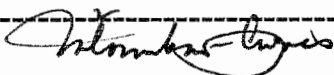


EN BANC

G.R. No. 256288 – ATTY. ROMEO M. ESMERO, *Petitioner*, v. HIS EXCELLENCY, HONORABLE PRESIDENT, RODRIGO ROA DUTERTE, *Respondent*.

Promulgated:  
June 29, 2021

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SEPARATE CONCURRING OPINION

LEONEN, J.:

I agree with the *ponencia* that matters within the President’s discretion cannot be the subject of a writ of mandamus. However, I take exception to its allusion that a sitting President cannot be the subject of *any* type of suit.

Petitioner Romeo Esmero, through this Petition for Mandamus, asks this Court to compel President Rodrigo Roa Duterte to defend the West Philippine Sea, which, he states, is part of the Philippine territory pursuant to the Constitution and as confirmed by the favorable ruling of the United Nations Arbitral Tribunal.<sup>1</sup> He insists that the President is bound to do so, citing pertinent constitutional and statutory provisions:

(1) Primary function of the President — As the Executive in whom the executive power is vested (Sec. 1), the primary function of the President is to enforce the laws as well as to formulate policies to be embodied in exi[s]ting laws. He sees to it that all laws are enforced by the officials and employees of his department. [B]efore assuming office, he is required to take an oath or affirmation to the effect that as President of the Philippines, he will, among others, “execute its laws”. (Sec. 5). Now, he “shall insure, that the law be faithfully executed.” (Sec. 17). In the exercise of this function, the president, if needed, may employ the powers attached to his office as the Commander-in-Chief of all the armed forces of the country (Sec. 18, par. 1), including the Philippine National Police (Art. XVI, Sec. 6) under the Department of Interior and Local Government ([Republic Act] No. 6975).<sup>2</sup>

Preceded by the purported “verbal dispute”<sup>3</sup> between President Duterte and former Supreme Court Senior Associate Justice Antonio T. Carpio and former Foreign Affairs Secretary Albert F. Del Rosario over the presence of Chinese maritime vessels in the West Philippine Sea, petitioner relates the ensuing antecedents:

<sup>1</sup> Supplemental Petition, p. 8 (Amended Prayer); see also Petition, p. 20.

<sup>2</sup> Petition, p. 9.

<sup>3</sup> Id. at 2.



10. Their point of dispute [is] the [presence of] various Chinese Maritime Ships that or invaded the West Philippine Sea which is part of our National Territory pursuant to Article I of our Constitution and pursuant to the [United Nations] Arbitral Ruling that [was] handed in our nation's favor during the former administration of our Honorable President then, Benigno "Pinoy" (sic) Aquino III.

At some point, those Chinese Mariti[m]e Ships totaled to more or less 300 ships and they would align themselves one after another in straight lines so that our poor Filipino [fisherfolk] living in the coastal areas facing the West Philippine Sea by mere sight of such threatening ship formation would not anymore try to fish in such area depriving them of their livelihood as well as that of their families which is so crucial for their survival most especially in the present [COVID] 19 Pandemic where more than one million Filipinos had already been stricken by this hell begotten scourge of our planet;

- [11.] Our Honorable Associate Justice Carpio and Honorable [Albert] Del Rosario are imploring our Excellency that he as the President of this country should defend our country's sovereign waters in the West Philippine Sea which is already part of our National Territory under Article I of our Constitution pursuant to the [United Nations] Arbitral Ruling which is already final in character.

They are telling [the Filipinos] that our Excellency is failing to live up to his duties as President of this country by his INACTION on the matter which amounts to a renunciation or abdication of the West Philippine Sea which is already part of our National Territory enshrined under Article I of our constitution and pursuant to the [United Nations] Arbitral Ruling which is already final in character.

Likewise, the [United Nations] Arbitral Body has likewise announced in National Television that the West Philippine Sea belongs to our beloved country, the Philippines;

- [12.] Formerly, our Excellency's position on the matter [were] the following:

- a) Our country cannot afford going to war against the powerful and military might of China,

Some of these invading Chinese maritime ships are armed with heavy artillery.

There was likewise a time that some reporters from ABS [-] CBN who were sent over to over look (sic) the situation in the West Philippine Sea were chased by Chinese Patrol Boats.

- b) Our country has debt of gratitude towards China because of the [COVID] 19 [v]accines that it has donated.

As regards this position of our Excellency, Honorable Associate

Justice Antonio Carpio replied that our country do[es] not need to go to war against [C]hina.

