

JUDICIAL REVIEW OF PEACE INITIATIVES*

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In Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain, the Supreme Court of the Philippines struck down a preliminary document that identified guideposts for future peace negotiations with the Moro Islamic Liberation Front. Separatists' aspirations are unlikely to be embodied in existing Constitutions, since it is precisely because their aspirations are inconsistent with those of the majority that they are fighting against the State. As a result, peace agreements stretch Constitutions to make room for these aspirations. But when judicial review is invoked to check these agreements, peace agreements risk being declared unconstitutional. Few peace agreements then can survive judicial scrutiny because judicial review enforces the status quo, therefore judicial review makes attaining peace difficult or impossible.

To avoid a legal dead end, I propose an approach to the review of peace agreements. We presume that they are valid and look beyond the provisions relating to the creation of autonomous regions. We should look to other constitutional values and judicial review should be undertaken with a view to ensuring that the goals of peace and tolerance are achieved. This approach skews the review process and places an extraordinary burden on those challenging the peace instrument as unconstitutional.

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INTRODUCTION

In *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain*, the Supreme Court of the Philippines struck down a preliminary document that identified guideposts for future peace negotiations with the Moro Islamic Liberation Front (MILF).¹ After the Supreme Court decision and fresh negotiations with the MILF, Congress considered a bill—the Bangsamoro Basic Law (BBL)—that would have granted the Muslim majority of the southern Philippines a greater measure of autonomy.² However, recent clashes³ with the MILF have fed anti-Muslim sentiments, poisoned the discourse on the validity of the bill, and dimmed hopes for an end to this decades-old conflict.⁴ The Bangsamoro Basic Law, the “embodiment of the [proposed] peace agreement between the Philippine government and the [MILF],” failed after an armed clash between the MILF and Philippine police officers.⁵ However, even without recent conflicts and even if there was little opposition to the bill in the House of Representatives, there were still Senators who thought that many of the BBL’s provisions were unconstitutional.⁶

1. *Province of North Cotabato v. Gov’t of the Republic of the Phil. Peace Panel on Ancestral Domain*, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm> [<https://perma.cc/5UJH-MQSU>].

2. Albert F. Arcilla, *Revisiting Mamapasano: A Disaster for the BBL*, BUSINESSWORLD ONLINE (Jan. 24, 2016), <http://www.bworldonline.com/content.php?section=Nation&title=revisiting-mamasapano-a-disaster-for-the-bbl&id=122002> [<https://perma.cc/QFD3-VL6S>].

3. At least thirty members of the Philippine National Police Special Action Force (SAF) were killed in a clash with Moro Islamic Liberation Front fighters when they attempted to arrest Malaysian terrorists. Edwin O. Fernandez, *30 Elite Cops Killed in Clash with MILF*, PHIL. DAILY INQUIRER (Jan. 26, 2015, 12:10 AM), <http://newsinfo.inquirer.net/667844/at-least-27-elite-cops-killed-in-clash-with-biff-in-maguindanao-reports#ixzz49XELb2P1> [<https://perma.cc/497Z-3BYD>].

4. Arcilla, *supra* note 2.

5. Amita Legaspi, *BBL the Last Casualty of Mamasapano Incident*, GMA NEWS ONLINE (Jan. 28, 2016, 7:43 PM), <http://www.gmanetwork.com/news/story/553093/news/nation/bbl-the-last-casualty-of-mamasapano-incident-drilon> [<https://perma.cc/5MWH-672M>].

6. Christine Mendez, *Senators Say BBL Raises Constitutional Red Flags*, PHIL. STAR (May 22, 2015, 12:00 AM), <http://www.philstar.com/headlines/2015/05/22/1457389/senators-say-bbl-raises-constitutional-red-flags> [<https://perma.cc/5MWH-672M>].

I. THE PROBLEM

This juncture in Philippine history highlights one of the biggest difficulties in the pursuit of peace in conflict areas. Separatists' aspirations are unlikely to be embodied in existing constitutions because their aspirations are inconsistent with those of the majority. Peace initiatives⁷ and agreements that attempt to make room for the separatists' aspirations are likely to stretch the constitutions. Even if drafts of such peace agreements were reached, when judicial review is invoked to check these agreements, the agreements risk being declared unconstitutional. Few peace agreements, if any, can survive judicial scrutiny because peace agreements defy conventions and judicial review enforces the *status quo*.

Peace agreements are also difficult to place within existing international legal categories because of their "subject matter . . . and their mix of state and non-state signatories."⁸ Seemingly outside the pale of the Constitution, judicial review is likely to make the quest for peace difficult, if not impossible.

Moreover, future attempts at reaching peace agreements may face the same judicial barriers. To address this problem, I propose a review of peace initiatives that avoids rigid readings of the Constitution. My proposal has two stages. First, courts should recognize the political nature of the peace process and avoid review of the preliminary stages of peace-making. Second, when asked to review a peace agreement, courts should adopt a standard that does not subject these initiatives to strict construction and the courts should look to other constitutional values, including the goals of peace and tolerance. This approach favors constitutionality and places an extraordinary burden on those challenging the peace instrument as unconstitutional. This approach is not designed to circumvent constitutional strictures. Instead, this approach should allow the State to attain its greater objectives of peaceful coexistence with its many sectors in society without exceeding constitutional bounds.

II. BACKGROUND

The Philippines and Muslim minorities in the south have been involved in an armed struggle for decades.⁹ The conflict began in the late 1960s and has taken the lives of over 100,000 people and cumulatively

7. In this Article, I use "peace initiatives" to cover the spectrum of activities and documents (pre-negotiation agreements, framework/substantive agreements, and implementation/renegotiation agreements) that are carried out or produced in the course of negotiating peace with separatist groups. See Sedfrey M. Candelaria & Maria Luisa Isabel L. Rosales, *Consultation and the Courts: Reconfiguring the Philippine Peace Process*, 54 *ATENEO L.J.* 59, 63 (2009).

