Government-Moro Peace Negotiation: 
Is ‘Earned Sovereignty’ Plausible or Possible in Islam?

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Introduction

My presentation revisits why Mindanao at once convulsed under a double-sided movement for Moro self-determination. As matters had come to a head with the aborted signing of the Memorandum of Agreement on Ancestral Domain scheduled on August 5, 2008 in Kuala Lumpur, most agreed that the peace talks was done with. As a result, belief grew within the Moro revolutionary fronts in which the political and military segments wage for control – of what has become known as ‘the peace process.’ The Bangsamoro people’s collective demand was in the compact rights emanating from the regime of Home Rule framed around the Tripoli Agreement on Peace of 2001. Government has had to contend with its own republican ideology that harps on the constitutional issue, however for domestic order. This paper draws on a minimalist restatement of classical theory of ‘treaty’ device in Islam nuanced on the Government-Moro Islamic Liberation Front’s peace negotiation for governance. The author seeks to handle the intractable peace process through actual experiences but will remain rhetorical unless the Comprehensive Compact is completely negotiated.

Negotiability of Moro Political Status

Is the future political status of the Bangsamoro people negotiable? Absolutely no power can foreclose and agree to negotiate what it considers as a condition of its autonomous existence. Thus a balance between the right to self-determination and full autonomous existence is reflected in the working drafts and the consensus points of the Government-Moro peace negotiations. On the Moro side, its
peace premise is that the progressive resolution of the conflict between the Government and Moros demands a closure to the ambiguity of the associative ties that characterize the totality of relationships between the Bangsamoro people and the rest of the Philippine body politic. Government’s negotiating position telescopes a work in progress—something entirely “a new formula”—and may work a change in the relatively autonomous arrangements of the country within a legal framework.

Negotiability sets the measures of what it is acceptable; it is true disputes over fundamentally contested concepts cannot be brought to closure by means of a definition. The memorandum of agreement on ancestral domain is a ‘treaty’ device which provides a framework for later, and more detailed ‘associative” ties and tiers for compact. But it lays down the barest bottom line negotiating position of the MILF to create the conditions in which negotiation could progress. Still, the general framework for the resumption of the Government-MILF Peace Talks based on principles and guidelines of conduct and action recognizes public reason.

**The security aspect:**

- Peaceful resolution must involve consultation with the Bangsamoro people.
- Peace talks must be free of any imposition in order to provide chances of success.
- Peace process must open new formulas to permanently respond to the aspirations of the Bangsamoro people for freedom.

**The rehabilitation aspect:**

- Observance of international humanitarian law and respect for internationally recognized human rights instruments.
- Protection of evacuees and displaced persons in the conduct of their relations.
• Reinforcement of the Bangsamoro people’s fundamental right to determine their own future and political status.

The ancestral domain aspect:
• Addressing the humanitarian and economic needs of the Bangsamoro people.
• Preservation of Bangsamoro social and cultural heritage and inherent rights over their ancestral domain.
• Discussion of four strands of the ancestral domain: concept, territory, resources, and governance.

The ordering of political values is crucial to avoid a stand-off. And so, both Parties have accepted the incremental characteristics of the peace process and the irreversibility of past agreements recognizing the principle of non derogation of prior agreements. Generally its facilitation approach is constructivist yet flexible in creative options based on craftsmanship in actual conflict resolution. The litigation of the MOA-AD is discussed in the main body of the paper as a case law because a framework ‘treaty’ device may require national legislation. It is now clear that our negotiation stratagem works to clarify the common misconception that “ratification” is a constitutional process. The ‘consent to be bound’ carried out at ‘international plane’ is quite a different process is a very interesting story for students of diplomacy and international relations.

Balancing between Sovereignty and Self Determination
Conceptual principles are helpful in understanding restorative justice to deal with the Moro collective rights and their political status of deprivation of foundational shared or ‘earned’ sovereign authority. Towards the closing years of the twentieth century, fate intervened when the United States tangled with Spain over the Philippine Islands and annexed the Moro population without assurance that a majority of our people desired it. The italicized “status” begs the question: Was the American annexation of Moro homeland to the Philippine republic
legal and moral? (This is too big a matter to discuss at this point in any detail, implied in extending our conception of political justice from the domestic case of plebiscitary consent).

In reality, it remains the ‘problematic’ of governance. The emergent approach after the end of the protectorate era (trusteeship arrangement) leaves room for resolving violent tension associated with sovereignty-based conflicts. The MOA-AD was found contrary to the Constitution because the Justices of the Supreme Court failed to appreciate our associative new formulation of shared authority leading to federative or associative arrangements. Owing perhaps to its resemblance to the category of associated free states or compact states under ‘colonial’ status of overseas territories. These are negotiated forms of political dependency that assumed transition into sovereign state. In the formulation of the MOA-AD with earned/shared sovereignty the particular moment opens the meaning of sovereignty to debate or to be more precise negotiability. No outward political form (Asad, 2001) is herein given concerning the conceptual basis of authority in Islam as possible ‘to write’ in the ‘basic law’ (al-dustur) of the BJE as opposed to the Lockean constitutional canon adopted by the Philippines. As a problematic, it is only asked for plausible explanation of the classical theory of amruhum shura (‘consult on the matter’) in order to direct us to the social constructive ideal.