There are other remedies, peaceful in its approach such as going again to the [United Nations] Arbitral Body and complain that [its] Arbitral Ruling that the West Philippine Sea belongs to our beloved country, all of its natural resources on its seabed including the giant clams that were hoisted there by China [belong] to our beloved country were ignored and not respected by China.

Likewise, as regards our alleged [d]ebt of gratitude towards [C]hina, some experts say that not all Sinovac [v]accines that we received from [C]hina are donated.

Most of those Sinovac [v]accines were paid for by us.

Likewise, renunciation or abdication of our [country's] sovereign rights on the West Philippine Sea is not the proper way for him to act as our [P]resident. As President, he should encourage our people that he is doing everything on our country's position on this matter.<sup>4</sup>

Petitioner further argues the following:

1. “[W]hat is outlawed by our Constitution is a [w]ar of aggression as an instrument of our national policy, not a defensive war to protect our National Territory.”<sup>5</sup> The government may call upon not only its citizens but also “aliens”<sup>6</sup> to defend the state. In case of a defensive war against China, the Americans are similarly obliged to help the country pursuant to the Mutual Defense Agreement.<sup>7</sup>
2. In executing the laws, the President should act within the bounds of constitutional and statutory laws. Moreover, “official discretion” may be subjected to judicial review.<sup>8</sup>
3. There is “*unlawful neglect or inaction*” on the part of the President. By virtue of his office, it is his “ministerial duty” to defend the West Philippine Sea, which is part of our National Territory.<sup>9</sup>
4. Our constitutionally enshrined national territory, which embraces the archipelagic principle, and the exclusive

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<sup>4</sup> Id. at 2–4.

<sup>5</sup> Id. at 5, citing CONST., art. II, sec. 4, which reads as follows:  
SECTION 4. The prime duty of the Government is to serve and protect the people. The Government may call upon the people to defend the State and, in the fulfillment thereof, all citizens may be required, under conditions provided by law, to render personal, military or civil service.

<sup>6</sup> Id. at 6.

<sup>7</sup> Id.

<sup>8</sup> Id. at 6–9.

<sup>9</sup> Id. at 11.

economic zone are recognized internationally.<sup>10</sup>

5. The present petition assailing the President's inaction to carry out his duty to defend the West Philippine Sea should not be considered as a suit against the State in which the latter's consent should be secured.<sup>11</sup>

In his Supplemental Petition,<sup>12</sup> petitioner stresses the importance of a purported "collective voice" among all the nations against China's invasion of our national territory. Allegedly, our diplomatic protest is but a "solitary voice" of an aggrieved country directed against an aggressor and not a "defense by our country on the issue of the West Philippine Sea."<sup>13</sup> Thus, petitioner proposes the following actions:

8. The proper way for the [Philippines] to act now is to go again to the United [Nations] but not to the arbitral body but to the [United Nations] Security Council and invoke the Uniting for Peace Resolution of 1950.

China is presumed by being a permanent member of the Security Council that it would veto any international sanctions which are diplomatic pressures and economic pressure by any [United Nations] member-states and by invoking again the Uniting Peace Resolution[.] [W]e could then go to the [United Nations] General Assembly to bypass such veto[.]

....

9. If we succeed with the [United Nations] General Assembly, the [United Nations] could then send its [United Nations] Patrol Boats in the West Philippine Sea to protect our [fisherfolk].

....

10. As regards the Kalayaan Islands which became part of our national Territory pursuant to the United Nations Convention of the Law of the Sea III because those islands belong to our Exclusive Economic Zone, our [c]ountry should sue China [before] the International Court of Justice and demand that China... pay for the Kalayaan islands which it took from us for trillions of [d]ollars in damages.<sup>14</sup>

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<sup>10</sup> Id. at 12–18, citing CONST., art. I, which reads as follows:

ARTICLE I. The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all other territories over which the Philippines has sovereignty or jurisdiction, consisting of its terrestrial, fluvial, and aerial domains, including its territorial sea, the seabed, the subsoil, the insular shelves, and other submarine areas. The waters around, between, and connecting the islands of the archipelago, regardless of their breadth and dimensions, form part of the internal waters of the Philippines.

<sup>11</sup> Id. at 19.

<sup>12</sup> Esmero's Supplemental Petition is captioned as "Supplement to the Petition for Mandamus[,] The Solution to the West Philippine Territorial Sea Issue[,] The U.N. Uniting for Peace Resolution of 1950."