8. Christine Bell, *Peace Agreements: Their Nature and Legal Status*, 100 *AM. J. INT'L L.* 373, 379 (2006).

9. Justin Holbrook, *Legal Hybridity in the Philippines: Lessons in Legal Pluralism from Mindanao and the Sulu Archipelago*, 18 *TUL. J. INT'L & COMP. L.* 403, 408–16 (2010).

displaced millions. Two major peace agreements have been signed—one in 1976 and another in 1996—but neither has brought lasting peace.¹⁰

The conflict in Mindanao¹¹ began with the displacement of millions of indigenous peoples, many of whom used to dominate Mindanao, Sulu,¹² and Palawan.¹³ The displacement was complemented by a legal regime imposed by Spanish and American colonizers who did not recognize private ownership rights of indigenous communities. This regime continued to be implemented even after the Philippines became independent in 1946.¹⁴

Resettlement programs began during the American colonial period and continued until the 1960s, where land was distributed as incentives for military careers, land reform programs, rebel returnees, and a host of other reasons, all of which exacerbated the situation.¹⁵ Muslim resentment turned into organized resistance after it was discovered that the military had killed dozens of Muslim trainees who were being prepared for an invasion of Sabah, Malaysia.¹⁶ Muslims began to take up arms, and the Moro National Liberation Front (MNLF) was formed to establish a Muslim state. Ferdinand Marcos¹⁷ cited this movement as one of the reasons why he imposed martial law in 1972.¹⁸

In 1976, the Philippine government and the MNLF entered into a peace treaty called the Tripoli Agreement, which President Marcos never implemented.¹⁹ While Marcos created two autonomous regions in Mindanao, he never relinquished political control over these regions to the Muslims.²⁰ Nur Misuari, leader of the MNLF, denounced Marcos' actions, and fighting resumed.²¹ It has been suggested that the Marcos govern-

10. Astrid S. Tuminez, *Neither Sovereignty nor Autonomy: Continuing Conflict in Southern Philippines*, 102 AM. SOC'Y INT'L L. PROC. 122 (2008) [hereinafter Tuminez, *Continuing Conflict*]. The following section draws from my book DANTE B. GATMAY-TAN, *LEGAL METHOD ESSENTIALS* 13–15 (2014).

11. The southernmost island group in the Philippines.

12. A southern province in the Philippines, and part of the Mindanao island group.

13. A western province in the Philippines.

14. Astrid S. Tuminez, *This Land Is Our Land: Moro Ancestral Domain and Its Implication for Peace and Development in the Southern Philippines*, 27(2) SAIS REVIEW OF INTERNATIONAL AFFAIRS 77, 78–79 (2007) [hereinafter Tuminez, *Our Land*].

15. *Id.* at 79.

16. *Id.* at 79–80. To be sure, there were many factors that helped crystallize armed Muslim opposition to the Marcos regime. The Muslim separatist movement was fueled by centuries of State neglect, grievances arising from Christian resettlement in Mindanao, and outside support from Muslim states and organizations helped mobilize some 30,000 armed combatants in many parts of Mindanao. See Lela Garner Noble, *Politics in the Marcos Era*, in *CRISIS IN THE PHILIPPINES: THE MARCOS ERA AND BEYOND* 70, 95 (John Bresnan ed., 1986).

17. The President of the Philippines from 1965 to 1986.

18. Tuminez, *Continuing Conflict*, *supra* note 10.

19. *Id.* at 80–81.

20. *Id.* at 81.

21. Jacques Bertrand, *Peace and Conflict in the Southern Philippines: Why the 1996 Peace Agreement is Fragile*, 73:1 PACIFIC AFFAIRS 37, 39 (2000).

ment entered into the agreement only to stave off political pressure, particularly from the Middle East, and to relieve itself of the economic strain brought on by war.²² The Tripoli Agreement compelled Marcos to create autonomous regions which were described as “cosmetic creations with no real legislative authority and no independent operating budget.”²³

In 1986, Marcos was ousted from office by millions of protesters employing “nonviolent praxis.”²⁴ His successor, Corazon Aquino, created a commission to draft a constitution that was ratified in 1987.²⁵ The new Constitution contains broad provisions on Muslim political autonomy.

The creation of the autonomous regions was meant to accommodate the demands of Muslims for meaningful autonomy in the governance of their affairs. A similar remedy is available for the Cordillera Region, where similar sentiments for autonomy exist but previous attempts to ratify the creation of an autonomous region in that area failed.²⁶

These provisions, however, are subject to a charter to be drafted by Congress and approval through a plebiscite.²⁷ Initially, only four (Muslim dominated) provinces opted to join the Autonomous Region for Muslim Mindanao (ARMM).²⁸ In the meantime, a split had occurred among the leaders of the MNLF.²⁹ In 1984, the split became formal as the Moro Islamic Liberation Front broke away.³⁰ The MILF took on a more uncompromising position and abandoned the more secular approach adopted by the MNLF.³¹

The Government of the Philippines succeeded in crafting the Final Peace Agreement with the MNLF in 1996. The agreement created transitional bodies such as the Southern Philippines Council for Peace and Development (SPCPD) to oversee economic development in Mindanao and the agreement created the Special Zone for Peace and Development (SZOPAD). Both bodies ran into popular and congressional opposition and lacked support from the central government. Again, autonomy became illusory under the agreement. The ARMM continued to be the government’s main response to Muslim grievances but had little support from Manila. In 2001, Congress amended its charter without consulting the ARMM or Muslim leadership. ARMM remained largely dependent

22. *Id.*

23. THOMAS M. MCKENNA, *MUSLIM RULERS AND REBELS: EVERYDAY POLITICS AND ARMED SEPARATISM IN THE SOUTHERN PHILIPPINES* 168 (1998).

24. MARK R. THOMPSON, *THE ANTI-MARCOS STRUGGLE: PERSONALISTIC RULE AND DEMOCRATIC TRANSITION IN THE PHILIPPINES* 138–61 (1995).

25. *Id.* at 165–66.

26. *See* *Ordillo v. Comm’n on Elections*, G.R. No. 93054 (S.C., Dec. 4, 1990) (Phil.), <http://www.chanrobles.com/cralaw/1990decemberdecisions.php?id=22> [<https://perma.cc/E4KU-L3HP>].

27. Tuminez, *Continuing Conflict*, *supra* note 10, at 81, 85.

28. *Id.* at 81.