National liberation and political independence are assumed to coincide. Underlying debates on changing political and economic status raises the key issue of relationships with the “metropole” and with other regional or local units. Powerful reasons exist for continuing political ties with “Imperial Manila” but the MOA-AD approach pursues a path for long-term resolution of the Mindanao conflict. Shared sovereign authority under dar-ul sulh as negotiated, if handled constructively with a cooling off—transition period—during which central authority and our aggrieved people has a defined legal preclusive effect and transitive process function to halt political violence. Commentators on international relations such as James Hooper and Paul Williams (2004) say “interest in out-
right independence is substantially lessened and in bringing about an end to the conflict through some form of perpetual autonomy or self-governance.”

As a backdrop if we think rationally out of the maddening reactive anti-Moro sentiments it will make us reflect of the ‘triumph of diplomacy’ in our era of postmodern states. General information and news analysis generated by opinion-editorials are hardly balanced media coverage of the GRP-MILF peace process. This catch phrase is taken from the theme of a book on how the Moro rulers of Ranaw, the Magindanaw sultanate and the Sulu sultanate had survived the era of treaty-making with Spain (an imperial power) and Holland (a commercial power) and the United States up to 1916, when President Woodrow Wilson enunciated seminal ideas of the right to self-determination.

The most important thread running through dispassionate arguments for the creation of juridical and institutional structure is the right to self-determination. But there is no occasion to speak of Balkanization of the ‘ungovernable’ part of the border region of Mindanao and the Sulu archipelago. Representation is the heart of the issue. What is represented draws various arguments from discursive strategies: sovereignty/ self-determination or sovereignty/ intervention boundaries. Autonomous systems of power to found the problem affecting the status of the Bangsamoro people from the start (original position) factored in two international treaties. We agree with Anaya (1996, at 4) is that international law continues to develop to support indigenous peoples’ demands. One was the Treaty of Paris of 1898 in which Spain ceded the Philippine Islands to the United States annexing the Moro homeland, and the other was the Treaty of Paris of 1919. The first was very much part of the disintegration of the “empire” (caliphate in 1924) and the second was the impetus for power shifting above the “state” level.

Contemporaneous with the ideation of the right to self-determination, there was reluctance in the American public to relinquish their ‘sovereignty’ to the construction of the League. This gave reason for the United States to retain the Philippine Islands as an “unincorporated territory” under the doctrine of
warship and trusteeship. But it was the ideologies of the Malolos Congress that proffered the first associative ties between the Filipinos and the Moros. With the mandate system, America governed the Moro people separately under the Moro Province until 1916, when it “incorporated” into the mercantilist 1935 Commonwealth of the Philippines without their plebiscitary consent. Now the Country (Spain’s Las Islas Filipinas possession) has just awakened to the depth of the Bangsamoro legitimate grievances. Instead of killing the ideas, the ideologies and the cause (or *sabab*) that are embodied in the Memorandum of Agreement on Ancestral Domain, the representatives of Government must face up to the agreed text as Statecraft. It vindicates the JUSTNESS of the ORIGINAL POSITION to fix it in constitutional construct. Traditional Moro negri (statehood) ‘earned sovereignty’ is encapsulated by the Republic in its present form and structure as an autonomous entity presently in existence before the family of nations since 1946.

Spokespersons for that sovereign state called the Republic of the Philippines (GRP) configure their constituencies into a political community. In a formal position paper presented at the Exploratory peace talks affecting the Ancestral Domain strand on territory the Moro Islamic Liberation Front (MILF) negotiating panel a radically novel discursive move to problematize the right to self-determination. What is current status of the “territorial integrity” of the Philippines? Such an assumption neglects a number of contested constitutional issues before the negotiating table. When reduced to geographic maps with proper technical coordinates, the fundamental question we formally raised at the GRP-MILF Talks are as follows:

1. Is the present national territorial delimitation based on the Treaty of Paris of 10 December 1898 as corrected by the Treaty of Washington of 7 November 1900 and the Treaty between the United States and England on 2 January 1930? Or,

2. Is it the current technical description of the archipelago doctrine based on R.A. 3046 of 1961, as amended by R.A. 5446 of 1968 as a system of
straight baselines, its negotiating position on boundary delimitations under the United Nations Law of the Sea Convention? An act of statesmanship is to ‘write sovereignty’ in terms of the ‘associative ties’ between the Central authority and the Bangsamoro juridical entity envisaged in the initialed Memorandum of Agreement on Ancestral Domain (shorthand MOA-AD). As it was presented, no serious negotiated political settlement of the Bangsamoro problem could proceed from the Constitution because it was a narrow framework for negotiation. Yet in the words of the late Salamat Hashim: “The most civilized and practical way to solve the Bangsamoro Problem is through a negotiated political settlement of this conflict.” As a discursive strategy, we cannot argue as if the meaning of sovereignty were stable; for, in reality, not one but various forms of sovereign statehood exist.

A broad political context for the Moro armed struggle: justice should be not confused with legitimacy for workable arrangements. There is a truncated understanding of sovereignty when 12 June 1898 was fixed by law as an episodic event, following the inauguration of Philippine independence on 4 July 1946. Article 1 of Title I of the Malolos Constitution succinctly reads: “The political association of all the Filipinos constitutes a nation, whose state is called the Philippine Republic.” At that stage of the revolutionary struggle for the Bangsamoro homeland was not a part of the whole Country, for as a matter of historical narrative the Aguinaldo Republic invited the Sultan of Sulu and the Sultan of Mag-indanaw to federate with it.

