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## SC Dissenters Expose Unequal Philippine-U.S. Ties

By the Policy Study, Publication and Advocacy (PSPA) Program  
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*"We are two very good tailors and after many years of research we have invented an extraordinary method to weave a cloth so light and fine that it looks invisible. As a matter of fact it is invisible to anyone who is too stupid and incompetent to appreciate its quality." (Emperor's New Clothes)*

These are trying times. The search for heroes continues – apparently in vain. Actually not heroes but dignity, that which inspires the mind and soul to see the inherent goodness and greatness in *us* as a people, a community. The World Bank report on corruption in the country indicts this country as much as indigenous incriminating reports take to task *our* capacity for honesty and integrity. And now, a Supreme Court (SC) *Decision* rubs it in.

Remember Lance Corporal Daniel Smith? He is a member of the United States Armed Forces stationed in the Philippines under the auspices of the Visiting Forces Agreement (VFA). He was convicted of raping a Filipina, Suzette Nicolas. His appeal from the judgment of conviction is awaiting decision by the Court of Appeals (CA). Meantime, from incarceration by Philippine authorities he was transferred to the United States Embassy for purposes of detention. Philippine authorities lost control over Smith, and so the victim sued the Government to enforce Philippine jurisdiction over Smith's person.

The suit (*Suzette Nicolas v. Alberto Romulo et al*, docket number, G.R. No. 175888) was filed with the Supreme Court (SC). Eventually her suit was joined by patriots, Jovito Salonga et al. and Bagong Alyansang Makabayan (BAYAN or New Patriotic Alliance), who initiated their respective petitions with the Supreme Court (SC), seeking to junk the Visiting Forces Agreement under which Smith was allowed entry to and stay in the Philippines as an armed component of a foreign military and was transferred to United States custody even if he is a convicted felon.

Essentially the petitions of Suzette Nicolas, Jovito Salonga and BAYAN et al. assail the unequal positions of the

sovereignties of the Philippines and the United States as regards the existence and enforcement of the VFA, for being contrary to the constitutional provision that the agreement must be "recognized as a treaty by the other contracting State," and the erroneous if not subservient interpretation of this agreement to favor Smith's transfer of custody to U.S. authorities.

On February 11, 2009 the SC promulgated its *Decision* on these petitions. Expectedly, the Court harked back to its previous *Decision* promulgated in 2000. Traditional court usually does so in recognition of the legal principles of *res judicata* and *stare decisis*, which require that prior decisions control the outcome of subsequent cases bearing somehow similar facts. The Court held that the VFA is "constitutional" because in so many words the United States recognized it as a treaty. Nonetheless, it ordered Secretary of Foreign Affairs Alberto Romulo to immediately negotiate with the U.S. representative for the transfer of Smith's detention to a facility under the control and custody of Philippine authorities pursuant to the provisions of the VFA. No timeframe was, however, given for the transfer of Smith nor was there a requirement as to the place for his detention.

### Not a treaty

Strong *Dissenting Opinions* to the *Decision* were registered by Chief Justice Reynato S. Puno and Associate Justice Antonio S. Carpio, arguing in the main that the agreement had not been and could never be recognized by the United States as a treaty because its provisions could not be enforced as a source of rights and obligations within the United States and its legal system. The Dissenters pointed to a *Decision* of the United States Supreme Court, *Medellin v. Texas*, 128 S.Ct. 1346, 170 L.Ed.2d 190, which prohibited U.S. authorities from enforcing international agreements in their home soil unless congressional action had been taken thereon to adopt their provisions and implement them domestically, or by the international agreements' own clear and unequivocal terms indicating that they are self-executory.

The difference between the *Decision* and the *Dissenting Opinions* lies in their interpretation of the constitutional requirement that the VFA must be “recognized as a treaty by the other contracting State.” The *Decision* takes on its face the assurance made by agents of the President of the United States that the agreement is indeed deemed a treaty by them. The *Dissenting Opinions* do not buy this line of the *Decision* saying that the United States' legal system itself bars the VFA from being enforced by and within U.S.' jurisdiction in the absence of an enabling law.

The divergence between the *Decision* and the *Dissenting Opinions* reflects more than just contradictory legal positions. Rather, it reflects a political context of disparity between supposedly equal partners. The *Decision* treats a too keen deference to a foreign state – on one hand, vigorously implementing the Visiting Forces Agreement as the legal framework to be observed in determining the rights and obligations of American soldiers in the country, while on the other keeping a blind eye on whether the United States would do the same when a similar situation faces it in its jurisdiction. The *Decision* wraps up its argumentation with a presumption of equality between the Philippines and the United States simply because the latter's agents said so even if the laws of the United States more likely than not indicate otherwise.

Worse, out of such fanatical deference to the United States, the Philippine government – including the high court – has made pronouncements that Smith would not after all be transferred to a detention facility controlled by Philippine authorities. The Malacañang (presidential palace) spokesperson said that the transfer of Smith may no longer be necessary because the Court of Appeals that is reviewing the judgment of conviction may overturn the latter and set him free.

The *Decision* failed to provide a timeframe for the turnover of Smith; nor did it state the kind of detention facility where he must be placed in, whether comparable to Smith's local counterparts who have been similarly convicted of rape or some other special jail for him and him alone. The *ponente* of the *Decision* went to the extent of stating in a television interview that the Supreme Court cannot enforce its *Decision* against the United States because it was not included as a party in the petitions before the Supreme Court – certainly there is a ring of legal truth to this statement but is it also not true that a jurisdiction of a court must be enforced against anyone who frustrates its will? And then again what happens where the United States and the Philippines conspire to ignore, or at least neglect, the execution of the *Decision*? From the way things are bandied about on Smith's custody there appears to be no good ground to believe that his transfer will eventually come about.

### Blind obedience

The *Dissenting Opinions*, on the other hand, fortify the notion that if the United States as a matter of law cannot give credence to

the Visiting Forces Agreement as a domestic law within its sphere – in the same way that the Philippine Government is running its life on Smith's disposition – then the Philippines should scrap the agreement for being unconscionable. This view partakes of a political framework that consists not of a blind subservience to a non-existent reality but a statement of will for the assertion of Philippine sovereignty. The *Dissenting Opinions* do not dream of ever equaling the might of the United States but discern the need to espouse self-respect in Philippine foreign relations especially where, as in this case, it is the law itself and not political realities that stresses the imbalance between Philippine and United States relations.

Clearly the *Dissenting Opinions* deal not with the political rhetoric of anti-American imperialism, one that is sometimes lost in substance amidst sloganeering, but with legal hermeneutics that affirms in black and white the improbability of getting a fair treatment from the “other contracting party.” What the *Dissenting Opinions* thus provide this country is a legal statement of the status of Philippine foreign relations vis-à-vis the United States as one between pauper and prince or servant and master. The *Dissenting Opinions* are valuable because for once significant parts of an institution of this country, the Supreme Court, exposed the narrative of inequality between the contracting parties of the Visiting Forces Agreement and sealed such exposé in a language beyond the usual symbols of dissent, thus, putting it in the mainstream paradigm of right-wrong and good-bad thinking.

*No longer are there very good tailors. No longer a cloth so light and fine. No longer too stupid, incompetent and impenitent. No longer a quality to appreciate. For the first time we heard a voice of two from the madding crowd that the Emperor is naked. What deliverance it is though liberation it may not be – yet.*

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