29. *Id.*

30. *Id.*

31. *Id.*

on grants from Manila that were irregular in amount and timing and reinforced Muslim dependency.³²

Since 2001, Malaysia officially facilitated the Government of the Republic of the Philippines (GRP) and MILF talks, which began with a three-item agenda: 1) security, 2) rehabilitation, and 3) ancestral domain. Interim agreements were signed on the first two items, but ancestral domain proved to be thorny grounds and remains unresolved.³³ Ancestral domain demands include territory to constitute a Moro homeland, “sufficient control over economic resources on that land, and a structure of governance consistent with Moro culture” (with minimal interference from Manila).³⁴

To prevent the collapse of talks with the MILF, a new framework was adopted: “a GRP-MILF peace agreement [that] would govern the enabling law for the Moro homeland . . . preventing Congress from emasculating Moro gains from negotiations.”³⁵ “ARMM enlargement and the creation of a genuine Moro autonomy could theoretically happen without . . . opposition [from] Congress or local anti-Moro groups.”³⁶ The framework produced a document called the Memorandum of Agreement on Ancestral Domain (MoA-AD). Unfortunately, local governments challenged the constitutionality of the MoA-AD and prevailed in the Supreme Court.³⁷

On March 27, 2014, the Government of the Philippines and the MILF signed the Comprehensive Agreement on the Bangsamoro (CAB), which ended decades of hostilities.³⁸ The CAB was to be the basis for the Bangsamoro Basic Law that would then govern the Bangsamoro.³⁹ The success in negotiations in the Philippines is credited in part to the fact that the mediators were “loath to push for a speedy resolution because they appear to realize the parties would be unwilling to settle only for minimum gains.”⁴⁰

32. *Id.* at 82–83.

33. *Id.* at 83

34. *Id.*

35. *Id.* at 85.

36. *Id.*

37. *See* Province of North Cotabato v. Gov’t of the Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm> [<https://perma.cc/5UJH-MQSU>].

38. Kristine Angeli Sabillo, *Bangsamoro Peace Pact Signed*, PHIL. DAILY INQUIRER (Mar. 27, 2014, 5:33 PM), <http://newsinfo.inquirer.net/589568/bangsamoro-peace-pact-signed#ixzz2xCatYZIM> [<https://perma.cc/96JR-Z8G5>].

39. A transition commission submitted a draft of the Bangsamoro Basic Law to Congress. Once enacted by Congress, the law will be subjected to a plebiscite in areas identified as core territory of the Bangsamoro in early 2015. Genalyn D. Kabling & Edd K. Usman, *No More War*, MANILA BULLETIN (Mar. 28, 2014), <http://www.mb.com.ph/no-more-war>.

40. A.W. Harris, *Peace Processes Under Conditions of Uncertain Sovereignty*, 12 INT’L NEGOT. 175, 200 (2007).

The Supreme Court has already dismissed cases challenging the constitutionality of the Bangsamoro Basic Law *that has not yet been written*,⁴¹ thus indicating that opponents of autonomy will bring this case before the courts.

III. THE SUPREME COURT—THE *NORTH COTABATO* CASE

The *North Cotabato* case involved an earlier attempt to reach a peace agreement with the MILF.⁴² The Government of the Republic of the Philippines (GRP) and the MILF were scheduled to sign the MoA-AD.⁴³ The MoA-AD includes “four earlier agreements between the GRP and the MILF.”⁴⁴ It also includes “two agreements between the GRP and the MNLF: the 1976 Tripoli Agreement, and the Final Peace Agreement on the Implementation of the 1976 Tripoli Agreement, signed on September 2, 1996.”⁴⁵ Cases, however, were filed to enjoin the signing of the MoA.⁴⁶

The Petitioners invoked their constitutional right to information on matters of public concern,⁴⁷ as provided in Section 7, Article III of the Bill of Rights:

Sec. 7. The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.⁴⁸

The Court explained that “[m]atters of public concern covered by the right to information include steps and negotiations leading to the consummation of the contract.”⁴⁹ “Intended as a ‘splendid symmetry’ to the right to information under the Bill of Rights is the policy of public disclosure under Section 28, Article II of the Constitution,” which provides that “subject to reasonable conditions prescribed by law, the State

41. Edu Punay, “*Case vs. BBL Premature*,” *SC Orders Gov’t to Answer Petitions vs Bangsamoro Deals*, PHIL. STAR (June 24, 2015, 1:00 AM), <http://www.philstar.com/headlines/2015/06/24/1469339/case-vs-bbl-premature-sc-orders-govt-answer-petitions-vs-bangsamoro> [<https://perma.cc/5QK9-3ESN>].

42. *Province of North Cotabato v. Gov’t of the Republic of the Phil. Peace Panel on Ancestral Domain*, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm> [<https://perma.cc/5UJH-MQSU>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. CONST. (1987), art. III, § 7 (Phil.).

49. *Province of North Cotabato v. Gov’t of the Republic of the Phil. Peace Panel on Ancestral Domain*, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm> [<https://perma.cc/5UJH-MQSU>].

adopts and implements a policy of full public disclosure of all its transactions involving public interest.”⁵⁰

Attached to these twin rights is the right to public consultation.⁵¹ The Court then spelled out why public consultations are needed:⁵²

Executive Order No. 3 (which constituted the GRP Peace Panel) had numerous mechanisms for continuing consultations on both the national and local levels and for creating a principal forum for consensusbuilding.⁵³

“[I]t is the duty of the Presidential Adviser on the Peace Process to conduct regular dialogues to seek relevant information, comments, advice, and recommendations from peace partners and concerned sectors of society.”⁵⁴

“[T]he Local Government Code of 1991 requires all national offices to conduct consultations before implementing any project or program critical to the environment and human ecology[,] including those that may call for the eviction of a particular group of people residing in such locality.”⁵⁵ The MoAAD is one such program “which could pervasively and drastically result [in] the diaspora or displacement of a great number of inhabitants from their . . . environment” by unequivocally and unilaterally vesting “ownership of a vast territory to the Bangsamoro people.”⁵⁶

The Indigenous Peoples Rights Act of 1997 provides a “procedure for the recognition and delineation of ancestral domain, which entails, among other things, the observance of the free and prior informed consent of the Indigenous Cultural Communities/Indigenous Peoples.”⁵⁷ “[T]he Executive Department . . . cannot delineate and recognize an ancestral domain claim by mere agreement.”⁵⁸

Thus, the court held, “In sum, the Presidential Adviser on the Peace Process committed grave abuse of discretion when he failed to carry out the pertinent consultation process, as mandated by E.O. No. 3, Republic Act No. 7160, and Republic Act No. 8371.”⁵⁹ The Supreme Court also held that the MoAAD is contrary to the present Constitution.⁶⁰ It held that “the associative relationship envisioned between the GRP and the BJE” was unconstitutional because “the concept presuppose[d] that the associated entity [was] a state and implicate[d] that the same is on its way to independence.”⁶¹

50. *Id.* (emphasis omitted); CONST. (1987), art. 2, § 28 (Phil.).

