotabato under a state of emergency, violates the principle of local autonomy under

15 This is similar to what we took "worthy of note" in our above discussion of the earlier *Disomangcop* Decision.

16 This is similar to the petitioners' concern in our above discussion of the earlier *Atitiw* Decision.

Sec. 16, Art. X of the Constitution, and Sec. 1, Art. V of the Expanded ARMM Organic Act, R.A. 9054; and [2] Whether or not President Arroyo invalidly exercised emergency powers when she called out the AFP and the PNP to prevent and suppress all incidents of lawless violence in those three provinces, in the aftermath of the Ampatuan/ Maguindanao Massacre.

The Supreme Court unfortunately skirted the first issue. It noted that the issue was anchored on the allegation of the petitioners that, through the subject proclamation and accompanying administrative orders, the President authorized the DILG Secretary to take over the operations of the ARMM and assume direct governmental powers over the region. After pointing out that this was not so, because it was the ARMM Vice-Governor who assumed the vacated post of the arrested Governor, pursuant to the rule on succession found in Art. VII, Sec. 12 of R.A. 9054, the Court did not further deal with the first issue.

As for the second issue, the Supreme Court said that, when the President called out the AFP and the PNP, this was pursuant not to Sec. 23(2), Art. VI of the Constitution pertaining to "times of war or other national emergency" but rather to Sec. 18, Art. VII of the Constitution pertaining to her Commander-in-Chief powers.

There is really not much to say in relation to this case other than the Ampatuan regime and the Maguindanao Massacre being the nadir (lowest point) of the ARMM as a "failed experiment," and that the National Government has often had to rely on the long arm of the AFP to restore a modicum of law and order in this largely frontier-type and ungovernable (to the National Government) region.

Candao v. People
G.R. Nos. 186659-710, October 19, 2011
First Division (Unanimous)
Justice Martin Villarama, *ponente*

The case calls for the review of the Sandiganbayan conviction for malversation of public funds under Article 217 of the Revised Penal Code of a former ARMM Regional Governor and his Executive Secretary involving the total amount of P21,045,570.64 malversed funds as finally determined by the Commission on Audit (COA).

In upholding the conviction, the Supreme Court ruled that "[T]he fact that ARMM was still a recently established autonomous government unit at the time does not mitigate or exempt petitioners from criminal liability for any misuse or embezzlement of public funds allocated for their operations and projects. The Organic Act for ARMM (R.A. No. 6734) mandates that the financial accounts of the expenditures and revenues of the ARMM are subject to audit by the COA.[17] Presently, under the Amended Organic Act (R.A. No. 9054), the ARMM remained subject to national laws and policies relating to, among others, fiscal matters and general auditing.[18]"

17 Citing Art. IX, Sec. 2 of R.A. 6734.

18 Citing Art. IV, Sec. 3 (d) and (j) of R.A. 9054.

Under the present set-up, the long arm of the COA, aside from the long arm of the AFP, can reach into the ARMM – for better or for worse. It cannot but be noted though that the two principal co-accused in this case are brothers who have been both associated with the MILF, either as an ally or as a functionary, one of them having been previously in charge of the MILF's development arm, the Bangsamoro Development Agency (BDA). It might also be noted that the MILF recognizes "corruption of the moral fiber" as one of nine listed concerns of the Bangsamoro problem.[19] To be swallowed by the corrupting milieu of the ARMM is apparently also one reason – *rightly or wrongly* -- for the MILF's strong hesistance for any engagement in that arena, even for reforming it in transition to a new autonomous political entity in place of the ARMM.

EPILOGUE

There are **other Supreme Court decisions on local government and autonomy**, not specifically on autonomous regions, *that also have bearing on the latter in so far as they are also local government units*, as follows:

Basco v. Phil. Amusements and Gaming Corporation (1991):[20] "In a unitary system of government, such as the government under the Philippine Constitution, local governments can only be an *intra sovereign subdivision of a sovereign nation*, it cannot be an *imperium in imperio* [an empire within an empire]."

Solicitor General v. Metropolitan Manila Authority (1991):[21] "Local political subdivisions are able to legislate only by virtue of a valid delegation of legislative power from the national legislature (except only that the power to create their own sources of revenue and levy taxes is conferred by the Constitution itself).[22] They are mere agents vested with what is called the power of subordinate legislation. As delegates of Congress, the local government unit cannot contravene but must obey at all times the will of their principal."