Our MOA-AD concepts and principles put into question the foundational meanings of the Philippine Republic which the Malolos Congress employed. “What matters for us present generation of patriots,” we begun to articulate, after opposition to the MOA-AD mounted in the press that “Drilon’s half-a-million-worth of PDI ADS highlights the absolute necessity for a change in the first principles of the unitary system.” I went on record in Open Letter to ask rhetorically: “How do we, then, fit inter-subjective understandings of ‘statehood’? Former senate president Frank Drilon, at least, seriously confronts the arenas of
debate over the MOA-AD, but why does he not concede to explore the course of constitutionalism beyond the status quo of the existing constitutional order?” It is with my challenge in this discursive summation that the line is drawn:

“That is unfortunate, because, what is placed before the Supreme Court is a new “elegant formula” of negotiability to balance between state sovereign authority and the right to self determination.”

“We need to examine the MOA-AD on the foundation of the formal division of sovereignty that favors “state rights” that have inhered in the Bangsamoro people, whose ancestral homeland was “illegally and immorally annexed” to the Republic without their plebiscitary consent. Peace negotiations are said to be “the war after the war.” Here, too, there is a subtle but in-depth way of looking at what amount of central authority in point of fact is compatible with “what is worth dying for” in the eyes of majority of Bangsamoro in the contemporary politics of identity. This is what the MILF-GRP negotiation process is all about: to determine the extent and limits of each side’s commitments. Clearly the premise of peace with your Muslim brothers under the MOA-AD precisely does not endanger but entrench the Country’s sovereignty. The MOA-AD achieves, rather than contemplates the use of naked coercive force, the desirable levers of division, allocation and distribution of powers; in other words, shared and residuary authorities for the Bangsamoro people and the rest of the Filipino people. All I can advance for now as an explanatory note is that the “general welfare clause” of the Philippine Constitution to match the principle of maslaha wal mursalah in Islamic constitutionalism is a catch all framework to accommodate “a medley of associative ties and tiers.” [Open Letter, Mindanews 24 August 2008]

I have only mentioned in passing that the turn-of-twentieth-century American interventionist foreign policy in the Pacific region applied ‘regime change’ to
the Philippine Islands. Some say there is no need to conceive toleration for non-liberal peoples. Pressing ‘dismemberment’ is not in our agenda of current peace talks; but we have embraced the “undigested” phrase “self-determination.” Wilsonian aggregation of identity—a race or a culture, a territorial area or a community—into a singular unit congruent with national boarders has remained incomplete. At the dawn of the twenty-first century, ethnic-sorting out has not quite produced a stable territorial configuration but an ‘ungovernable’ region in the southern Philippines.

**Why Truce, not Confrontation?**

What precisely is the position of stalemated forces at the time of the truce between the Government and Moros? How can there be a policy of appeasement when there is no shortage of broad revolutionary sympathy from the Muslim community as a mass base? There being no sign of imminent military victory, thus the logic of stalemate points to a compromise. The MOA-AD agreed text account of legitimacy does not depend on individual consent (i.e. obedience) but public consent. Acceptance of this conceptualization sweeps away a host of which issues at negotiating side is winning (or losing) at abstract level.

A political community is an aggregation of peoples unified, at least in part, by being governed by the same government to count on priority of consent to claims of legitimacy from society. When commentators caution not to confuse justice with legitimacy, it means no more than “an international agreement about the nature of workable arrangements” implying the acceptance of the negotiated framework. It is a useful explanation of transformations to achieve “the permissible aims and methods” for foreign policy. But agreement may also develop in other ways that do not create rights and obligations. For example, internally the crisis of Moros originated in the disintegration of Muslim political entities; once placed at a disadvantage, it has resulted in their socio-economic stagnation. The external observer status of the Bangsamoro people in the Organization of Islamic Countries (OIC) is the ‘acceptance’ component of legitimacy. Apart from
entry into a new arena of struggle, Islamic diplomacy marks the OIC as a site of diplomatic contest between GRP and MNLF. The OIC’s collective right as the ‘legitimate interpretive’ community for Islam was wont to endorse the MOA-AD immanent from the regime of *dar-ul-sulh* (or territory under peace agreement) by virtue of the Terms of Reference.

Considerations of the construction of state sovereignty are enmeshed in as systems of social relations. It makes conceivable to disentangle concepts like state and sovereignty as analytical constructs to comprehend the theoretical possibility of non-sovereign territorial states (Taiwan) or non-territorial ones (Palestine). Once we conceptualize these terms “state sovereignty” and “sovereign authority” not as single ideal but distinct associative ties and tiers. In this, it enables us to consider entities (under peace agreement) as geographically contained structure whose agent (Bangsamoro juridical entity) embodied in the “social contract” begins to exercise (provisional) claims of authority or ‘earned’ sovereignty. Even though we employ the terms “internal” and “external” sovereignty we can refer to the state and territorial state interchangeably, and to encompass in the social construction of both distinct categories.

The term ‘framework treaty’ is a relatively recent invention. It is no more than a description of a type of agreement which provide a framework for later, more detailed, treaties (usually called protocols). It can also be national legislation, which elaborates the principles declared in the framework treaty like the Tripoli Agreement of 1976. To shift now the terms of negotiation and diplomatic discourse, we need some working definition.