51. *Province of North Cotabato v. Gov’t of the Republic of the Phil. Peace Panel on Ancestral Domain*, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm> [<https://perma.cc/5UJH-MQSU>].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

While there is a suspensive clause in the MoAAD stating that “the provisions . . . inconsistent with the present legal framework will not be effective until that framework is amended, the same does not cure its defect.”⁶² The provisions establishing such associative relationship

is, itself, a violation of the Memorandum of Instructions from the President dated March 1, 2001, addressed to the Government Peace Panel. Moreover, as the clause is worded, it virtually guarantees that the necessary amendments to the Constitution and the laws will eventually be put in place. Neither the GRP Peace Panel nor the President herself is authorized to make such a guarantee.⁶³

This is tantamount to the “usurpation of constituent powers vested only in Congress, a Constitutional Convention, or the people themselves through the process of initiative.”⁶⁴

“The Supreme Court reached its decision with a majority of eight judges to seven. The minority of seven claimed it to be a moot decision as the GRP had already declared that it would not be signing the document.”⁶⁵

In short, “the Supreme Court stated that it was [declaring] the MoA-AD unconstitutional . . . because there was no consultation [conducted] despite the gravity of implications for the population,” and because “the Executive ventured outside its jurisdiction” by ignoring “existing laws on how indigenous peoples should have access to ancestral domain [and] promising constitutional changes that it could not guarantee.”⁶⁶ The Court also found fault in the relationship between the Republic of the Philippines and the MILF, which was described as “associative” because the term in the international arena is usually “used as a transitional device of former colonies on their way to full independence.”⁶⁷

Again, the MoA-AD was not a peace agreement but a step towards reaching that agreement.⁶⁸ However, a majority of the Supreme Court ruled on its constitutionality even though the government had abandoned plans to sign it. It is also clear that the Court’s ruling was premised on a very strict application of the law. For example, the MoA-AD could not contain any novel way of delineating and distributing ancestral domains.

Supporters of the MoA-AD, on the other hand, frame the issue in a different light. To them, the MoA-AD uses a paradigm in the resolution of ethno-political conflicts brought about by “the emergence of

62. *Id.*

63. *Id.*

64. *Id.*

65. Timothy Williams, *The MoA-AD Debacle—An Analysis of Individuals’ Voices, Provincial Propaganda and National Disinterest*, 29 J. OF CURRENT SE. ASIAN AFF. 121, 128 (2010).

66. *Id.*

67. *Id.* (quoting Province of North Cotabato v. Gov’t of the Republic of the Phil. Peace Panel on Ancestral Domain, G.R. No. 183591 (S.C., Oct. 14, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/october2008/183591.htm> [<https://perma.cc/5UJH-MQSU>]).

68. Williams, *supra* note 65, at 123.

liberation movements asserting their right to self-determination against the State," which they claim was used successfully in conflict areas like Ireland.⁶⁹ The MoA-AD allows the government to fulfil its constitutional duties to protect indigenous communities⁷⁰ and to address the historical injustices against Muslims.⁷¹

IV. DISCUSSION

The Philippine case illustrates the difficulties that are inherent when courts are asked to gauge the legality of peace initiatives. Courts can "extend and develop the agreement's meaning where they find it to be part of the legal framework."⁷² Conversely, they can "terminate the operation of an agreement even in the face of political [opportunities] to sustain it."⁷³ Courts examine peace agreements within traditional legal categories.⁷⁴ Because of the importance of form, parties to agreements frame obligations so that they fall within legal categories.⁷⁵ Some States use "constitutional revision" as a means of defusing conflict and casting some agreements as constitutions.⁷⁶

69. Marohomsalic et al., *The Memorandum of Agreement on Ancestral Domain: A Commentary*, 33 IBP JOURNAL 71, 85 (2008).

70. *Id.* at 88.

71. *Id.* at 90–94. The experience of reaching a peace agreement in Ireland is instructive to the Philippines because the process took years to accomplish. See Jeremy A. Colby, *Getting to Peace: Avoiding Roadblocks on the Road to Peace in Northern Ireland*, 14 TEMP. INT'L & COMP. L.J. 1 (2000). Judicial review at the early stages could have squandered the incremental gains reached by the parties. The Agreement is by no means final and requires more negotiations if they are to be properly implemented. Again, however, these difficulties do not warrant judicial intervention. If anything, it is an argument that courts should stay away from the negotiations to allow political actors to reach agreements.

72. Bell, *supra* note 8, at 389.

73. *Id.*

74. *Id.* at 389–95.

75. *Id.* at 389.

76. *Id.* at 391. The main agreement in South Africa, was the Interim Constitution, which set up a transitional arrangement designed to lead to elections and a constitutional assembly that would produce a final constitution. The Interim Constitution [detailed] . . . how the African National Congress (ANC) and the National Party/South African government would hold power, the transitional mechanisms for government, and agreed principles that were to set the parameters for the drafting of a final constitution by the newly elected representatives. . . . [The efforts in] Bosnia-Herzegovina focused on peace agreements that in effect were constitutional blueprints whose principal purpose was to accommodate the new minorities inevitably created by the disintegration of the former Yugoslavia. The final deal in Bosnia reflected a correlation between peace agreement negotiations and constitution making. The Washington Agreement . . . had two parts: a preliminary agreement of only ten lines, plus a constitution for the federation that set out a "power map" as between Croats and Bosniacs.

See *id.* at 391–92.

As I suggested at the beginning of this Article, the review of peace initiatives needs a liberal approach that harmonizes the limits of autonomy with other *constitutional values*, including the goals of peace. This approach favors a finding of constitutionality and places an extraordinary burden on those challenging the peace instrument or process as unconstitutional. Such approach will allow the State to attain its greater objectives of peaceful coexistence.

A. *Formula*

There is every reason for the Philippine Supreme Court to accommodate the aspirations of the Bangsamoro, to hasten the Philippines' march to peace. The Court can do this by avoiding a strict and technical appreciation of the Constitution.

The judiciary has an opportunity to take part in the peace process in two ways. It can defer to political actors or cite an array of doctrines to avoid interfering with the political processes necessary in reaching peace.

When the resolution of the legality of a peace agreement is unavoidable, the courts can still relax the standards of review to recognize the unique nature of a peace accord.

I submit that this is the only way to attain the constitutional goal of peace. I suspect, however, that critics will raise objections to my formula, but I can illustrate why these criticisms are baseless. The following are objections that are likely to be raised:

- a. Courts cannot avoid their duty to address the constitutionality of a statute;
- b. Judicial review demands a dispassionate approach of strict compliance with constitutional strictures; and
- c. Judicial review should be performed consistently regardless of the issue that is involved.