Magtajas v. Pryce Properties Corp., Inc. (1994):[23] "This basic relationship between the national legislature and the local government units has not been enfeebled by the new provisions in the Constitution strengthening the policy of local autonomy. Without meaning to detract from that policy, we here confirm that Congress retains control of the local government units although in a significantly reduced degree now than under our previous Constitutions. The power to create still includes the power to destroy. The power to grant still includes the power withhold or recall. True, there are certain notable innovations in the Constitution, like the direct conferment on the local

19 MILF Technical Committee on Agenda Setting, "Agenda: To Solve the Bangsamoro Problem," 25 February 1997.

20 *En Banc*, G.R. No. 91649, May 14, 1991; 197 SCRA 52.

21 *En Banc*, G.R. No. 102782, December 11, 1991; 204 SCRA 837.

22 Citing Art. X, Sec. 5 of the 1987 Constitution.

23 *En Banc*, G.R. No. 111097, July 20, 1994; 234 SCRA 255.

government units of the power to tax, which cannot now be withdrawn by mere statute. By and large, however, the national legislature is still the principal of the local government units, which cannot defy its will or modify or violate it."

Of course, as far as the GPH-MILF peace negotiations are concerned, the most important Philippine jurisprudence is still the afore-cited **SC Decision on the MOA-AD** in the case of ***Province of North Cotabato v. GRP Peace Panel*** (2008), which "formulate[s] controlling principles to guide the bench, the bar, the public and, most, especially the government in negotiating with the MILF regarding Ancestral Domain." This SC Decision also *includes a discussion on RSD and secession which is generally reflective of the weight of current international legal opinion on these matters*. We shall no longer discuss this particular SC Decision here but just refer the reader to our published legal critique thereof.[24]

To help wind up this discussion, we can benefit from the relevant insights of two Filipino scholars and peace advocates who have devoted much studies on autonomous governance, including on the ARMM in particular. Lawyer Benedicto "Benny" Bacani comments:

> The trend of decisions is very much influenced by the growing awareness of the ills in the ARMM. There is direct correlation between ARMM as a failed experiment and the evolving jurisprudence tipping power and control to the national government at the expense of the region's autonomy as decentralization of power. Supreme Court decisions are not insulated from context. In fact, it is all about context -- settling disputes which in most instances arose from selfish personal claims to positions and power in the ARMM rather than asserting autonomy powers for Moro self-determination. The current efforts of the national government to reform the ARMM and the acquiescence of the Supreme Court, laudable and necessary though it may be, do not serve the cause of Moro self-determination. Thus, peace negotiations cannot successfully take off from this reform train. The better tact perhaps is to open another track going back to the original intent of the Constitution for autonomy as a vehicle for self-determination. I long for the day when the national government and the Moro people can argue their case jointly before the Supreme Court for genuine autonomy either under this Constitution or an amended one. Wishful thinking but peace advocates are entitled to have loads of it![25]

And constitutionalist and federalist Jose "Pepe" Abueva in turn remarks:

> A basic problem of Philippine political development is structural: the dominance of our political oligarchy of family dynasties, many of whom

24 Soliman M. Santos, Jr., "A Critical View of the Supreme Court Decision on the MOA-AD from the Perspective of the Mindanao Peace Process" in 84(1) *Philippine Law Journal* 255-309 [2009], and in Soliman M. Santos, Jr., *In Defense of and Thinking Beyond the GRP-MILF MOA-AD: A Peace Advocate's Essays on the Controversial Memorandum of Agreement on Ancestral Domain* (Davao City: Alternate Forum for Research in Mindanao, Inc., 2011) 61-112.

25 Benedicto Bacani, email remarks, 9 April 2012.

are self-serving, reactive rather than proactive. They have a vested interest in the status quo: political, economic and social, so they resist basic reforms. A related aspect of our political structure is the dominance of lawyers and a judiciary bound by jurisprudence (looking backward rather than forward and breaking new ground). Our 1987 Constitution reflects the dualism that perpetuates the political structure and the economic and social system. Our fundamental law abounds in lofty visions and ideals, if not myths ("a democratic and republican State" where "sovereignty resides in the people and all government authority emanates from them"; "a just and humane society"; and a "democracy under the rule of law and a regime of truth, justice, freedom, love, equality and peace.") But to realize and fulfill the visions and ideals, the Constitution merely restored our traditional and failed presidential government and highly centralized unitary system that mainly serve the interests of the ruling class.

