

# Postscript to the Supreme Court MOA-AD Judgment: No Other Way but to Move Forward

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## I. INTRODUCTION

The recent Supreme Court judgment in the *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP) (MOA-AD Case)*<sup>1</sup> will be remembered as one of the most controversial cases in Philippine constitutional jurisprudence.

Peace advocates who have judiciously monitored the GRP-MILF peace negotiations will be better advised to examine more closely the implications of the judgment despite the tremendous frustration they experienced after the Supreme Court aborted the signing of the Memorandum of Agreement on the Ancestral Domain (MOA-AD),<sup>2</sup> and eventually declared it as unconstitutional.

In light of the objective of this Symposium to see the peace process move forward, I would like to pose the following fundamental questions which could clarify the implications of the judgment for the peace process:

- a) Did the judgment bar future peace negotiations?
- b) What guidelines have been set by the Supreme Court for purposes of future peace negotiations?

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1. *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, 568 SCRA 402 (2008) [hereinafter MOA-AD case].
2. *Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001*, Aug. 5, 2008 [hereinafter MOA-AD].

- c) Are the principles contained in the MOA-AD capable of re-affirmation in some other form in the course of peace negotiations?

## II. FUTURE PEACE NEGOTIATIONS

The decision of the Court to proceed with entertaining the full ventilation of procedural and substantive issues, through the exercise of the power of judicial review over acts of the Executive in the conduct of peace negotiations, is a case of first impression. One legal scholar points out the predicament that domestic courts would grapple with in relation to an inquiry into a peace agreement:

Domestic courts, too, often end up examining the political and legal question at the heart of the agreement .... To be sure, in many situations the role of courts and tribunals will be marginal to an agreement's success or failure: courts and tribunals are likely to be ineffective in sustaining an agreement in the face of fundamental and violent dissenter. However, marginal relevance is not the same as irrelevance. Courts and tribunals have the capacity to extend and develop the agreement's meaning where they find it to be part of the legal framework. More negatively, they have the capacity to terminate the operation of an agreement even in the face of political chances to sustain it.<sup>3</sup>

The Court acknowledged that the petitions before it were not confined to the terms and provisions of the MOA-AD, but to other on-going and future negotiations and agreements necessary for its realization. This was an occasion for the Court to lay down a framework for the different government negotiating panels.<sup>4</sup>

It is worth emphasizing that the majority of the Court feared that surely the MOA-AD can be renegotiated or another will be drawn-up, prompting the Court to decide on substantive matters aside from the purely procedural concern.

In closing its discussion of the issues, the Court expressed with caution that

[t]he sovereign people may, if it so desired, go to the extent of giving up a portion of its own territory to the Moros for the sake of peace, for it can change the Constitution in any way it wants, so long as the

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3. Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 AM. J. INT'L L. 373, 388 (2006).

4. Another Government Negotiating Panel exists for purposes of peace talks with the Communist Party of the Philippines/New People's Army/National Democratic Front.

change is not inconsistent with what, in international law, is known as *Jus Cogens*.<sup>5</sup>

This pronouncement stands as a retort to the petitioners' view that any change in the Constitution as a consequence of the peace negotiations is unthinkable or impossible. The doors leading to charter change to accommodate a negotiated political settlement were definitely not closed by the Court.

### III. GUIDELINES FOR NEGOTIATORS

In an attempt to set guidelines for GRP peace negotiators, the Court reviewed the extent of the powers and mandate of the President in the conduct of peace negotiations through her Chief Executive function and in her capacity as Commander-in-Chief of all the armed forces.

The Court did not invalidate the existing executive issuances outlining the mandate of the GRP Panels negotiating with various organized armed groups.

Executive Order No. 125 of 1993<sup>6</sup> and Executive Order No. 3 of 2001<sup>7</sup> (E.O. No. 3) recognize that the comprehensive peace process may require administrative action, new legislation or even constitutional amendments.

