A Clash between Two Bedans

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Lawyers are regarded as guardians of the law. They have the duty to protect people's lives and property as well as the society within the realms of justice.

The discord today between the administration and the opposition has divided this country on the basis of: political affiliations; the social classes; the left-wing and right wing; bureaucrats and revolutionaries; yellow and red; and a few other distinctions. This article does not seek to favour or overthrow either side, but merely to provide a more informed choice of which sides we take on certain issues, and the legal aspects behind the disagreement between the administration and the opposition, without regard for motives or political color.

The persons central to these opposing sides are two Bedan lawyers, both graduates of the College of Law of San Beda College — President Rodrigo Roa Duterte and Senator Leila Norma Eulalia Josefa Magistrado De Lima.

Extrajudicial Killings

Extrajudicial killings - this is one of the subjects that have brought on the divide among the Philippine constituency. President Rodrigo Duterte has either admitted, denied, or expressed acquiescence to these allegations. These however, remain to be allegations, there being no judicial finding on its existence, we cannot presume such fact. However, on the basis of the sheer number of deaths, we cannot also reject the possibility.

On multiple occasions, the President has vowed to protect the policemen who do their duty, even if they kill a thousand people in the course of their work. On the other side, Senator Leila De Lima has been outspoken about the observance of human rights, in the course of the drug war, and has pointed out the violations thereof which she claims is blatant, in view of the number of deaths and nature of wounds inflicted. Duterte and his Cabinet has refuted these allegations, claiming: that it is only natural, as they really have guns, and fight back; that there could be salvage victims and that they will investigate; and that as a lawyer he will uphold his duty to observe due process.

On President Duterte's side:

When faced with criminal prosecution, any person can raise self defense by virtue of the Revised Penal Code (RPC) provisions on Justifying Circumstances, and law enforcement officers are no exception. If there is peril to their lives, Duterte is precise in saying that police officers can do whatever be in their means to expel the danger, pursuant to Article 11, Paragraph 1 of the RPC, that *"Anyone who acts in defense of his person or rights, provided the following circumstances concur: First, Unlawful aggression. Second, Reasonable Necessity of the means employed to prevent or repel it. Third, Lack of sufficient provocation on the part of the person defending himself."*

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The President's stance is further bolstered by a rule of evidence which provides for the presumption of regularity in the performance of official duty. As to the rational basis underlying this presumption, the Supreme Court held that: *"Indeed, it is a self-evident fact that our law enforcement officers are sworn to uphold the law, not to invent crimes. The imperative of ensuring the smooth functioning of the government machinery grounds the evidentiary presumption that public officers have performed their duties regularly. To accept as presumption-overcoming dubious tales of the likes respondent purveyed is to leave the smooth functioning of our government to the mercy of the fertile imagination of litigants, free to concoct all sorts of devious plots and attribute them to unnamed civil servants."* (Miro v. Dosono, G.R. No. 170697)

As applied to cases involving violations of the Comprehensive Dangerous Drugs Act, this presumption stands strong, as stated in the case of *People v. Gonzales y Baron (G.R. No. 106098 [1993]), the defense that accused was framed-up by the police officers requires stronger proof than bare assertion because of this presumption of regularity in the performance of their official duties by police officers.*

There is therefore firm foundations for which the extreme measures on the war against the proliferation of drugs which has plagued this country for decades, may be sustained.

On Senator De Lima's side:

Acting on the sheer number of killings resulting in legitimate police operations against violators of the Comprehensive Dangerous Drugs Act, coupled with the President's Statements on killings, the Senator has been a staunch advocate for the rights of these criminals, which to her are victims nonetheless. She claims that we cannot deem these victims as criminals by virtue of the constitutional presumption of innocence. Under our present jurisprudence, she has this in her favour, as due process vis-à-vis the presumption of innocence, until there has been a judicial finding of guilt beyond reasonable doubt, the presumption remains. As declared by the High Court in People v. Clores (G.R. No. L-61408): *The presumption of innocence is a conclusion of law in favor of the accused whereby his innocence is not only established but continues until sufficient evidence is introduced to overcome the proof which the law has created — that is, his innocence.*

Furthermore, as held in *People v. Tintinman, (G.R. No. 101663 [1992]), the Supreme Court citing the case of People vs Cando: the presumption of regularity in the performance of official duty cannot prevail over the presumption of innocence.* This is bolstered by a long line of decisions, declaring that *the disputable presumption that official duties have been regularly performed must yield to the constitutional presumption of innocence of an accused. (People v. Fernando y Carane, G.R. No. L-66947 [1986])*

It is therefore beyond dispute that the presumption of innocence, being a legal presumption which is expressly enshrined in our fundamental law, cannot be defeated by a mere rule of evidence. This however, is purely academic, on the issue of the extrajudicial killings, since these people, whether you refer to them as victims or criminals, can no longer be the subject of criminal prosecution, as they cannot admit nor defend their actions. Nor can they be held liable thereafter.

It should be noted however that the presumption of regularity in the performance of

duty, and a justifying circumstance cannot be raised at the same time, effectively placing all the burden on the offended party, or his heirs. Otherwise, it might appear that the general public would be left at the mercy of the most unscrupulous law enforcement officers. As when a police officer, accused of the crime of homicide commited during a buy-bust operation, alleges that he merely acted in self-defense, and further invoking the presumption of regularity, need not present any evidence therefor. While on the opposing side, the heirs of the deceased would have the burden of proving that there was indeed, no self-defense. This is not so, under the law.