...⚖...

In the Name of God, the Beneficent, the Merciful

Framework Agreement on the Bangsamoro

The Philippine Government (GPH) and the Moro Islamic Liberation Front (MILF) herein referred to as the Parties to this Agreement,

HAVE AGREED AND ACKNOWLEDGED AS FOLLOWS:

I. ESTABLISHMENT OF THE BANGSAMORO

1. The Parties agree that the status quo is unacceptable and that the Bangsamoro shall be established to replace the Autonomous Region in Muslim Mindanao (ARMM). The Bangsamoro is the new autonomous political entity (NPE) referred to in the Decision Points of Principles as of April 2012.

2. The government of the Bangsamoro shall have a ministerial form.

   The Parties agree to entrench an electoral system suitable to a ministerial form of government. The electoral system shall allow democratic participation, ensure accountability of public officers primarily to their constituents and encourage formation of genuinely principled political parties. The electoral system shall be contained in the Bangsamoro Basic Law to be implemented through legislation enacted by the Bangsamoro Government and correlated with national laws.

3. The provinces, cities, municipalities, barangays and geographic areas within its territory shall be the constituent units of the Bangsamoro.

   The authority to regulate on its own responsibility the affairs of the constituent units is guaranteed within the limit of the Bangsamoro Basic Law. The privileges already enjoyed by the local government units under existing laws shall not be diminished unless otherwise altered, modified or reformed for good governance pursuant to the provisions of the Bangsamoro local government code.

4. The relationship of the Central Government with the Bangsamoro Government shall be asymmetric.

5. The Parties recognize Bangsamoro identity. Those who at the time of conquest and colonization were considered natives or original inhabitants of Mindanao and the Sulu archipelago and its adjacent islands including Palawan, and their descendants whether of mixed or of full blood shall have the right to identify themselves as Bangsamoro by ascription or self-ascription.

   Spouses and their descendants are classified as Bangsamoro. The freedom of

choice of other Indigenous peoples shall be respected.

II. BASIC LAW

1. The Bangsamoro shall be governed by a Basic Law.

2. The provisions of the Bangsamoro Basic Law shall be consistent with all agreements of the Parties.

3. The Basic Law shall reflect the Bangsamoro system of life and meet internationally accepted standards of governance.

4. It shall be formulated by the Bangsamoro people and ratified by the qualified voters within its territory.

III. POWERS

1. The Central Government will have reserved powers, the Bangsamoro Government shall have its exclusive powers, and there will be concurrent powers shared by the Central Government and the Bangsamoro Government.

   The Annex on Power Sharing, which includes the principles on intergovernmental relations, shall form part of this Agreement and guide the drafting of the Basic Law.

2. The Central Government shall have powers on:

   a) Defense and external security
   b) Foreign policy
   c) Common market and global trade, provided that the power to enter into economic agreements already allowed under Republic Act No. 9054 shall be transferred to the Bangsamoro
   d) Coinage and monetary policy
   e) Citizenship and naturalization
   f) Postal service

   This list is without prejudice to additional powers that may be agreed upon by the Parties.

3. The Parties recognize the need to strengthen the Shari'ah courts and to expand their jurisdiction over cases. The Bangsamoro shall have competence over the Shari'ah justice system. The supremacy of Shari'ah and its application shall only be to Muslims.

4. The Bangsamoro Basic Law may provide for the power of the Bangsamoro Government to accredit halal-certifying bodies in the Bangsamoro.

5. The Bangsamoro Basic Law shall provide for justice institutions in the Bangsamoro. This includes:

   a) The competence over the Shari'ah justice system, as well as the formal institutionalization and operation of its functions, and the expansion of the jurisdiction of the Shari'ah courts;
   b) Measures to improve the workings of local civil courts, when necessary; and
   c) Alternative dispute resolution systems.

6. The customary rights and traditions of indigenous peoples shall be taken into consideration in the formation of the Bangsamoro's justice system. This may include the recognition of indigenous processes as alternative modes of dispute resolution.

IV. REVENUE GENERATION AND WEALTH SHARING

1. The parties agree that wealth creation (or revenue generation and sourcing) is important for the operation of the Bangsamoro.