However, the judgment pointed out that E.O. No. 3 requires not just the conduct of plebiscite but regular dialogues with the National Peace Forum and other partners. It is unfortunate that the Court failed to give sufficient weight to the 112 or so consultations that the GRP Panel secretariat submitted for consideration. A serious and incisive examination of the documented consultative fora, resolutions of local government units, and position papers, reveals consistency with E.O. No. 3.

On the other hand, the Court admitted that it may not require the Presidential Adviser on the Peace Process to conduct consultation in a particular way or manner but may require him to comply with the law and discharge the functions within the authority granted by the President. The threshold of a constitutionally compliant consultative process, however, is not clearly defined in the judgment. This is where peace negotiators and advocates may contribute in crystallizing the limits of compliance with the

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5. MOA-AD case, 562 SCRA at 518.
  6. Office of the President, Defining the Approach and Administrative Structure for Government's Comprehensive Peace Efforts, Executive Order No. 125 (Sep. 15, 1993).
  7. Office of the President, Defining Policy and Administrative Structure: For Government's Comprehensive Peace Efforts, Executive Order No. 3 (Feb. 28, 2001).

corresponding respect for the integrity of the confidential character of crucial stages of peace negotiations.

#### IV. REAFFIRMATION OF THE MOA-AD PRINCIPLES

The GRP Panel prayed before the Court that there was no need to inquire into the constitutionality of the MOA-AD on account of its non-self-executing character, as it will be effective only upon the signing of the Comprehensive Compact as the GRP and MILF Panels intended in the following questioned provision: “The Parties agree that the mechanisms and modalities for the actual implementation of this MOA-AD shall be spelt out in the Comprehensive Compact to mutually take such steps to enable it to occur effectively.”<sup>8</sup>

Any provisions of the MOA-AD requiring amendments to the existing legal framework shall come into force upon signing of the Comprehensive Compact and upon effecting the necessary changes to the legal framework with due regard to the non derogation of prior agreements and within the stipulated time frame to be contained in the Comprehensive Compact.<sup>9</sup>

It is of interest to note that there is unanimity among the members of the Court, including some dissenters, that the MOA-AD cannot all be accommodated under the present Constitution and laws. However, the Court differed from the GRP Panel in its interpretation of the commitment to amend the existing legal framework in that the Court concluded that the commitment of the GRP Panel constituted a guarantee and, in fact, encroached upon the constituent powers of the Legislature, a co-equal branch of the government.

I consider the interpretations made by the Court on various provisions of the MOA-AD as having been derived from domestic and international case law with marginal application to the unique characteristics and context of the MOA-AD.

Notwithstanding these interpretations, it is my considered view that these provisions are capable of resurrecting in the course of future peace negotiations in light of the earlier discussion that the Court did not discount the possibility that the sovereign people may go to the extent of changing the fundamental law in any way it wants.

#### V. CONCLUDING OBSERVATIONS

The judgment of the Court was premised on three assumptions:

- a) The MOA-AD is akin to an ordinary contract in civil law.

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8. MOA-AD case, 562 SCRA at 453 (citing MOA-AD, ¶ 7 of Governance).

9. MOA-AD, ¶ 7 of Governance.

- b) The Executive Orders and Memorandum of Instructions are valid.
- c) The inference that a State has been created by the MOA-AD.
- d) It bears emphasizing that the contract theory in civil law may not necessarily apply to peace agreements as experienced in most peace negotiations. A peace agreement is *sui generis* in character — a class by itself.<sup>10</sup>

The Court recognized that proposals to amend existing laws and the Constitution can be made arising out of peace negotiations, including the possibility of new arrangements with certain groups or communities presently engaged in armed conflict with the Philippine Government, provided the appropriate constitutional processes are followed. This, at least, gives the nation hope to realize a renegotiated peace process. Meanwhile, the political, economic and social costs of the aborted signing of the MOA-AD require decisive action to avert escalation of violence on the ground.

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10. Bell, *supra* note 2, at 378. She argues that the presence of non-state signatories tends to take a peace agreement outside international legal definitions of “treaty” or “international agreement,” while the presence of multiple state parties tends to make them difficult to analyze as domestic legal documents.