I will present responses to these criticisms to show that they are not always true. I also emphasize that the rules of construction support my proposed formula and that the Court is duty-bound to ensure that other values of the Constitution are implemented.

B. *The Duty to Settle Disputes*

The idea that courts should restrain themselves when dealing with political questions is familiar. Courts avoid deciding on “political questions” or “those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of government.”⁷⁷ Although courts have been given more power to review acts of the political branches of government, the 1987 Constitution did not remove the idea of a political question. Courts cannot, for example, question the President's recognition of a foreign

77. *Tañada v. Cuenco*, G.R. No. L-10520 (S.C., Feb. 28, 1957) (Phil.), http://www.law-phil.net/judjuris/juri1957/feb1957/gr_1-10520_1957.html [<https://perma.cc/2QYA-WXU5>].

government, set aside a presidential pardon, or “amend the Constitution under the guise of resolving a dispute brought before [it] because that power is reserved to the people.”⁷⁸

In any case, despite the breadth of judicial power in the Philippines, the courts do not wield it freely. Judicial review involves “the delicate exercise of examining the validity or constitutionality of an act of a coequal branch of government,”⁷⁹ and the Supreme Court “must continually exercise restraint to avoid the risk of supplanting the wisdom of the constitutionally appointed actor with that of its own.”⁸⁰ In another case, the Supreme Court explained that “the doctrine of separation of powers . . . imposes upon the courts proper restraint . . . in striking down the acts of the Executive or the Legislature as unconstitutional.”⁸¹ The Court’s function of review is limited: “The Court may pass upon the constitutionality of acts of the legislative and the executive branches, since its duty is not to review their collective wisdom but, rather, to make sure that they have acted in consonance with their respective authorities and rights as mandated of them by the Constitution.”⁸² If “the Court finds no constitutional violations of any sort, then, it has no more authority of proscribing the actions under review.”⁸³

Because of the inherently political nature of peace negotiations or agreements, there is more reason for courts to exercise restraint when asked to intervene. The Court could have waited for a final agreement to be signed before it exercised its power of judicial review.

The different kinds of peace agreements that emerge at the different stages of the peace process can “be categorized into three stages: pre-negotiation agreements, framework-substantive agreements, and implementation agreements.”⁸⁴ Pre-negotiation agreements settle issues regarding who will negotiate and the status they assume when negotiating.⁸⁵ Framework agreements “set out the framework for resolving the substantive issues” that are in dispute.⁸⁶ Typically, they “reaffirm[] a commitment to non-violent means for resolving . . . conflict[,] . . . begin[] to address . . . the consequences of the conflict . . . provide[] . . . inter-

78. *Marcos v. Manglapus*, G.R. No. 88211 (S.C., Sept. 15, 1989) (Phil.), http://www.lawphil.net/judjuris/juri1989/sep1989/gr_88211_1989.html [<https://perma.cc/7APV-MAGX>].

79. *Saguisag v. Ochoa, Jr.*, G.R. Nos. 212426 & 212444 (S.C., Jan. 12, 2016) (Phil.), <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/january2016/212426.pdf> [<https://perma.cc/KLV5-CP5T>].

80. *Id.*

81. *Imbong v. Ochoa, Jr.*, G.R. No. 204819, 204934, 204957, 204988, 205003, 205043, 205138, 205478, 205491, 205720, 206355, 207111, 207172 & 207563 (S.C., Apr. 8, 2014) (Phil.), <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2014/april2014/204819.pdf> [<https://perma.cc/7ZEW-TJSF>].

82. *Id.*

83. *Id.*

84. CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* 20 (2005).

85. *Id.*

86. *Id.* at 25.

im agreements as to how power is to be held and exercised[,] and set[] an agenda” or timetable “for reaching a more permanent resolution of substantive issues such as self-determination, democratization, policing, rights protection, and reconstruction.”⁸⁷ Implementation agreements flesh out details of the framework agreements and may require legislation for full implementation.⁸⁸

“The unique nature of the peace process demands a flexibility in approach” and “alert[s] the Court [to] the novelty of the case.”⁸⁹ The place of the MoA-AD in the spectrum of peace initiatives should have stayed the Court’s hand:

Once the pertinent consultations have taken place and the peace process has considerably gone past the negotiation stage, then the Court may assert itself without fostering the deeply-rooted feelings of suspicion of the government’s ulterior motives. These small steps will begin to chip away at the obstacles to peace in the Philippines.⁹⁰

It would be improper for the Court to inquire into the level of consultations that were conducted by the government if the process is on-going. A premature intervention on the part of the Court would raise suspicions on the government’s motives and possibly defeat negotiations.

Restraining judicial review of executive action is not novel. For one, courts have kept their distance from the executive branch when the latter deals in diplomatic relations. Courts do not compel the executive branch to reveal details when negotiating with foreign countries, saying that secrecy does not violate “the constitutional provisions of freedom of speech or of the press nor of the freedom of access to information.”⁹¹ “The nature of diplomacy requires centralization of authority,” expedition of decision, and its confidentiality.⁹² Others point to U.S. practice where courts defer to the political branches in foreign affairs because the latter have distinct features and resources that give them an institutional advantage over courts.⁹³

C. *The Limits of the Constitution*

The second possible critique of my formula will claim that the interpretation of the peace process and its products should strictly conform

87. *Id.*

88. *Id.* at 27.

89. Candelaria & Rosales, *supra* note 7, at 82.

90. *Id.*

91. Akbayan Citizens Action Party v. Aquino, G.R. No. 170516 (S.C., July 16, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/july2008/170516.htm> [<https://perma.cc/8QZE-JRUM>].

92. *Id.*

93. Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 1009 (2004). Courts generally demur to the political branches in deciding war powers questions. This deference recognizes the constitutional intent to commit the “conduct of war and of foreign, military, and diplomatic affairs to the political branches.” See J. Richard Broughton, *What is it Good for? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKL. L. REV. 685, 690–91 (2001).

to the provisions of the Constitution. This view ignores the fact that the non-state actors' (separatists in this case) demands are rarely, if ever, addressed by the Constitution. Aspirations of separatist groups are incompatible with those embedded in national constitutions.