2. Consistent with the Bangsamoro Basic Law, the Bangsamoro will have the power to create its own sources of revenues and to levy taxes, fees, and charges, subject to limitations as may be mutually agreed upon by the Parties. This power shall include the power to determine tax bases and tax rates, guided by the principles of devolution of power, equalization, equity, accountability, administrative simplicity, harmonization, economic efficiency, and fiscal autonomy.

3. The Bangsamoro will have the authority to receive grants and donations from domestic and foreign sources, and block grants and subsidies from the Central Government. Subject to acceptable credit worthiness, it shall also have the authority to contract loans from domestic and foreign lending institutions, except foreign and domestic loans requiring sovereign guaranty, whether explicit or implicit, which would require the approval of the Central Government.

4. The Bangsamoro shall have a just and equitable share in the revenues generated through the exploration, development or utilization of natural resources obtaining in all the areas/territories, land or water, covered by and within the jurisdiction of the Bangsamoro, in accordance with the formula agreed upon by the Parties.

5. The Bangsamoro may create its own auditing body and procedures for accountability over revenues and other funds generated within or by the region

from external sources. This shall be without prejudice to the power, authority and duty of the national Commission on Audit to examine, audit and settle all accounts pertaining to the revenues and the use of funds and property owned and held in trust by any government instrumentality, including GOCCs.

6. The details of revenue and wealth sharing arrangements between the Central Government and the Bangsamoro Government shall be agreed upon by the Parties. The Annex on Wealth Sharing shall form part of this Agreement.

7. There shall be an intergovernmental fiscal policy board composed of representatives of the Bangsamoro and the Central Government in order to address revenue imbalances and fluctuations in regional financial needs and revenue-raising capacity. The Board shall meet at least once in six (6) months to determine necessary fiscal policy adjustments, subject to the principles of intergovernmental relations mutually agreed upon by both Parties. Once full fiscal autonomy has been achieved by the Bangsamoro then it may no longer be necessary to have a representative from the Central Government to sit in the Board. Fiscal autonomy shall mean generation and budgeting of the Bangsamoro's own sources of revenue, its share of the internal revenue taxes and block grants and subsidies remitted to it by the central government or any donor.

8. The Parties agree that sustainable development is crucial in protecting and improving the quality of life of the Bangsamoro people. To this end, the Bangsamoro shall develop a comprehensive framework for sustainable development through the proper conservation, utilization and development of natural resources. For efficient coordination and assistance, the Bangsamoro legislative body shall create, by law, an intergovernmental body composed of representatives of the Bangsamoro and the Central Government, which shall ensure the harmonization of environmental and developmental plans, as well as formulate common environmental objectives.

V. TERRITORY

1. The core territory of the Bangsamoro shall be composed of: (a) the present geographical area of the ARMM; (b) the Municipalities of Baloi, Munai, Nunungan, Pantar, Tagoloan and Tangkal in the province of Lanao del Norte and all other barangays in the Municipalities of Kabacan, Carmen, Aleosan, Pigkawayan, Pikit, and Midsayap that voted for inclusion in the ARMM during the 2001 plebiscite; (c) the cities of Cotabato and Isabela; and (d) all other contiguous areas where there is a resolution of the local government unit or a petition of at least ten percent (10%) of the qualified voters in the area asking for their inclusion at least two months prior to the conduct of the ratification of the Bangsamoro Basic Law and the process of delimitation of the Bangsamoro as mentioned in the next paragraph.

2. The Parties shall work together in order to ensure the widest acceptability of the Bangsamoro Basic Law as drafted by the Transitory Commission and the core areas mentioned in the previous paragraph, through a process of popular ratification among all the Bangsamoro within the areas for their adoption. An international third party monitoring team shall be present to ensure that the process is free, fair, credible, legitimate and in conformity with international standards.

3. Areas which are contiguous and outside the core territory where there are substantial populations of the Bangsamoro may opt anytime to be part of the territory upon petition of at least ten percent (10%) of the residents and approved by a majority of qualified voters in a plebiscite.

4. The disposition of internal and territorial waters shall be referred to in the Annexes on Wealth and Power Sharing.

5. Territory refers to the land mass as well as the maritime, terrestrial, fluvial and alluvial domains, and the aerial domain and the atmospheric space above it. Governance shall be as agreed upon by the parties in this agreement and in the sections on wealth and power sharing.