- In Islamic political theory, the ‘land of unbelief’ is subdivided into the land of *harb* (war) and the land of *sulh* (truce). But a compromise can exist in that land under truce: As such Muslims do not wage war or instigate violence or resort to armed means, where a compact is concluded by which a legal regime can develop into a *dar-ul-mua’hada* – a territory under compact.
- In the Islamist diplomatic instrument the Moro negotiating panel prof-
ferred a regime of transition covenant to negotiate a political settlement for *dar-ul-sulh* – a territory under truce. Such in-built organizing devise intersects where there is sometimes a need for provisions by which a legal regime created by the agreement can develop. This is consistent with how things work in diplomatic practice.

- In the Memorandum of agreement on ancestral land, the agreed text states: The entrenchment of compact rights “emanating from the regime of ‘territory under compact’ and ‘territory under peace agreement’ partake (s) the nature of a treaty device.”

The true spirit and intent of writing this part of the MOA-AD is to correct the historical injustices of the status quo for the purpose of democratic peace. Beyond the existing constitutional structure based on the organizing principles of Philippine unitary system, much more will have to be asked. Whatever be the banner: freedom, autonomy, or national liberation there is need of a complete calling in question about the justness of the original position. The de facto negotiated political settlement can only be acceptable until political justice is done.

The issue seems perfect for the contemporary Islamic movement that generated the radical thinking of the 1960s on to the mid-1970s. Around this time the jihadist path was veering into the mood of separatist agitation propaganda overlaid with political commitment between unbelief and Islam. To resolve the tension underlying the ‘*basics and constants*’ The inclusion of the above conceptual framework as a Term of Reference (TOR) provides a context within which the associative ties may be established for just peace as settlement. Thinking of the “*territory under peace agreement,*” in a way of re-territorialization, is to entrench the Bangsamoro Juridical Entity (BJE) as a sub-state embracing its land base and internal territorial waters.

Here is the context in which the negotiators and interlocutors are exercised, so to speak, thinking ‘outside the box’. The fact of reasonable pluralism is parallel to the diversity among reasonable peoples. Originally, the Bangsamoro homeland and historic territory embraced the Mindanao-Sulu-Palawan geographic
region. Territory embraced under the BJE Substate are: the area covered by the present ARMM; a number of municipalities which voted to be with ARMM in a plebiscite in 2001 but did become part of the ARMM; plus another 735 villages whose residents will be asked whether they wish to be part of the territory in a plebiscite to be held 12 months upon the signing of the MOA-AD. The delimitations are contained in agreed Categories (A, B, C) in the MOA-AD in maps annexed. Another category is proposed to be special zone of intervention; after 25 years a referendum will be conducted in these geographic areas. Apart from demographic ploy used to wiggle plebiscitary results, in past referendums legislative gerrymandering of the conflict-affected areas (CAA) made possible to alter the Moro mandate to demand for Home Rule. The degree of human security has become vital to the geographic areas now designated as Special Intervention Areas with a re-characterization: from sovereignty as control to sovereignty as shared responsibility to protect.

The Putrajaya Facilitation

I have conveniently named here the procedural steps with third party negotiation track as the “Putrajaya Facilitation.” While the Putrajaya process has appeared to be on track, nothing could be further from the truth. That GRP made this about-face is convenient for reasons for compliance to the Philippine Supreme Court’s temporary restraining order (TRO). This is unprecedented especially because GRP and MILF had initialed the MOA-AD agreed text along with the Malaysian facilitator. The consent to be bound can be the most significant act which the GRP could have done in consonant with the Vienna version (1969) in diplomatic practice (Article 11). Like so much the Dayton version of General Framework for Peace in Bosnia (1995) in the wake of TRO just to avoid signature. But initialing arrangement in the Dayton version is unique in that it contained the phrase “in their present form … thus establishing their entry into force.” During the oral argument before the Court, the Solicitor General manifested that the Government will no longer sign the MOA-AD “in the present
form” and later added “in any other.” For diplomats and students of diplomacy the interesting question is, “Does initialing of a treaty constitute signature?”

But the outcome of calamity in Government-Moro armed conflict in place of primacy of the peace process was triggered by episodes that had driven policy decisions to the tipping point. Settler elites and local officials precipitated it with a petition with the Supreme Court to restraint the signing the MOA-AD on August 5, 2008 in Kuala Lumpur where important officials, envoys and guests were invited. Against this backdrop, it is not hard to understand why the MILF chief negotiating panel Mohagher Iqbal had not hesitated to declare the MOA-AD as a “done deal.”

The proposal for Bangsamoro Juridical Entity (for brevity, BJE) faced three principal grounds of criticism. First, and dealt with at once, was the complaint that there was no consultation hence Government infringed the right to information. Of the other two grounds: one argument ‘dismemberment’ of the Republic was raised by Opposition solons with presidential and senatorial ambitions that intervened in the case. Resistance to an imagined ‘Islamic state’ was not confined to them; the Arroyo presidency found the going tough among business and church interests. But another ground that placated the most objectors—including the Left and media opinion-editorials—was premised on utilizing the BJE as the vehicle for ‘extension of term limits’ via charter change.

Surely, the Justices of the Supreme Court know best why the Moro Islamic Liberation (MILF) was not impleaded in the TRO. The unstated premise is that the Court is a nonmajoritarian institution that can overstep it bounds, hence the accompanying plea for judicial restraint and less intrusive government under the contractual clause. Why, then, should procedure give way to permit debates over the substantive? Jurists and lawyers can read the MILF chief negotiator’s remark that “MOA-AD is a done deal” would become, sooner or later, the subject of judicial debate involving high stakes including issues of political morality. This reasoning does not hide the crucial fact that both GRP and MILF negotiating panels may have plausible arguments for their positions. Jurisprudential growth
areas such as theories resting the legitimacy of *travaux* in treaty law (and practice) and the malleability of the living constitution (and judicial activism) are not perplexing at all or a grave cause for alarm.