<sup>13</sup> Supplemental Petition, p. 2.

<sup>14</sup> Id. at 6–8.

The *ponencia* held that the Petition should be dismissed outright for naming the President as the lone respondent. Citing *De Lima v. Duterte*,<sup>15</sup> it explained that “the President is immune from suit during his incumbency, regardless of the nature of the suit filed against him.”<sup>16</sup> It further held that even if this Court were to consider the case filed as against the President’s representative or the executive secretary, a writ of mandamus would still not lie in petitioner’s favor as he fell short of proving a clear right to the relief asked for:

Mandamus is used merely to compel action and to coerce the performance of a pre-existing duty; it does not lie to control discretion. For a petition for mandamus to prosper, it must be shown that the subject of the petition is a **ministerial** act or duty on the part of the board, officer or person, and that the petitioner has a well-defined, clear and certain right to warrant the grant thereof. It falls on the petitioner to show that his clear legal right to the performance of the act, and a corresponding compelling duty on the part of the respondent to perform the act.

This Court, in *De Castro v. Judicial and Bar Council*, distinguished a ministerial act from one that is discretionary. “A purely ministerial act or duty is one which an officer or tribunal performs in a given state of facts, **in a prescribed manner**, in obedience to the mandate of a legal authority, without regard to or the exercise of his own judgment upon the propriety or impropriety of the act done.

Indeed, the President is the guardian of the Philippine archipelago, including all the islands and waters embraced therein and all other territories over which it has sovereignty or jurisdiction. By constitutional fiat and the intrinsic nature of his office, the President is also the sole organ and authority in the external affairs of the country.

....

Petitioner submits that it is the ministerial duty of the President, as part of his mandate to enforce the laws and see to their faithful execution, to “defend” the national territory by going before the United Nations (UN) to ask the latter to send “UN Patrol Boats. . . to protect our fishermen.” It is also petitioner’s view that the Philippines should “sue China with (sic) the International Court of Justice [(ICJ)] and demand that China [ ] pay for the Kalayaan Islands which it took from us for trillions of Dollars in damages.”

For all his posturing, however, petitioner has failed to point to any law that specifically requires the President to go the UN or the ICJ to sue China for its incursions into our exclusive economic zone (EEZ). Neither has he shown a clear and unmistakable constitutional or statutory provision which prescribes *how* the President is to respond to any threat (actual or imminent) from another State to our sovereignty or exercise of our sovereign rights.<sup>17</sup> (Emphasis in the original, citations omitted)

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<sup>15</sup> G.R. No. 227635, October 15, 2019 <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65820>> [Per C.J. Bersamin, En Banc].

<sup>16</sup> *Ponencia*, p. 2.

<sup>17</sup> *Id.* at 2–5.

I agree with the *ponencia* that the President is immune from suit, whether administrative, civil, or criminal, during their incumbency.<sup>18</sup>

However, I cannot agree with the *ponencia*'s statement that the President can *never* be sued "regardless of the nature of the suit filed against him."<sup>19</sup> As I have stated in my separate opinion in *De Lima v. Duterte*,<sup>20</sup> "[p]residential immunity, as it is currently understood, is not absolute." It is merely immunity from liability, not accountability. The liability itself is not absolved, but merely deferred until the end of their tenure in office.

In *Estrada v. Desierto*,<sup>21</sup> this Court delineated the extent of presidential immunity to ascertain whether then President Joseph Estrada can invoke the privilege as regards his criminal charges before the Office of the Ombudsman despite his ouster in 2001. In rejecting such contention, this Court explained that a *non-sitting* president cannot be afforded immunity from suit for criminal acts perpetrated while in office:

*We now come to the scope of immunity that can be claimed by petitioner as a non-sitting President. The cases filed against petitioner Estrada are criminal in character. They involve plunder, bribery and graft and corruption. By no stretch of the imagination can these crimes, especially plunder which carries the death penalty, be covered by the alleged mantle of immunity of a non-sitting president. Petitioner cannot cite any decision of this Court licensing the President to commit criminal acts and wrapping him with post-tenure immunity from liability. It will be anomalous to hold that immunity is an inoculation from liability for unlawful acts and omissions. The rule is that unlawful acts of public officials are not acts of the State and the officer who acts illegally is not acting as such but stands in the same footing as any other trespasser.*