6. The Bangsamoro Basic Law shall recognize the collective democratic rights of the constituents in the Bangsamoro.

VI. BASIC RIGHTS

1. In addition to basic rights already enjoyed, the following rights of all citizens residing in the Bangsamoro bind the legislature, executive and judiciary as directly enforceable law and are guaranteed:

   a. Right to life and to inviolability of one's person and dignity;
   b. Right to freedom and expression of religion and beliefs;
   c. Right to privacy;
   d. Right to freedom of speech;
   e. Right to express political opinion and pursue democratically political aspiration;
   f. Right to seek constitutional change by peaceful and legitimate means;
   g. Right of women to meaningful political participation, and protection from all forms of violence;
   h. Right to freely choose one's place of residence and the inviolability of the home;
   i. Right to equal opportunity and non-discrimination in social and economic activity and the public service, regardless of class, creed, disability, gender and ethnicity;

j. Right to establish cultural and religious associations;
k. Right to freedom from religious, ethnic and sectarian harassment; and
l. Right to redress of grievances and due process of law.

2. Vested property rights shall be recognized and respected. With respect to the legitimate grievances of the Bangsamoro people arising from any unjust dispossession of their territorial and proprietary rights, customary land tenure or their marginalization shall be acknowledged. Whenever restoration is no longer possible, the Central Government and the Government of the Bangsamoro shall take effective measures for adequate reparation collectively beneficial to the Bangsamoro people in such quality, quantity and status to be determined mutually.

3. Indigenous peoples' rights shall be respected.

4. The Central Government shall ensure the protection of the rights of the Bangsamoro people residing outside the territory of the Bangsamoro and undertake programs for the rehabilitation and development of their communities. The Bangsamoro Government may provide assistance to their communities to enhance their economic, social and cultural development.

VII. TRANSITION AND IMPLEMENTATION

1. The Parties agree to the need for a transition period and the institution of transitional mechanisms.

2. The Parties agree to adopt and incorporate an Annex on Transitional Arrangements and Modalities, which forms a part of this Framework Agreement.

3. There shall be created a Transition Commission through an Executive Order and supported by Congressional Resolutions.

4. The functions of the Transition Commission are as follows:

   a. To work on the drafting of the Bangsamoro Basic Law with provisions consistent with all agreements entered and that may be entered into by the Parties;
   b. To work on proposals to amend the Philippine Constitution for the purpose of accommodating and entrenching in the constitution the agreements of the Parties whenever necessary without derogating from any prior peace agreements;
   c. To coordinate whenever necessary development programs in Bangsamoro communities in conjunction with the MILF Bangsamoro Development Agency (BDA), the Bangsamoro Leadership and Management Institute (BLMI) and other agencies.

5. The Transition Commission shall be composed of fifteen (15) members all of whom are Bangsamoro. Seven (7) members shall be selected by the GPH and eight (8) members, including the Chairman, shall be selected by the MILF.

6. The Transition Commission will be independent from the ARMM and other government agencies. The GPH shall allocate funds and provide other resources for its effective operation. All other agencies of government shall support the Transition Commission in the performance of its tasks and responsibilities until it becomes *functus oficio* and cease to exist.

7. The draft Bangsamoro Basic Law submitted by the Transition Commission shall be certified as an urgent bill by the President.

8. Upon promulgation and ratification of the Basic Law, which provides for the creation of the Bangsamoro Transition Authority (BTA), the ARMM is deemed abolished.

9. All devolved authorities shall be vested in the Bangsamoro Transition Authority during the interim period. The ministerial form and Cabinet system of government shall commence once the Bangsamoro Transition Authority is in place. The Bangsamoro Transition Authority may reorganize the bureaucracy into institutions of governance appropriate thereto.

10. The Bangsamoro Transition Authority shall ensure that the continued functioning of government in the area of autonomy is exercised pursuant to its mandate under the Basic Law. The Bangsamoro Transition Authority will be immediately replaced in 2016 upon the election and assumption of the members of the Bangsamoro legislative assembly and the formation of the Bangsamoro government.

11. There will be created a third party monitoring team to be composed of international bodies, as well as domestic groups to monitor the implementation of all agreements.

12. At the end of the transition period, the GPH and MILF Peace Negotiating Panels, together with the Malaysian Facilitator and the Third Party Monitoring Team, shall convene a meeting to review, assess or evaluate the implementation of all agreements and the progress of the transition. An 'Exit Document' officially terminating the peace negotiation may be crafted and signed by both Parties if and only when all agreements have been fully implemented.