As others have pointed out, constitutions cannot make peace, and constitution-drafting and peacemaking are not compatible. Proponents of constitution-drafting as a peacemaking tool simply assume the two processes are compatible. "They fail to examine whether the goals of the two processes are complementary, whether the needs of the two processes are likely to clash, and the impact the differing needs and goals of the two processes could have on the success of the constitution drafting/peacemaking."⁹⁴

"Regardless of form," a peace treaty is expected to

declare a cease-fire, establish a process for demobilizing and disarming warring parties, and design the processes for a transition to a peaceful conflict resolution. Some peace treaties also include extensive provisions for new or refurbished political and legal institutions [as well as] transitional justice mechanisms. While these more extensive agreements reflect peace-building goals, ending violence immediately always remains the peace treaties' primary aim. Many conflicts generate numerous peace treaties that build upon each other as peacemakers attempt to maintain momentum toward peace by resolving continuing and developing issues through newer agreements.⁹⁵

Constitution-drafting, on the other hand, serves different goals.⁹⁶

The drafting process is expected to develop a document that creates the foundation of the state by developing a framework for governance. Constitutions are generally forward looking, anticipating the long-term needs and desires of the constituencies they serve. They set the stage for the smooth operation of the government and for peaceful relations between and within the government and its constituents, creating security and stability.⁹⁷

[P]eacemaking concentrates on stopping violence, while constitution-drafting focuses on establishing a functioning and ordered state. Peace treaties reflect the immediate changes and compromises necessary to end violent conflict, while constitutions codify an existing consensus on national identity and values and on how society wishes

94. Hallie Ludsin, *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, 33 PA. J. OF INT'L L. 239, 244 (2011). The alternative view is that the constitution can be partly a peace agreement and partly a framework setting up the rules by which the new democracy will operate. An ideal constitution-making process can "drive the transformative process from conflict to peace, seek to transform the society from one that resorts to violence to one that resorts to political means to resolve conflict, and/or shape the governance framework that will regulate access to power and resources—all key reasons for conflict." Kirsti Samuels, *Post-Conflict Peace-Building and Constitution Making*, 6 CHI. J INT'L. L. 663, 664 (2006).

95. Ludsin, *supra* note 94, at 245.

96. *Id.*

97. *Id.* at 245–46.

to be governed, anticipating future threats to peaceful relations. A peace treaty may adopt measures that radically change the government and politics in a conflict zone, while traditionally constitutions create stability by protecting against such changes.⁹⁸

D. *Different Forms of Judicial Review*

The third objection would be an argument that judicial review should be carried out in a similar fashion regardless of the political tenor of the cases involved.

Students of judicial review know, however, that courts routinely take politics into consideration when deciding cases.

In other countries, political uncertainties have always played a role in judicial review. Courts should be more vigilant during emergencies, however, when the possibility of government abuse is greater.⁹⁹ The Israeli Supreme Court has dealt with security actions (in the Gaza strip) over a long period of time and has demonstrated an “ability to establish its independence vis-à-vis the security establishment” and also demonstrated the limits of that independence.¹⁰⁰ One study concluded:

When the issue is the application of international norms amidst an armed conflict, there is no easy solution to this tension. The Court has realized—at least since the 1990s—that the transnational community is a necessary check on its discretion when adjudicating cases pertaining to the military commander’s use of his occupying power under international law. By providing reasons addressed at the international community of jurists, the court can be seen as seeking to alleviate some of the concerns that might otherwise be associated with its judgments (e.g. judgments reflecting the perspective of only one side of the conflict).¹⁰¹

The Court also used the “presence of the international audience” when addressing the domestic audience.¹⁰² The Court argued that “ignoring the international community [could] lead to greater interventions and loss of independence” (in essence creating a “buffer [against] pressure generated by the security establishment”).¹⁰³

Other High Courts balance the opposing interests of factions of the population. The South African Constitutional Court was able to contain tensions inherent in the post-apartheid era.¹⁰⁴ In Nepal, the Supreme

98. *Id.* at 247.

99. Amnon Reichman, *Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel*, 2011 UTAH L. REV. 63 (2011).

100. *Id.* at 93.

101. *Id.* at 95.

102. *Id.*

103. *Id.*

104. See Heinz Klug, *Constitutional Authority and Judicial Pragmatism: Politics and Law in the Evolution of South Africa’s Constitutional Court*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 93–113 (Diana Kapiszewski et al. eds., 2013).

Court navigated the demands of national unity and socio-cultural diversity and among others things, upheld national customs over “legal rights” and recognized the rights of sexual minorities.¹⁰⁵

Political uncertainty can come in other forms. A study of the Israeli Supreme Court’s review of the acts of transitional governments (i.e. where administrations are completing their terms) is also enlightening.¹⁰⁶ There is a high rate of executive turn-over in Israel; governments last no more than twenty-two months and caretaker governments can govern for as long as eleven weeks.¹⁰⁷ “During these transition periods, caretaker governments in Israel acted in ways resembling lame-duck presidents in the United States, who have sought to make public-sector appointments, conduct international negotiations, or embark on military operations before relinquishing . . . power.”¹⁰⁸

The Israeli Court has held that transition governments should act with restraint except when there is “a vital public need” at stake.¹⁰⁹ The Court’s record shows that it prohibits public sector appointments by transition governments across the board “while routinely permitting accelerated peace negotiations—contrary to practice elsewhere where courts prohibit caretaker governments from doing both.”¹¹⁰

Pursuant to the review practices elsewhere, there are enough bases for the Court to apply a different standard of review when the question of the validity of a peace agreement is presented before it. One might argue that the peace process is inherently political. We also learned that constitution-drafting may provide for the discussion of differences between the State and the MILF, but it can leave out crucial issues that would prevent the peace from taking root. The goals of peace-making may be beyond the parameters of the Constitution. The scale of the devastation caused by decades of conflict may also place this issue within the realm of an emergency, which can also trigger a different standard of review.

Judicial review is not a rigid process that is applied evenly in every case that comes before a court; courts can recognize political nuances when deciding legal issues. For example, the Philippine Supreme Court, following United States case law,¹¹¹ uses three standards of judicial review when the equal protection clause is invoked:

105. Mara Malagodi, *Constitutional Change and the Quest for Legal Inclusion in Nepal*, in *RIGHTS IN DIVIDED SOCIETIES* 169, 192 (Coin Harvey & Alex Schwartz, eds. 2012).

106. Rivka Weill, *Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters*, 45 *VAND. J. TRANSNAT’L L.* 1381 (2012).

107. *Id.* at 1387–88.

108. *Id.* at 1388.

109. *Id.* at 1390.

110. *Id.* at 1391.