A former Senate president and Senators with open presidential ambitions—and with roles in mind as precedent setting—have supplied arguments that put the blame on respondent Government peace negotiators for “endangering the country’s sovereignty.” There is a deep distrust prompting the Court to ask: Are the objections to MOA not based on “fear of the unknown” as many details will have to be further discussed for inclusion in the Comprehensive Compact? What is objectionable to the MOA when it appears to be conditioned on the amendment of the Constitution?” The embodiment of progressive counterargument does not foreclose “the re-conceptualization of sovereignty to include multiple loci of authority.” Despite the timely intervention of the Muslim Legal Assistance Foundation (MUSLAF) and the Consortium of Bangsamoro Civil Society (CBCS) and Bangsamoro Women Solidarity Forum (BWSF), no Moro integral voice was heard from lawyer volunteers to argue how the ‘treaty device’ is shaped by and in turn could shape or open ‘new formulas’ and ‘free of any imposition’ because it remains to be concluded in the Comprehensive Compact.

The MOA-AD has become a symbol of continuities and discontinuities in the Government-Moro peace negotiations, and for radical context in which rival conceptions of injustice and violence. The revolutionary leadership itself is not out of touch with realities on the ground but it was beyond the MILF that the intellectuals and personal influences (ignored in most accounts) are important here. So I wrote in my commentary:

“People with Bangsamoro sympathies watched the events but tempered expressing nationalist hostility. Yet the Islamist ascendancy spawned views of survival as an ethnic political unit, reminiscent of a Christian exhortation of ‘a sea of settlers’ marching onward Estrada’s call to an “all out-war” in 2001 accompanied by sloganeering ‘Muslim Free Mindanao.’ Per-
haps this time both Government and the Opposition could not anticipate the seismic upheaval in public opinion that catapulted the MILF Home Rule project into national politics and diplomatic relations. Separatist sentiments were not daunted but heaped on the Solicitor General’s abandonment of signature ‘in its present form’ or ‘in any form’ now marked by the stigma of betrayal before the hall of justice. Control and direction of the means of reactionary response had become important in view of the common frustrations. Of far greater impact, the ‘guns of August’ produced immediate and predictable violence by two revolutionary hot-heads. Neither side seems to have gotten the upper hand of the other in the continuing fighting.”

Now whether that disconnectedness prevails has became the focus of attention of the “friends” of the peace process in international community. Ironically it was politics of law in the Manila metropolis that has sealed the fate of the MOA-AD and BJE. But along side the story of the ambitions of the Opposition political clans and the Church leaders and the Business-taking interests showed their true colors.

This point is reinforced by consideration of local key figures and settler politicians in Mindanao. For over two decades now the southern part of the Philippines was merged into a semi-autonomous Muslim region in Mindanao established under the 1987 Constitution. The march of the new region for Home Rule was tested under a democratic process after the signing of Jakarta Accord of 1996 with the MNLF. Nowhere was there a level of support from the Christian settler whose opposition still has demonstrated anti-Moro bias legacy of supine ‘colon mentality’ in past plebiscites. Although the Government-Moro peace talks had officially concluded, Mindanao still convulsed from the lack or incomplete Government implementation of the Final Peace Agreement of 1996. The leading figures of the Moro nationalist movement proved not just wanting in presenting their case to the electorate but as the political expression of Bangsamoro peo-
ple’s struggle for self-determination. In many parts of Mindanao opposition from Christian settlers was total during the referendum for creation of the ARRM.

**Grounding ‘Earned Sovereignty’**

There is a basic contradiction in seizing upon self-determination as the major principle behind commonwealth aspiration. Whereas RSD marches under the flag of *freedom*, commonwealth marches under the banner of *equality*. “Although they may seem to go arm in arm, Alexis de Tocqueville noted long ago that freedom and equality will always be at odds with each other” (Rogers, 1987). This equation appears in the paragraph 1 on the strand on Governance:

> “The recognition and peaceful resolution of the conflict must involve consultations with the Bangsamoro people free of any imposition in order to provide chances of success and open new formulas that permanently respond to the aspirations of the Bangsamoro people [for freedom].”

Reading this, President Gloria Arroyo gave instruction to her chief negotiator Rodolfo Garcia to negotiate for its deletion. Mohagher Iqbal picked up on this ‘word-for-word wigginess’ about *freedom* insisting: it is a faithful version of the paragraph lifted from the 2001 Tripoli Agreement of Peace. Impasse set it again; hardball playing now surfaced into affective positional contest of will. Datu Osman bin Abdul Razak, our facilitator, had to keep the conflict constructive by altering the way that the panels viewed their situation. To invent creative options, par. 1 and par. 7 on Governance were correlated to par. 2 (d) on Territory. Reframing meant changes to the “legal framework” with the Government taking up the lead role of pushing people in one direction or another. Constitutional issues were to be taken up in the Comprehensive Compact stage of negotiation.