12. The Negotiating Panel of both Parties shall continue the negotiations until all issues are resolved and all agreements implemented.

VIII. NORMALIZATION

1. The Parties agree that normalization is vital to the peace process. It is through normalization that communities can return to conditions where they can achieve their desired quality of life, which includes the pursuit of sustainable livelihoods and political participation within a peaceful deliberative society.

2. The aim of normalization is to ensure human security in the Bangsamoro. Normalization helps build a society that is committed to basic human rights, where individuals are free from fear of violence or crime and where long-held traditions and value continue to be honored. Human insecurity embraces a wide range of issues that would include violation of human and civil rights, social and political injustice and impunity.

3. As a matter of principle, it is essential that policing structure and arrangement are such that the police service is professional and free from partisan political control. The police system shall be civilian in character so that it is effective and efficient in law enforcement, fair and impartial as well as accountable under the law for its action, and responsible both to the Central Government and the Bangsamoro Government, and to the communities it serves.

4. An independent commission shall be organized by the Parties to recommend appropriate policing within the area. The commission shall be composed of representatives from the parties and may invite local and international experts on law enforcement to assist the commission in its work.

5. The MILF shall undertake a graduated program for decommissioning of its forces so that they are put beyond use.

6. In a phased and gradual manner, all law enforcement functions shall be transferred from the Armed Forces of the Philippines (AFP) to the police force for the Bangsamoro.

   The Parties agree to continue negotiations on the form, functions and relationship of the police force of the Bangsamoro taking into consideration the results of the independent review process mentioned in paragraph 4.

7. The Joint Coordinating Committees on Cessation of Hostilities (JCCCH) as well as the Ad hoc Joint Action Group (AHJAG) with the participation of the International Monitoring Team (IMT) shall continue to monitor the ceasefire agreement until the full decommissioning of the MILF forces. These existing coordinating mechanisms shall be the basis for the creation of a Joint Normalization Committee (JNC) to ensure the coordination between the Government and remaining MILF forces, and through which MILF shall assist in maintaining peace and order in the area of the Bangsamoro until

decommissioning shall have been fully completed.

8. Both Parties commit to work in partnership for the reduction and control of firearms in the area and the disbandment of private armies and other armed groups.

9. The details of the normalization process and timetables for decommissioning shall be in an Annex on Normalization and shall form part of this Agreement.

10. The Parties agree to intensify development efforts for rehabilitation, reconstruction and development of the Bangsamoro, and institute programs to address the needs of MILF combatants, internally displaced persons, and poverty-stricken communities.

11. The Parties recognize the need to attract multi-donor country support, assistance and pledges to the normalization process. For this purpose, a Trust Fund shall be established through which urgent support, recurrent and investment budget cost will be released with efficiency, transparency and accountability. The Parties agree to adopt criteria for eligible financing schemes, such as, priority areas of capacity building, institutional strengthening, impact programs to address imbalances in development and infrastructures, and economic facilitation for return to normal life affecting combatant and non-combatant elements of the MILF, indigenous peoples, women, children, and internally displaced persons.

12. The Parties agree to work out a program for transitional justice to address the legitimate grievances of the Bangsamoro people, correct historical injustices, and address human rights violations.

IX. MISCELLANEOUS

1. This Agreement shall not be implemented unilaterally.

2. The Parties commit to work further on the details of the Framework Agreement in the context of this document and complete a comprehensive agreement by the end of the year.

Done and initialed this 12th day of October 2012 in Kuala Lumpur, Malaysia and signed in Manila, Philippines on the 15th day of October 2012.

FOR THE GPH:

Marvic M.V. F. Leonen
GPH Panel Chairman

FOR THE MILF:

Mohagher Iqbal
MILF Panel Chairman

WITNESSED BY:

Tengku Dato' Ab Ghafar bin Tengku Mohamed
Malaysian Facilitator

IN THE PRESENCE OF:

Benigno Simeon Aquino III
President of the Republic
of the Philippines

Dato' Sri Hj. Mohd Najib Bin Tun Hj. Abdul Razak
Prime Minister of Malaysia

and

Al Haj Murad Ebrahim
Chairman of the Moro Islamic Liberation Front

...⚖...

