Constitutional Challenges of Philippine Peace Negotiations

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I. INTRODUCTION

As a Filipino lawyer invited by the *Ateneo Law Journal* to speak on the "Challenges of Peace Negotiations," allow me to focus, within the brief time given, on certain *constitutional* challenges of peace negotiations in the Philippines. I will deal here only with the two major pending peace negotiations of the Government of the Republic of the Philippines (GRP) with the country's two major rebel groups: the Moro Islamic Liberation Front (MILF) and the communist-led National Democratic Front of the Philippines (NDFP). At the outset, let me say that the constitutional challenges are not the biggest or most important challenges in these two peace negotiations. It goes almost without saying that the political challenges — in terms of political will, peace policy and a public constituency of support — are still the most important factors for a negotiated political settlement. But the two cases at bar, to use terms of court litigation, point to the ultimate necessity for such a settlement to also be a negotiated *constitutional* settlement.

II. THE CASE OF THE GRP-MILF PEACE NEGOTIATIONS

Let us take first the case of the GRP-MILF Peace Negotiations, where the discussion of constitutional challenges is already very rich. Thanks and (for some) no thanks to the Supreme Court Decision of 14 October 2008 on the aborted GRP-MILF Memorandum of Agreement on the Ancestral Domain

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(MOA-AD).[1] This is the first case in Philippine jurisprudence on peace negotiations with rebel groups, one which ultimately has implications not only for the negotiations with the MILF, even as this was the context of the court litigation. The Court declared the initialed but unsigned final draft of the MOA-AD as "contrary to law and the constitution."[2] This Decision is now a reality which the GRP-MILF peace negotiations have to live with. The MILF may of course not feel bound by the Decision of the Court, but they are negotiating with a counterpart which is bound by it. Recently, the Presidential Adviser on the Peace Process (PAPP), Secretary Avelino I. Razon, Jr., indicated that for the resumption of the negotiations, "the GRP is now guided by the Decision and the outcome of our continuing consultations on the ground, in resolving the substantive issues at the negotiating table."

As far as the Decision of the Court is concerned, there are basically two ways to interpret it: one is conservatively or restrictively, and the other is liberally or progressively, i.e., in pushing and exhausting the allowable limits of the Decision's controlling principles and parameters. The conservative approach is to be paralyzed by fear in pursuing the substantive issues lest the new peace panel be similarly struck down as the old panel was for unconstitutional acts of negotiation. This means not touching with a 10-foot pole anything that looks like the unconstitutional MOA-AD and its contents. This means taking the path of least resistance of merely enhancing the current Organic Act for the Autonomous Region in Muslim Mindanao (ARMM) which is circumscribed by the Constitution's existing provisions on autonomous regions.

But the experience of 20 years of this model has proven that it has not solved the Bangsamoro problem. This, in fact, is what the MILF has been saying. But the Decision, which the MILF does not recognize, has made it even more wary of Philippine constitutional processes which it understandably sees as a quagmire or trap, not to mention its inherent revolutionary rejection of the Philippine constitutional framework.

A more thorough reading of the Court's decision will, however, show that its declaration of the MOA-AD as "contrary to law and the constitution" actually hinged on two procedural matters, and not really on the contents *per se* of the MOA-AD. The two procedural matters are nonetheless substantive in that they involve constitutional and legal rights, duties, processes, and powers. One has to do with the constitutional right of the people to information, the constitutional state policy of full public

1. The Province of North Cotabato v. The Government of the Republic of the Philippines Peace Panel on Ancestral Domain, 568 SCRA 402 (2008) [hereinafter MOA-AD case].

2. *Id.*

disclosure, and constitutional and statutory provisions on public consultations, all of which the Court (arguably) found the previous GRP Peace Panel to have violated and particularly the previous PAPP to have "committed grave abuse of discretion."[3] The other has to do with constitutional processes and constituent powers for amendments or revisions of the Constitution, which the Court (arguably) found the previous GRP Peace Panel's actions to have been a "usurpation" by "guaranteeing" to the MILF that constitutional changes will be made "to conform to the MOA-AD."

While it is true that the Decision of the Court found that "[t]he MOA-AD cannot be reconciled with the present Constitution and laws," and that the MOA-AD's underlying concept of an associative relationship between the GRP and the Bangsamoro Juridical Entity (BJE) is "*unconstitutional*, for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence,"[4] the Decision of the Court also stated that this and other political options for Moro self-determination are really all ultimately up to the sovereign people: "The sovereign people may, if so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, *for it can change the Constitution in any [way] it wants*."[5] The Decision of the Court in fact stated that "[a]s the experience of nations which have similarly gone through internal armed conflict will show, however, peace is rarely attained by simply pursuing a military solution. Oftentimes, changes as far-reaching as a fundamental reconfiguration of the nation's constitutional structure is required."[6]

The Decision of the Court cited an American law journal article on post-conflict peace-building and constitution-making: "Constitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate."[7] And then the Decision cited another American law journal article on the nature and legal status of peace agreements in saying that "the typical way that peace agreements establish or confirm mechanisms for demilitarization and demobilization [DDR

3. *Id.* at 521.

4. *Id.* (emphasis supplied).

5. *Id.* at 518 (emphasis supplied).

6. *Id.* at 502.

7. Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663 (2006).

advocates, take note!] is by linking them to *new constitutional structures* addressing governance, elections, and legal and human rights institutions."[8]

Let us say, or assume for the sake of argument, that the key concepts in the MOA-AD, not necessarily the whole MOA-AD or how it is phrased, is indicative of a mutually acceptable level or degree of Moro self-determination, without prejudice to whatever renegotiation or further negotiations. Giving it effect "would require an amendment [of the Constitution],"[9] according to the Decision of the Court, because "the mere passage of legislation ... would not suffice, since any new law that might vest in the BJE the powers found in the MOA-AD must, itself, comply with other provisions of the Constitution."[10] This is really logical if any such new structural relationship (whether associative, federative, or otherwise) is to rise above the level or degree of self-determination under the Constitution's existing provisions on autonomous regions. Thus, the Decision of the Court actually gets it right in saying that

> [i]f 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.[11]

The only real caveat is for the President (or her agent, the GRP Peace Panel) not to usurp constituent powers but instead "she may submit proposals for constitutional change to Congress ...."[12] And of course, there is also the caveat on public information, disclosure, and consultation.

And while the Supreme Court Decision found the MOA-AD's underlying concept of associative relationship to be "*unconstitutional*, for the concept presupposes that the associated entity is a state and implies that the same is on its way to independence,"[13] even this is *not precluded* because the Court's Decision also says that the sovereign people "can change the Constitution in any way it wants."[14] That would be, of course, a matter of sovereign political decision. The PAPP Secretary Razon has, however, stated that among the guidelines laid down for the new GRP Peace Panel is that "any future agreement with the MILF must be within Philippine citizenship. There shall be no talk of independence." This probably represents the upper

8. MOA-AD case, 568 SCRA at 503 (emphasis supplied) (citing Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373 (2006)).

9. *Id.* at 484.

10. *Id.* at 484.

11. *Id.* at 504.

12. *Id.* at 505.

13. *Id.* at 521.

14. MOA-AD case, 568 SCRA at 518 (emphasis supplied).

limit or line which must not be crossed as far as the GRP side and political constituency are concerned. Conceivably, an associative relationship that is expressly *not* one "on its way to independence" would still be in the realm of mutually acceptable possibilities. Probabilities are another matter.

In any case, one implication, if not controlling principle, of the SC Decision is that if the GRP-MILF peace negotiations are to arrive at a higher level or degree of Moro self-determination than that provided by the Constitution's existing provisions on autonomous regions, then these negotiations should be reframed to partake of the nature of constitutional negotiations. Since mutuality and bilateralism are part of the inherent character of negotiations and a negotiated settlement, both parties should recognize the need for such constitutional negotiations and accordingly engage in them with the best possible guiding lights. This is the *key-link* constitutional challenge to both sides now at this critical juncture of the third serious impasse in the GRP-MILF peace negotiations.

II. THE CASE OF THE GRP-NDFP PEACE NEGOTIATIONS

If you think that the GRP-MILF peace negotiations are hard, wait till you reckon with the case of the GRP-NDFP Peace Negotiations, which we turn to now. One would have thought that the latter would be easier as a constitutional challenge, if we were to base it only on the negotiations framework agreement, The Hague Joint Declaration of 1 September 1992.[15] Here, the GRP and NDFP agreed that the substantive agenda of the formal peace negotiations shall include, among others, "political and *constitutional reforms*, end of hostilities and disposition of forces" [so, DDR is on the agenda here, unlike in the several negotiations framework agreements with the MILF]. Constitutional reforms connote constitutional change. The GRP's "Six Paths to Peace" policy framework since 1993 in fact indicates the "first path" to be "pursuit of social, economic and political reforms … aimed at addressing the root causes of internal armed conflict … [and] this may require administrative action, new legislation, or even constitutional amendments."

Unfortunately, unlike the case of the GRP-MILF peace negotiations which are strategic in nature, the GRP-NDFP peace negotiations are only tactical in nature for both sides, subsumed under a more paramount war strategy — protracted people's war for the NDFP and the counter-insurgency war for the GRP. This has taken the form of a different kind of constitutional challenge, that of a contest between two Filipino governments: the established official GRP and the NDFP's shadow underground "People's Democratic Government." They are competing

15. The Hague Joint Declaration, GRP-NDFP, Sep. 1, 1992, *available at* http://www.derechos.org/nizkor/filipinas/doc/hague.html (last accessed May 29, 2009).

against each other and for the allegiance, hearts, and minds of the Filipino people. The NDFP asserts that "the people's revolutionary government has its own legal and judicial system," including its own constitutional framework, which is opposed to that of the GRP. On the ground, this NDFP assertion is to be made along the line of recent Communist Party of the Philippines (CPP) directives to its New People's Army (NPA) "to build relatively stable base areas" by "suppressing and driving away the oppressors and exploiters and dismantling the reactionary organs of political power over extensive areas" in the countryside. Note that the latter directive is not just to "shadow" and compete with but no less than "dismantle" the official village and municipal government units — so that these can be effectively replaced by revolutionary organs of political power.

This different kind of "two-state" dynamic has all the makings of "an irresistible force meeting an immovable object," in other words, an increase in the level of violence, both revolutionary and counter-revolutionary, on top of an already established long-time absence of a ceasefire (unlike with the MILF). In this scenario of human insecurity, perhaps the best case scenario is for the warring parties to substantially adhere to human rights and international humanitarian law (IHL). After all, not only do they already have a substantive Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law (CARHRIHL),[16] but they also actually have as common frames of reference the International Bill of Rights and IHL (e.g., the Geneva Conventions and their Protocols). And these common frames of reference are found in their respective, even if opposing, constitutional frameworks. The *minimum* constitutional challenge in the GRP-NDFP case, therefore, is to show better adherence in practice to those common frames of reference of human rights and IHL, and to make the most of this common ground by building on it: first, to build more of much needed confidence with each other, and second, to possibly build a *rights-based* substantive agenda for socio-economic, political and constitutional reforms — whether inside *or outside* the negotiations. Now, if we can only find the political will to address all these constitutional challenges.

Thank you.

16. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, Mar. 16, 1998.