Indeed, a critical reading of current literature on executive immunity will reveal a judicial disinclination to expand the privilege especially when it impedes the search for truth or impairs the vindication of a right. In the 1974 case of *US v. Nixon*, US President Richard Nixon, a sitting President, was subpoenaed to produce certain recordings and documents relating to his conversations with aids and advisers. Seven advisers of President Nixon's associates were facing charges of conspiracy to obstruct justice and other offenses which were committed in a burglary of the Democratic National Headquarters in Washington's Watergate Hotel during the 1972 presidential campaign. President Nixon himself was named an unindicted co-conspirator. President Nixon moved to quash the subpoena on the ground, among others, that the President was not subject to judicial process and that he should first be impeached and removed from office before he could be made amenable to judicial proceedings. The claim was rejected by the US Supreme Court. It concluded that "when the ground for asserting privilege as to subpoenaed materials sought for

<sup>18</sup> *Rubrico v. Macapagal-Arroyo*, 627 Phil. 37, 62 (2010) [Per J. Velasco, Jr., En Banc], citing *David v. Macapagal-Arroyo*, 522 Phil. 705 (2006) [Per J. Sandoval-Gutierrez, En Banc].

<sup>19</sup> Ponencia, p. 2.

<sup>20</sup> J. Leonen, Concurring Opinion in *De Lima v. Duterte*, G.R. No. 227635, November 3, 2020 [Unsigned, En Banc].

<sup>21</sup> 406 Phil. 1 (2001) [Per J. Puno, En Banc].

use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.” In the 1982 case of *Nixon v. Fitzgerald*, the US Supreme Court further held that the immunity of the President from civil damages covers only “official acts.” Recently, the US Supreme Court had the occasion to reiterate this doctrine in the case of *Clinton v. Jones* where it held that the US President's immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct.

*There are more reasons not to be sympathetic to appeals to stretch the scope of executive immunity in our jurisdiction. One of the great themes of the 1987 Constitution is that a public office is a public trust. It declared as a state policy that “(t)he State shall maintain honesty and integrity in the public service and take positive and effective measures against graft and corruption.” It ordained that “(p)ublic officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.” It set the rule that “(t)he right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches or estoppel.” It maintained the Sandiganbayan as an anti-graft court. It created the office of the Ombudsman and endowed it with enormous powers, among which is to “(i)nvestigate on its own, or on complaint by any person, any act or omission of any public official, employee, office or agency, when such act or omission appears to be illegal, unjust, improper, or inefficient.” The Office of the Ombudsman was also given fiscal autonomy. These constitutional policies will be devalued if we sustain petitioner’s claim that a non-sitting president enjoys immunity from suit for criminal acts committed during his incumbency.<sup>22</sup> (Emphasis supplied; citations omitted)*

In resolving the relevant motion for reconsideration in *Estrada*, this Court remained firm in its ruling. It reiterated that the protection afforded by the privilege only extends during the president’s *tenure*:

*Petitioner stubbornly clings to the contention that he is entitled to absolute immunity from suit. His arguments are merely recycled and we need not prolong the longevity of the debate on the subject. In our Decision, we exhaustively traced the origin of executive immunity in our jurisdiction and its bends and turns up to the present time. We held that given the intent of the 1987 Constitution to breathe life to the policy that a public office is a public trust, the petitioner, as a non-sitting President, cannot claim executive immunity for his alleged criminal acts committed while a sitting President. Petitioner’s rehashed arguments including their thinly disguised new spins are based on the rejected contention that he is still President, albeit, a President on leave. His stance that his immunity covers his entire term of office or until June 30, 2004 disregards the reality that he has relinquished the presidency and there is now a new de jure President.*

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<sup>22</sup> Id. at 75–78.

Petitioner goes a step further and avers that even a non-sitting President enjoys immunity from suit during his *term* of office. He buttresses his position with the deliberations of the Constitutional Commission, *viz*:

“Mr. Suarez. Thank you.

The last question is with reference to the Committee's omitting in the draft proposal the immunity provision for the President. I agree with Commissioner Nolleto that the Committee did very well in striking out this second sentence, at the very least, of the original provision on immunity from suit under the 1973 Constitution. But would the Committee members not agree to a restoration of at least the first sentence that the president shall be immune from suit during his *tenure*, considering that if we do not provide him that kind of an immunity, he might be spending all his time facing litigations, as the President-in-exile in Hawaii is now facing litigations almost daily?

Fr. Bernas:

The reason for the omission is that we consider it understood in present jurisprudence that during his *tenure* he is immune from suit.

Mr. Suarez:

So there is no need to express it here.