111. As one author summarizes, in reviewing claims of discrimination under the Equal Protection Clause, the US Supreme Court established three tiers of scrutiny to assess the constitutionality of discriminatory policies: strict, intermediate, and rational basis scrutiny. Under “rational basis” review “[a]ll that is required of an action is that the classification be rationally related to serving a legitimate state interest.” Nuzhat

We ourselves have often applied the rational basis test mainly in analysis of equal protection challenges. Using the rational basis examination, laws or ordinances are upheld if they rationally further a legitimate governmental interest. Under intermediate review, governmental interest is extensively examined and the availability of less restrictive measures is considered. Applying strict scrutiny, the focus is on the presence of compelling, rather than substantial, governmental interest and on the absence of less restrictive means for achieving that interest.¹¹²

Even in the absence of a constitutional proscription, the Court banned midnight appointments,¹¹³ consistent with the discussion above on transition governments. As early as 1962, the Supreme Court (like the Israeli Court) had recognized the implications of transition governments.

E. *Rules of Construction*

There is a built-in bias towards constitutionality when courts interpret laws or weigh the validity of government actions. “When a statute is susceptible [to] two interpretations, the Court must ‘adopt the one in consonance with the presumed intention of the legislature to give its enactments the most reasonable and beneficial construction.’”¹¹⁴ “[B]etween two possible interpretations . . . one of which” will free it “from constitutional infirmity,” and the other, which will taint it with a “grave defect, the former is to be preferred. A construction that would save rather than one that would affix the seal of doom certainly commends

Chowdry, *I, Spy (But Only on You): Raza v. City of New York, The Civil Rights Disaster of Religious & Ethnic-Based Surveillance, and the National Security Excuse*, 46 COLUM. HUM. RTS. L. REV. 278, 293 (2015). Rational basis review is “the baseline level that is applied to policies discriminating against non-protected groups such as the disabled or elderly.” *Id.*

Intermediate scrutiny is the middle ground between rational basis and strict scrutiny. Intermediate scrutiny hinges on the finding that the classification is an “important” governmental interest that is “substantially related” to serving that interest. Courts have held policies discriminating against groups that need to be protected but are not a “suspect class” are subject to intermediate scrutiny. Gender-related discriminatory policies fall within the scope of this tier. Finally, strict scrutiny holds the most stringent standards for the examination of policies, requiring that the challenged classification serve a “compelling governmental interest” and use “narrowly tailored means” to do so. Strict scrutiny is used to protect vulnerable classes, which have often faced historical discrimination and political process failure, against “suspect classifications.” Essentially, the test is applied when fundamental rights are at stake: it is the standard used to review discriminatory policies based along racial, ethnic, and religious lines, policies that infringe upon “fundamental rights,” and policies that violate constitutionally guaranteed rights. *Id.* at 293–95.

112. *White Light Corp. v. City of Manila*, G.R. No. 122846 (S.C., Jan. 20, 2009) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2009/jan2009/122846.htm> [<https://perma.cc/67BG-7AGW>].

113. *Aytona v. Castillo*, G.R. No. L-19313 (S.C., Jan. 19, 1962) (Phil.), http://www.lawphil.net/judjuris/juri1962/jan1962/gr_1-19313_1962.html [<https://perma.cc/HV3A-FGK5>].

114. *Bases Conversion and Development Authority v. Commission on Audit*, G.R. No. 178160 (S.C., Feb. 9, 2008) (Phil.), http://www.lawphil.net/judjuris/juri2009/feb2009/gr_178160_2009.html [<https://perma.cc/967Q-QAQN>].

itself.”¹¹⁵ It is “an elementary, a fundamental, and a universal rule of construction, applied when considering constitutional questions, that when a law is susceptible of two constructions, one of which will maintain and the other destroy it, the courts will always adopt the former.”¹¹⁶

F. *Promoting Other Values*

There are other values that inform the writing of the Philippine Constitution. The Preamble itself provides that Filipinos aspire to “secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace.”¹¹⁷ “[T]he President also has the duty of supervising and enforce[ing] . . . laws for the maintenance of general peace and public order. Thus, he is granted administrative power over bureaus and offices under his control to enable him to discharge his duties effectively.”¹¹⁸ Article II Section 5 of the Constitution provides:

Section 5. The maintenance of peace and order, the protection of life, liberty, and property, and promotion of the general welfare are essential for the enjoyment by all the people of the blessings of democracy.¹¹⁹

The Court has a duty to ensure that these other goals are met. I suggest that in assessing a peace agreement, Philippine courts should be alert to the presence of this mandate and should adopt an approach that ensures these goals are met.

To be clear, my approach to judicial review does not push the judiciary into politics or policy-making. My approach requires courts to point to values that are *explicitly written* in the Constitution (as I have shown here) to avoid infusing its decisions with the judges’ own values.¹²⁰ It does not vest upon the courts the task of making public policies.¹²¹ Nor am I advocating an approach that requires judges to find “overarching principle[s] of justice” that can be used to ground legal obligations.¹²² Again, I would limit the search for values to the Constitution itself to avoid the

115. *De la Cruz v. Paras*, G.R. No. L-42571-72 (S.C., July 25, 1983) (Phil.), http://www.lawphil.net/judjuris/juri1983/jul1983/gr_l_42571_72_1983.html [<https://perma.cc/MLV7-G7RN>].

116. *Gonzalez v. Katigbak*, G.R. No. L-69500 (S.C., July 22, 1985) (Phil.), http://www.lawphil.net/judjuris/juri1985/jul1985/gr_l69500_1985.html [<https://perma.cc/M2WD-NUPW>].

117. CONST. (1987), pmb1. (Phil.).

118. *Anak Mindanao Party-List Group v. Executive Secretary*, G.R. No. 166052 (S.C., Aug. 29, 2007) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2007-august2007/166052.htm> [<https://perma.cc/FFL3-FN7R>].

119. CONST. (1987), art. II, § 5 (Phil.).

120. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 43–72 (1980).

121. Rachel Sieder et al., *Introduction* to *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 3 (Rachel Sieder et al. eds., 2005).

122. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 313 (1990).

temptation of overriding or overwriting the consensus embodied in the sacred document.

The adjudication of constitutional issues creates a space where arguments and ideologies can be considered:

Within a given constitutional tradition, a particular constitutional outcome may be demanded by the combination of local sources and by the methodological distinctiveness of that tradition. But in most cases, those contingent features of a constitutional tradition merely rule out, and do not require, specific constitutional decisions. Rather, they create an argumentative space within which a tradition is open to elaboration, reinterpretation, contestation, and change. These spaces provide openings for competing ideologies to shape and direct constitutional interpretation. For example, clauses entrenching specific rights (e.g. the right to equality) are framed abstractly and incorporate principles of political morality by reference. They therefore invite courts to articulate an underlying theory of the right in question and to craft constitutional doctrine to implement that theory.¹²³

In dealing with peace initiatives, courts must engage in interactive discussions to decide how to approach a problem. Deliberation is problem solving where facts and normative arguments are heard, and where “pre-existing views of the discussants evolve in the course of investigation and discussion.”¹²⁴ Deliberation also considers the larger “institution’s objectives, identity, and norms, which may be implicated in decisions made to solve the practical problem.”¹²⁵ Deliberation should also “consider the views and interests of the . . . ‘stakeholders’—persons with an ongoing relationship to the institution and whose interests will be affected by the decision.”¹²⁶ The resolution of the problem cannot be done by simply contrasting peace initiatives with the text of the Constitution.