Indigenous and Tribal Peoples Convention

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 76th Session on 7 June 1989, and

Noting the international standards contained in the Indigenous and Tribal Populations Convention and Recommendation, 1957 and

Recalling the terms of the Universal Declaration of Human Rights, the International Convention on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the many international instruments on the prevention of discrimination, and

Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards, and

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding, and

Noting that the following provisions have been framed with the co-operation of the United Nations, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization, as well as of the Inter-American Indian Institute, at appropriate levels and in their respective fields, and that it is proposed to continue this co-operation in promoting and securing the application of these provisions, and

Having decided upon the adoption of certain proposals with regard to the partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107),
Which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention revising the Indigenous and Tribal Populations Convention, 1957;

Adopts the twenty-seventh day of June of the year one thousand nine hundred and eighty-nine, the following Convention, which may be cited as the Indigenous and Tribal Peoples Convention, 1989;

PART I
GENERAL POLICY

Article 1

1. This Convention applies to:

   (a) tribal peoples in independent countries whose social, cultural, and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
   (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all their own social, economic, cultural, and political institutions.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

3. The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to term under international law.

Article 2

1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

2. Such action shall include measures for:

   (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
   (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
   (c) assisting the members of the peoples concerned to eliminate socioeconomic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

Article 3

1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the

Convention shall be applied without discrimination to male and female members of these peoples.

2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

Article 4

1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

3. Enjoyment of the general rights of the citizenship, without discrimination, shall not be prejudiced in any way by such special measures.

Article 5

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;
(b) the integrity of the values, practices and institutions of these peoples shall be respected;
(c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 6

1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement to consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly;

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The result of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties.

Article 9

1. To the extent compatible with national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their numbers shall be respected.

2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

Article 10

1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics.

2. Preference shall be given to methods of punishment other than confinement in prison.

Article 11

The exaction from members of the peoples concerned of compulsory personal services in any form, whether paid or unpaid, shall be prohibited and punishable by law, except in cases prescribed by law for all citizens.

Article 12

The peoples concerned shall be safeguarded against the abuse of their rights and shall be able to take legal proceedings, either individually or through their representative bodies, for the effective protection of these rights. Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means.

PART II
LAND

Article 13

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

2. The use of the term 'lands' in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the people concerned.

Article 15

1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conversation of these resources.

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

Article 17

1. Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

2. The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

3. Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

Article 18

Adequate penalties shall be established by law of unauthorised intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences.

Article 19

National agrarian programmes shall secure to the peoples concerned treatment equivalent to that accorded to other sectors of the population with regard to:

(a) the provision of more land for these peoples when they have not the area necessary for providing the essentials of a normal existence, or for any possible increase in their numbers;
(b) the provision of the means required to promote the development of the lands which these peoples already possess.

PART III
RECRUITMENT AND CONDITIONS OF EMPLOYMENT

Article 20

1. Governments shall, within the framework of national laws and regulations, and in co-

operation with the peoples concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers belonging to these peoples, to the extent that they are not effectively protected by laws applicable to workers in general.

2. Governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and the other workers, in particular as regards:

   (a) admission to employment, including skilled employment, as wall as measures for promotion and advancement;
   (b) equal remuneration for work of equal value;
   (c) medical and social assistance, occupational safety and health, all social security benefits and any other occupationally related benefits, and housing;
   (d) the right of association and freedom for all lawful trade unison activities, and the righ to conclude collective agreements with employers or employers' organizations.

3. The measures taken shall include measures to ensure:

   (a) that workers belonging to the peoples concerned, including seasonal, casual and migrant workers in agricultural and other employment, as well as those employed by labour contractors, enjoy the protection afforded by national law and practice to other such workers in the same sectors, and that they are fully informed of their rights under labour legislation and of the means of redress available to them;
   (b) that workers belonging to these peoples are not subjected to working conditions hazardous to their health, in particular through exposure to pesticides or other toxic substances;
   (c) that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude;
   (d) that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

4. Particular attention shall be paid to the establishment of adequate labour inspection services in areas where workers belonging to the peoples concerned undertake wage employment, in order to ensure compliance with the provisions of this Part of this Convention.

PART IV
VOCATIONAL TRAINING, HANDICRAFTS AND RURAL INDUSTRIES

Article 21

Members of the peoples concerned shall enjoy opportunities at least equal to those of other citizens in respect of vocational training measures.

Article 22

1. Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programmes of general application.

2. Whenever existing programmes of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programmes and facilities.

3. Any special training programmes shall be based on the economic environment, social and cultural conditions and practical needs of the peoples concerned. Any studies made in this connection shall be carried out in co-operation with these peoples, who shall be consulted on the organization and operation of such programmes. Where feasible, these peoples shall progressively assume responsibility for the organization and operation of such special training programmes, if they so decide.