I have argued that ‘if politics is not pathology’ then its ancestry is *thymos*, spiritedness. What is clear is freedom translates to as a sense of self-worth or delusions about ‘democracy subverting peace and freedom’. The thread running
through the diverse arguments are claims to sovereignty. Thus we need to uncover and harness the substantive content of political morality. Fukuyama (1992) argues that we may talk about politics in “a world of thymotic moral selves” as the seat of resistance to tyranny and oppression. Realism has to generalize in terms of theory from the talk of ontology. In Plato’s Republic he spoke of thymos, or “spiritedness.” One schooled in Ibn Khaldun discourse can say the concept of mar’wa (Arabic, esteem) and mar’tabat (Arabic, pride) are akin to thymotic worth. Making a claim public interest narrows down to components such as the “people” for popular consultation. Construction of the inside (domestic order) is authority to fix meaning and identity. What is represented, MOA-AD? What if associative representation fails, BJE? Not grounded in such assumptions are the formation and the logic of self-determination. “How is ‘earned sovereignty’ possible” is asked to trace the genealogy of Moro sovereign authority to the suzerainty of the Moro sultanates.

People feel a sense of pride when their worth is recognized. Decolonization remains fundamentally a question of dignity, despite the formal close of that era. The English word ‘dignity’ refers to a person’s worth; “in-dignation” arises when that self-worth is offended. The notion of qatil is played out in the field by two commanders as a function of the armed struggle. Socrates speaks of thymos from the outside. Its opposite is isothymia, the desire to be recognized as ‘the equal to the other’. This lends continuity to the foundational authority lodge with the Presidency for defense and foreign policy. The struggle for recognition enters our vocabulary in international relations. It is during times of crisis, when the ‘naturalness of the given order’ is shaken: this sovereignty effect emerges. Thinking this way, I believe, illustrates sovereignty/ intervention as social constructs. Demands for respect of human rights have stabilized normative benchmark for evaluating foreign policies. What now with the International Monitoring Team (IMT) as an exercise of human responsibility? What is to do about the current humanitarian crisis triggered by the Court decision and aborted signing of the MOA-AD? What about the responsibility to protect the people?
Dissatisfaction with conflict prevention has prompted the rise of a new type of nonstate actors. Attitudinal distrust, hatred and rage formed out of the doctrine of frustration in the context of *din-ul fitra* and *ulil'amr* (or authority for each interpretive locus of authority). By this, re-characterization involves thinking of *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties. I return again to the historical ancestry of the Muslim dominated provinces replaced by logic of representation to employ a constructivist analytical tool. The representational project has been a storied stony ground for “earned sovereignty” in contemporary political governance and international relations. The territory existed in Mindanao from 1903 to 1916 as a distinct juridical entity known as “the Moro Province.” At the inception of the American tutelage in democratic governance the Moros were defined under treaty-based rights or in respect of the native tribes as ‘jural relationships’ as dependent peoples under President McKinley’s instruction to the Philippine Commission. By 1913, the Moro problem so defined “as nothing more the administrative integration of the Moro population into the Filipino body politic” was to dominate as a major factor in foreign policy ‘referent’ to the question of the grant of Philippine independence in 1946.

Alongside Moro leaders who perceived independence under the unitary State growing contemporary political awareness made the doctrine of ‘jural’ relationships anachronistic leading to the Muslim Independence Manifesto of 1968. Absence of coherent plan for decolonization was overtaken by the declaration of martial in 1972. Once the MNLF with Nur Misuari at the helm looked at the separatist cause in a linear way and succeed until 1976, then, abandoned RSD in 1996 the assumption that everyone will seek it collapsed. During the 1980s the search for alternative political arrangement took a new turn from integration to *duaybangsa* with the complex arguments over future political status. With Salamat Hashim gathering the intellectuals and the religious leaders and selection of traditional leaders the identity birthright options for political change or alignment of advantage (and ethnicity) was tied by the MILF to remedial right
to redress specific legitimate grievances. The MILF new political ideological demand is less viewed as some bureaucratic, procedural steps that only exposed the Bangsamoro people to a cycle of abolition and re-cycled autonomy panacea. The MOA-AD advocacy is a deeply rooted substantial change in the pursuit entrenchment of remedial rights from the diversity of decolonization.

**Legitimacy Deficit over Lost Rights**

American institutions dealing with “non governing territories” is an important seminal policy consideration for territories. The basic legal and historical differences were based on federal court precedents: the “unincorporated” or intended to become states; and “incorporated territory” were not necessarily destined for statehood but option was not ruled out. Owing to the recent litigation of the MOA-AD oral arguments in the Supreme Court and the debates it generated retired Justice Vicente V. Mendoza made a comparison between the Commonwealth and the Bangsamoro juridical entity:

“It is indeed true that the BJE is not fully independent or sovereign and indeed it is dependent on the Philippine government for its external defense and only lacks foreign recognition, at least at the present time. Nonetheless it is a state during the Commonwealth period, which was not a part of the territory of the United States although subject to its sovereignty. As a state, it was a signatory to several treaties and international agreements, such as the Charter of the United Nations of January 1, 1942, and a participant in the several conferences such as that held in Bretton Woods, New Hampshire, on July 1-22, 1944, on the GATT.” [The Legal Significance of the MOA on Bangsamoro Ancestral Domain, lecture delivered at he College of Law, UP on 5 September 2008]

This theoretical distinction was ruled upon in a U. S. Supreme Court case, *Hooven & Allison Co. v. Evatt*,

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*Government-Moro peace Negotiation*

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Datu Michael O. Mastura

...the adoption of the 1935 Constitution prepared the way for the complete independence of the Philippines and the government organized under it had been given, in many aspects, by the United States “the status of an independent government which has been reflected in its relation as such with the outside world.” Similarly, the Supreme Court of the Philippines held in *Laurel v. Misa* that “the Commonwealth of the Philippines was a sovereign government although not absolute.” [Mendoza, id]

Quoting the preceding paragraphs in his separate opinion on the MOA-AD ruling Justice Antonio T. Carpio stressed: “Thus, once the MOA-Ad is signed, the MILF, as the acknowledged representative of the BJE, can exercise the rights of the BJE as a state.”