Fr. Bernas:


There is no need. It was that way before. The only innovation made by the 1973 Constitution was to make that explicit and to add other things.

Mr. Suarez:

On the understanding, I will not press for any more query, madam President.

I thank the Commissioner for the clarification.”

*Petitioner, however, fails to distinguish between term and tenure. The term means the time during which the officer may claim to hold the office as of right, and fixes the interval after which the several incumbents shall succeed one another. The tenure represents the term during which the incumbent actually holds office. The tenure may be shorter than the term for reasons within or beyond the power of the incumbent. From the deliberations, the intent of the framers is clear that the immunity of the president from suit is concurrent only with his tenure and not his term.*<sup>23</sup> (Emphasis supplied; citations omitted)



The privilege of presidential immunity does not shield the president from any wrongdoing. It merely guarantees that the performance of their

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<sup>23</sup> *Estrada v. Desierto*, 408 Phil. 194, 242–244 (2001) [Per J. Puno, En Banc].



functions is free from interruptions, “considering that being the Chief Executive of the Government is a job that, aside from requiring all of the office-holder’s time, also demands undivided attention.”<sup>24</sup> In *David v. Macapagal-Arroyo*:<sup>25</sup>

Incidentally, it is not proper to implead President Arroyo as respondent. Settled is the doctrine that the President, during [their] tenure of office or actual incumbency, may not be sued in any civil or criminal case, and there is no need to provide for it in the Constitution or law. *It will degrade the dignity of the high office of the President, the Head of State, if he [or she] can be dragged into court litigations while serving as such. Furthermore, it is important that he [or she] be freed from any form of harassment, hindrance or distraction to enable [them] to fully attend to the performance of [their] official duties and functions. Unlike the legislative and judicial branch, only one constitutes the executive branch and anything which impairs his [or her] usefulness in the discharge of the many great and important duties imposed upon [them] by the Constitution necessarily impairs the operation of the Government.*<sup>26</sup> (Emphasis supplied; citations omitted)

Moreover, the scope of presidential immunity only covers immunity from liability during incumbency. It is not an immunity against accountability. Public office is a public trust. The president, as with any other public official, is accountable to the people at all times.<sup>27</sup>

Actions for the issuance of the extraordinary writs of amparo and habeas data are not “[actions] to determine criminal guilt requiring proof beyond reasonable doubt, or liability for damages requiring preponderance of evidence, or administrative responsibility requiring substantial evidence that will require full and exhaustive proceedings.”<sup>28</sup> This Court has stated that “since there is no determination of administrative, civil or criminal liability in amparo and habeas data proceedings, courts can only go as far as ascertaining responsibility or accountability for the enforced disappearance or extrajudicial killing.”<sup>29</sup>

The president should not be immune from suits that demand accountability from the respondent. Thus, the privilege of presidential immunity should not apply to actions for the issuance of the extraordinary writs of amparo and habeas data.

This case, however, involves a Petition for Mandamus to compel the President to request the United Nations to assist us in defending the West

<sup>24</sup> *Soliven v. Makasiar*, 249 Phil. 394, 400 (1988) [Per Curiam, En Banc].

<sup>25</sup> 522 Phil. 705, 763–764 (2006) [Per J. Sandoval-Gutierrez, En Banc].

<sup>26</sup> *Id.* at 764.


<sup>27</sup> See CONST., art. XI, sec. 1.

<sup>28</sup> *Secretary of Defense v. Manalo*, 589 Phil. 1, 41 (2008) [Per C.J. Puno, En Banc], citing Deliberations of the Committee on the Revision of the Rules of Court, August 10, 2007; August 24, 2007; August 31, 2007; and September 20, 2008.

<sup>29</sup> *Rodriguez v. Macapagal-Arroyo*, 676 Phil. 84, 105 (2011) [Per J. Sereno, En Banc].

Philippine Sea from foreign incursion. While the President does have the sworn duty to preserve and defend the Constitution, matters within the President's discretion are not compellable by mandamus. "As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs."<sup>30</sup> As such, the direction of the country's foreign policy is political in nature and subject to the discretion of our political branches. Absent any grave abuse of discretion, this Court should not interfere, regardless of whether the privilege of presidential immunity was invoked.

**ACCORDINGLY**, I vote to **DISMISS** the Petition.



**MARVIC M.V.F. LEONEN**  
Associate Justice

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<sup>30</sup> *Pimentel v. Office of the Executive Secretary*, 501 Phil. 303, 313 [Per J. Puno, En Banc].