Article 23

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities and strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

PART V
SOCIAL SECURITY AND HEALTH

Article 24

Social security schemes shall be extended progressively to cover the peoples concerned,

and applied without discrimination against them.

Article 25

1. Governments shall ensure that adequate health services are made available to the peoples concerned, or shall provide them with resources to allow them to design and deliver such services under their own responsibility and control, so that they may enjoy the highest attainable standard of physical and mental health.

2. Health services shall, to the extent possible, be community-based. These services shall be planned and administered in co-operation with the peoples concerned and take into account their economic, geographic, social and cultural conditions as well as their traditional preventive care, healing practices and medicines.

3. The health care system shall give preference to the training and employment of local community health workers, and focus on primary health care while maintaining strong links with other levels of health care services.

4. The provision of such health services shall be co-ordinated with other social, economic and cultural measures in the country.

PART VI
EDUCATION AND MEANS OF COMMUNICATION

Article 26

Measures shall be taken to ensure that members of the peoples concerned have the opportunity to acquire education at all levels on at least an equal footing with the rest of the national community.

Article 27

1. Education programmes and services for the peoples concerned shall be developed and implemented in co-operation with them to address their special needs, and shall incorporate their histories, their knowledge and technologies, their value system and their future social, economic and cultural aspiration.

2. The competent authority shall ensure the training of members of these peoples and their involvement in the formulation and implementation of education programmes, with a view to the progressive transfer of responsibility for the conduct of these programmmes to these peoples as appropriate.

3. In addition, governments shall recognise the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these

peoples. Appropriate resources shall be provided for this purpose.

Article 28

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this activities.

2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.

3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

Article 29

The imparting of general knowledge and skills that will help children belonging to the peoples concerned to participate fully and on an equal footing in their own community and in the national community shall be an aim of education for these peoples.

Article 30

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.

2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

Article 31

Educational measures shall be taken among all sections of the national community, and particularly among those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that they may harbour in respect of this peoples. To this end, efforts shall be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and the cultures of these peoples.

PART VII
CONTACTS AND CO-OPERATION ACROSS BORDERS

Article 32

Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.

PART VIII
ADMINISTRATION

Article 33

1. The governmental authority responsible for the matters covered in this Convention shall ensure that agencies or other appropriate mechanisms exist to administer the programmes affecting the peoples concerned, and shall ensure that they have the means necessary for the proper fulfillment of the functions assigned to them.

2. These programmes shall include:

   (a) the planning, co-ordination, execution, and evaluation, in co-operation with the peoples concerned, of the measures provided for in this Convention;
   (b) the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, in co-operation with the peoples concerned.

PART IX
GENERAL PROVISIONS

Article 34

The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.

Article 35

The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

PART X
FINAL PROVISIONS

Article 36

This Convention revises the Indigenous and Tribal Populations Convention, 1957.

Article 37

The formal ratifications of this Convention shall be communicated to the Director-General of the International Labour Office for registration.

Article 38

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General.

2. It shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member twelve months after the date on which its ratification has been registered.

Article 39

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 40

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications and denunciations communicated to him by the Members of the Organization.

2. When notifying the Members of the Organization of the registration of the second

ratification communicated to him, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention will come into force.

Article 41

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations for registration in accordance with Article 102 of the Charter of the United Nations full particulars of all ratifications and acts of denunciation registered by him in accordance with the provisions of the preceding Articles.

Article 42

At such times as it may consider necessary the Governing Body of the International Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 43

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides:

   (a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 39 above, if and when the new revising Convention shall have come into force;
   (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.
   (b) as from the date when the new revising Convention comes into force this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 44

The English and French versions of the text of this Convention are equally authoritative.

...⚖...

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,1 by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006,[1] by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

1 See Official Records for the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sec. A.

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights[2] and the International Covenant on Civil and

2 See resolution 2200 A (XXI), annex.

Political Rights,[2] as well as the Vienna Declaration and Programme of Action,[3] affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights [4] and international human rights law.

3 A/CONFA. 157/24 (Part I), chap. III

4 Resolution 217 A (III)

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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

Article 4

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

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, arte facts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect

indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

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

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

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands,

territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

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

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose

of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

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