The search for some coherent legal underpinnings for judicial review the due process clause and the general welfare clause both function as guarantees to the powerless. Lockean canon rests on the assertion that the authority of magistrates was only to be exercised for ‘the good, preservation and peace of men in that society’ derived from natural law function. From Marshall’s juristic model of ‘dependent nations’ to the exercise of juridical rights over ‘Indian territory’, the realist decisions legitimated the law of nations by which indigenous peoples were deemed to possess no ‘territorial rights’ that states or monarchs were bound to respect. The law’s construction of indigenous peoples as ‘populations’ to be governed and integrated or assimilated into mainstream society lumped together the Moros and other native ‘inhabitants’ into ‘non-Christian tribes’ prevailed over earlier natural law notions. Realist reductive idioms represented the Moro ruler’s treaties and compacts as ‘incapable of creating rights and obligations’ even if they had ‘treaty-making capacity’ that satisfied doctrinal structure embedded in the international legal frameworks, norms and discourses.

What was placed before this Court is not an abuse of authority or an act repugnant to the Constitution: The Memorandum of Agreement on the Ancestral Domain Aspect of the GRP-MILF Tripoli Agreement on Peace of 2001 is a new
“elegant formula” of negotiability to balance between state sovereign authority and the right to self determination for freedom.

Deeply held assumptions via “vague” standards were adopted leading to compromises with facilitation to reconcile wide gaps and differences. Creative ambiguity often lies behind the grease on which progress in relations between states turns. Analysis of interest is logically interwoven with the discourse on politics that constructs it as a conflict between politics and religion and the forces of secular statecraft. Political reality makes sovereignty and self determination perform the referents for statehood. Certainly the empiricist decisions of the Court can be criticized on the construction of the Philippine unitary state as the ‘signifier of modernity’ arising from nationalism and exhibiting positivist interpretation of international law that has concretized the unjust annexation of the Bangsamoro ancestral homeland.

Legitimacy deficit can be traced lost rights of the Bangsamoro people and indigenous peoples are effects of deficit democracy. From Worcester case logic the legal and political battle for termination policy shifted toward Carino decision rule over ownership of land under native title that was not part of the public domain. The politics of law move a progressive direction when “the presumption is and ought to be against the government” and the Regalian doctrine was held “all theory and discourse.” But the MILF sees the contestation of language and meaning in relation to indigenous peoples’ “land” and “territories” rather problematic in respect of the relations of power and territorial control over resources. Such relations, historically, are defined in terms of capitalism and the sovereign state.

**Litigation of the MOA-AD**

Cast at the center of the controversy was, one, an agreement and, two, a party to it that is neither a state nor an international legal person that was not impleaded. Justice Tinga characterizes the role the ‘unimpleaded party’ as instance of cases that are “laden with international law underpinnings or analogies which
it may capitalize on to serve adverse epiphenomenal consequences.” It is worth noting in parenthesis that I have used such conception-laden clause in analytical constructs and ‘real’ entities to tell us most about any given event or derivative phenomenon. Chief Justice Puno asserts the MOA-AD is heavy-laden with self-executing components.

Yet no matter how events turn and twist the TOR of the MOA with the TRO upside down, critical legal theory could not open new formulas or nutshell versions of familiar problems. Given the all-or-nothing ponencia’s dicta,

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

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

We, therefore, cannot locate the BJE within borders of the orbit of the Philippine unitary mononational model that remains unanswered as a republican empirical case that avoids the very basic question, about who the Moro people are, and whom decides who they are. Thinking about sovereignty this way makes us reflect what Sir Ivor Jennings once said: “the people cannot decide until somebody decides who are the people” (1965, at 16).

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

The thrust of the majority opinion is that the MOA-AD is inconsistent with the Constitution and ARMM organic act and IPRA as presently worded. Contributing to such argument of Petitioners: powers granted to the BJE exceed those of local government and beyond those of the present ARMM. Relationship between the Central Government and the Bangsamoro juridical entity is associative characterized by shared authority and responsibility with a structure of governance based on executive, legislative, judicial and administrative institutions with defined powers and functions in the Comprehensive Compact. Above all they are opposed to the associative concept that links the different provisions of the MOA-AD. Already we see that the understanding of BJE is incomplete and is unlikely to be a firm one until outstanding issues are politically settled in the Comprehensive Compact.

**Typologies are simplifications.**

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

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

Secondly, the Court glossed over the significance of the key issue of ownership
and control in the context of the contract clause. Because underlying the domi-
nant conceptions of ancestral domain and territory vary from the IPRA, which
is based on ILO convention No. 169 with policy effects on national minorities,
women, and child labor, the arguments and discourse suffered from lack of con-
creteness. Justice Carpio outlines the MOA-AD into two features:

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

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

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

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

“The design of a constitution and its constitution-making process can play an important role in the political and governance transition. Constitution-making after conflict is an opportunity to create a common vision of the future of a state and a road map on how to get there. The constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate.” [Kirsti Samuels, Post-Conflict Peace-Building and Constitution-Making, 6 Chi. J. Int’l L. 663 (2006).]