CONCLUSION

After decades of conflict, the Government of the Republic of the Philippines and the Moro Islamic Liberation Front have agreed to talk about reaching a peace agreement. This willingness to talk is significant in light of recent and now common violence that has unfortunately tainted Muslims in general.¹²⁷ The Supreme Court’s participation in the peace process, however, ended badly for peace advocates. The Court adopted

123. Sujit Choudhry & Richard Stacey, *Independent or Dependent? Constitutional Courts in Divided Societies*, in *RIGHTS IN DIVIDED SOCIETIES* 87, 93 (Colin Harvey & Alex Schwartz eds., 2012).

124. William N. Eskridge Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 *TEX. L. REV.* 1273, 1275 (2009).

125. *Id.* at 1276.

126. *Id.*

127. M. Cherif Bassiouni, *Misunderstanding Islam on the Use of Violence*, 37 *HOUS. J. INT’L L.* 643 (2015). The author points out the extremist Muslim groups have killed more Muslims than non-Muslims but that this fact is seldom reported in the media.

a hardline approach that nipped the initiative in the bud. The Court's approach of contrasting the Constitution and the MoA-AD was simple but it imperils security. The Supreme Court's exercise of judicial review may doom the quest for peace.

If a review of peace initiatives is unavoidable, the courts must, unless there is absolutely no way to reconcile it, lean towards a finding of constitutionality. All stakeholders should realize that this issue is by no means a typical case that can be disposed of by citing well-entrenched constitutional doctrines. New ones may be required, all in the hope of reaching peace and satisfying a constitutional mandate. As one scholar explains:

At the end of the day, it is not merely the form of constitutional government that is important; rather, the constitutional culture or ethos of tolerance and mutual respect are important in maintaining social peace. A plural society or community that desires peace and an integrated society must set its face against ethnic and religious hatred and aggressive nationalism which demonizes and excludes the 'Other.' It must both honor and give expression to a constitutional culture respectful of human and group rights and [commit] to sustaining ethnic-religious pluralism within the national order. Beyond rule-following and legalism, attention must be paid to the quality of constitutional norms and the public values espoused. Only then can a true spirit of inclusive fraternity displace the wry observation that "if all men are brothers, the ruling model is Cain and Abel."¹²⁸

EPILOGUE

The issues raised in *North Cotabato* were revived when the Philippines, under President Benigno Aquino III, renewed peace talks with the MILF.¹²⁹ The court summarized,

On October 15, 2012, a preliminary peace agreement called the [Framework Agreement on the Bangsamoro] (FAB) was signed between the government and the MILF. The FAB called for the creation of an autonomous political entity named Bangsamoro [that would] replac[e] the ARMM.¹³⁰ After further negotiations, the following Annexes to the FAB were signed [by the parties]:

- a. Annex on Transitional Arrangements and Modalities;
- b. Annex on Revenue Generation and Wealth Sharing;
- c. Annex on Power Sharing;
- d. Annex on Normalization; and

128. Li-ann Thio, *Constitutional Accommodation of the Rights of Ethnic and Religious Minorities in Plural Democracies: Lessons and Cautionary Tales from South-East Asia*, 22 PACE INT'L L. REV. 43, 49–50 (2010).

129. Philippine Constitution Ass'n v. Philippine Government, G.R. No. 218406 (S.C., Nov. 29, 2016) (Phil.), <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/218406.pdf> [<https://perma.cc/FW4T-NWGN>].

130. *Id.*

e. On the Bangsamoro Waters and Zones of Joint Cooperation Addendum to the Annex on Revenue Generation and Wealth Sharing and the Annex on Power Sharing.¹³¹

On March 27, 2014, the Philippine Government signed the Comprehensive Agreement on the Bangsamoro (CAB), which integrated the FAB, the Annexes, and the other agreements previously executed by the government and the MILF.¹³² The CAB required the enactment of a law that would serve as the charter for the Bangsamoro.¹³³ On September 10, 2014, the President presented a draft of the Bangsamoro Basic Law to the 16th Congress, but Congress adjourned without passing the law.¹³⁴

Like *North Cotabato* before it, “several petitions were filed with [the Supreme Court of the Philippines] assailing the constitutionality of the CAB, including the FAB, and its Annexes.”¹³⁵

This time, the Court dismissed the petitions saying there was “no actual case or controversy requiring a . . . resolution of the principal issue presented by petitioners.”¹³⁶ The Court distinguished the MOA-AD from the CAB since the CAB “mandate[d] the enactment of the Bangsamoro Basic Law in order for [the] peace agreements to be implemented.”¹³⁷ Conversely, “[t]he MOA-AD . . . did not provide for the enactment of [a law] to implement its provisions” and its provisions could be implemented immediately after its signing, which justified the intervention of the Supreme Court “to rule on its constitutionality.”¹³⁸

According to the Supreme Court,

any question on the constitutionality of the CAB and the FAB, without the implementing Bangsamoro Basic Law, is premature and not ripe for adjudication. Until a Bangsamoro Basic Law is passed by Congress, it is clear that there is no actual case or controversy that requires the Court to exercise its power of judicial review over a co-equal branch of government.¹³⁹

The distinction created by the Supreme Court is artificial. The MOA-AD could not have created a separate political subdivision for the Bangsamoro any more than the CAB could. A constitutional amendment was contemplated before the MOA-AD could have been implemented. Like the CAB, the MOA-AD was a preliminary document that merely marked the progress of the peace talks.

In any case, the Court’s decision is consistent with my suggestion that the courts should refrain from reviewing the preliminary stages of the peace process. The unconstitutionality of any part of the

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

process is better determined at the end when the rights of the parties are clearly determined.

At that late stage, courts should bear in mind the larger goals of the Constitution on the attainment of peace when scrutinizing peace agreements. An excessively strict approach would frustrate both the citizens who seek a peaceful resolution of conflict and the campaign for peace.