Now it is arguable that the transition governance in recent years was the Freedom Constitution of 1986 that disrupted and ruptured the struggle to fix the meaning of the state – to write the state – in such a way as to constitute the republic in the 1987 Constitution. I have taken the view in terms of precedent that even if the reinstatement of New Caledonia in 1986 had significance for decolonization, it validates our thesis that this unitary State sovereignty can be (un)defined and (de)constructed as it should be constitutionally. More space is required to tackle the constitutional theory of the Puno Court on “compact of people” and the “nonderogability” of this social contract.

Nonetheless back to our narrative of craftsmanship there exist ways other than de-colonization (ended in 1969) and trust of nongoverning territories (ended in 1996) to connect people with correct associative or federative modality or protectorate status depending on dominant constitutive elements with practical consequences. Dean Callagan Aquino predicts the conceptual frame less restrictive because ‘association’ under international law is not a univocal concept [not one meaning only] ergo ‘associative status’ can be empirically sui generis [a class by itself]. Continuing, he comments that the proposed “BJE could have
been another variant to the already variegated forms of association: An association between a sovereign State, the Republic of the Philippines, and a political entity analogous to, but not quite (nor necessarily ‘on the road to’) a state.” [Quoted in Patricio Diaz, mindanews http://www.com/index2.php?]

I think it plain in jurisprudential rule of recognition that the plausibility of the theory of the MOA-AD cannot be grasped on the behavior of the named negotiating officials. Is our peace process an idle game of nonclosure and disclosure? What is thus left unstated is: Government-MILF panel of negotiators in trying to reach a compromise acted not on a single motive but from a combination of purposes. Some puzzles connected with the ‘expanded definition’ of neglect of duty and grave abuse of discretion are presupposed such that the BJIE is spoken of as if that associative relationship is efficacious enough to dismember this “strong” Republic. To grasp the ‘treaty’ framework anchored on the important distinction between concept (of associative ties) and conception of BJIE (as if associative tier) means factually the entity is stillborn. The two as if suppositions are very closely associated in trying to reach a compromise acted not on a single motive but from a combination of purposes.

Yet, in point of fact, the MOA-AD as crafted results in a reversal of the very notion of repugnancy – constitutional ‘irreformability’ of the system and military stalemate. Sociologist Randy David writes in his column Public Lives:

“[O]ne has to be blind not to recognize the powerful movement that the leaders of the Moro Islamic Liberation Front (MILF) have nurtured in the heart of Mindanao. They have succeeded in bringing the concept of a Bangsamoro homeland to a higher stage. They speak for the Bangsamoro people because they have shown that they can do without any significant challenge from anyone. They dare to negotiate because they have proven that they can wage a determined war if they need to. Their question for a peaceful rectification of what they regard as the erroneous annexation of their homeland into the Philippine republic appears to be supported
by the United States, which they believe to be an original party to that historic injustice.” [“Modernity and the Bangsamoro,” PDI 8/16/08 at A12]

This of itself implied that the MILF was prepared to compromise: if politics were to be a continuation of war by other means. Justices of the Supreme Court may have thought of the worst case scenario but not of global justice. We have invoked in the MOA-AD litigation the substantive principles of *maslaha wal mursalah* (public good and public interest) and *daruat* (doctrine of necessity) as a first step.

Substantively it is the merit of the MOA-AD that – in looking at the law and its practice – there may be *other principles or policies arguing in other direction like in modern treaty law and diplomatic practices*. The Court probed this point but Justice Adolfo S. Azcuna’s separate opinion is a guarded brief statement of international law.

Mr. Justice Azcuna
Separate Opinion

“Finally, precedents are not strictly followed in international law, so that an international court may end up formulating a new rule out of the factual situation of our MOA-AD, making a unilateral declaration binding under a new type of situation, where, for instance, the other party is not able to sign a treaty as it is not yet a State, but the declaration is made to a “particular recipient” and “witnessed” by a host of sovereign States.”

Sovereign states are written effects of the sovereignty/ intervention boundaries. What is meant “to write” refers to what is represented or simulated (Weber, 1995). What correct information contemplates on the Comprehensive Compact to be negotiated leading to the contractual bind? In this sense the BJE is only “written off” in part. The Court concluded that the government panel did not draft the instrument with the clear intention of being bound thereby to the
international community as a whole or to any State, but only to the MILF. The Court also completed the logical correlation that the same instrument may not be considered a unilateral declaration under international law, but it would have provided a basis for a suit in an international court.

**Summary points**

No final statement is put forward but this discourse have ventilated the key argument for the Bangsamoro people and indigenous people (by choice) that they have already given de facto acceptance and support to their existing status. No one can foreclose the right to self-determination of the Bangsamoro people. The Treaty of Paris of 1898 and 1916 has not deprived them of remedial rights to redress serious grievances acknowledged no less than the U.S. State Department in exchange of written policy statements. The territorial fix of the Republic of the Philippines needs to be reconfigured in a new constitutional fix because it fatal to what is represented for the republic to access to code of sovereignty in deep-case logic of representation in international relations. As if to underline and build on the foundation of constitutional order our discourse on Bangsamoro homeland turns the components of the republican system to new constitutive constructs. At the ‘intersectionality’ between our analytical construct and ‘real’ entities that exist in the world order (the ‘outside’) we “found” the **associative ties (relationship) and tiers (structure)** the domestic social order (the ‘inside’).