The Supreme Court, has already ruled in *People v. Sarabia (G.R. No. 106102 [1999])*, that *"when an accused admits killing the victim, but invokes a justifying circumstance, the constitutional presumption of innocence is effectively waived and the burden of proving the existence of such circumstance shifts to the accused."* Considering that a justifying circumstance is never presumed, and whoever invokes it, has the burden of proving the same(source), a police officer therefore cannot and should not be allowed to invoke self-defense and at the same time raise the presumption of regularity.

Lastly, it bears stressing that police officers, contrary to what we may have heard, do not have full freedom to use any means to prevent harm on themselves, during legitimate police operations, considering that the second requisite of Self-Defense requires *"reasonable necessity of the means used to repel it."*

Presidential Immunity from Suit

On another legal aspect of the clash among the two, Sen. De Lima has filed petitions for the issuance of the writ of amparo and of the writ of habeas data, in order to have the Supreme Court re-examine the Presidential Immunity from suit. If the Court rules on the issue in her favour, would mark a historic moment in our political law.

For Duterte's part:

Duterte has on his side, jurisprudence which effectively shield him from any liability during his tenure as President, by virtue of the Doctrine of the President's Immunity from Suit.

In our jurisdiction, the very first case which applied the doctrine was in 1910 in the case of *Forbes v. Chuoco Tiaco (G.R. No. 6157) "The principle of nonliability, as herein enunciated, does not mean that the judiciary has no authority to touch the acts of the Governor-General; that he may, under cover of his office, do what he will, unimpeded and unrestrained. Such a construction would mean that tyranny, under the guise of the execution of the law, could walk defiantly abroad, destroying rights of person and of property, wholly free from interference of courts or legislatures. Thus, the doctrine had only jurisprudence as its origin."*

In *Soliven v. Makasiar (167 SCRA 393 [1988])*, which declared that *"The rationale for the grant of the privilege of the immunity from suit is to assure the exercise of presidential duties and functions free form any hindrance and or distraction."* It was meant that, so long as the president remains in office, absolutely no suit shall prosper against him.

For De Lima's part:

It was only during Martial Law, when the Presidential Immunity from suit, was actually incorporated in positive law. This was found in the 1973 Constitution which came as an

amendment in 1981. This provision however was not reproduced in the 1987 Constitution, which left the issue on whether the doctrine was still applicable, untouched. Then came *Soliven*, which upheld the president's immunity, after resort to the deliberations of our framers. It showed that the same is to be construed as absolute privilege from suit, but only during his tenure.

In the same case of *Soliven*, it was also shown that the framers, during the deliberations of the 1987 Constitution, did not intend to reproduce the provision, for the reason that it is already well accepted, and implied in our legal system. It is however, a basic rule of construction that when a provision of law is not reproduced in a subsequent law, the doctrine is deemed abandoned. While this is not exactly the case, in every situation, the Courts have accorded this rule of construction with such force, in ruling on matters before it, even when no such intention was actually in place.

Furthermore, the fact that our framers did not feel the need to provide for an express provision in the Constitution, entertains the notion that they have left it open to judicial scrutiny. Whether or not this was truly their intention, the fact remains that, at present, the presidential immunity only has for its basis, jurisprudence for which the court can effectively reverse in a subsequent decision.

Abandoning the doctrine, in view of the rational basis for the immunity as expressed in *Soliven*, may not be too far-reaching, especially considering *Clinton vs Jones* (42 USC §§ [1938]) which effectively abandoned the absolute immunity from suit, and instead limited the immunity to only official acts of the President, during his tenure. The Court added:

> We add a final comment on two matters that are discussed at length in the briefs: the risk that our decision will generate a large volume of politically motivated harassing and frivolous litigation, xxx We are not persuaded that xxx these risks are serious. Most frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement by the defendant.

Further considering the case of *Estrada v. Desierto (G.R. No. 146710-15 [2001])* which the Court clarified that, *"courts should look with disfavor upon the presidential privilege of immunity, especially when it impedes the search for truth or impairs the vindication of a right."* Perhaps the Supreme Court might give due course to the petitions filed by the Senator, with respect to the issue raised against the presidential immunity. Without regard to the merits of the petition of the Senator, perhaps there is a need to revisit.

Political Questions vis-à-vis Power of Judicial Review

Although the Supreme Court may rule in favor of abandoning the absolute doctrine on the presidential immunity from suit, could he even be held liable therefor during his tenure. If so, can the actions of the President in exercise of his discretion as the Chief Executive be impugned in Courts of Justice.

On Duterte's side:

Political questions, have been defined by the SC in *Tanada v. Cuenco* (103 Phil 1051 [1965]), as *"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 the government." This means that in case of violation of the duty falling with the two political branches' respective mandate, the remedy available to the people is not judicial but political. That is through, public demonstrations, mass media, and ultimately, through an exercise of suffrage. It is, in this regard the President has his best defense against his detractors. The constituency of which the President has gathered remains devoted to the President, despite all the his detractors may throw against him and his allies. Perhaps due to the fact that all that his critics can impugn, are those which the President has been vocal about during his elections, and for which he achieved support from the electorate. It is in this aspect, Duterte's strength lies and which has catapaulted him to the presidency, as well as the support he receives now.

The only recourse left with Sen. De Lima, a staunch opponent of the administration, is with the Judiciary. Thus, necessitating a review of the presidential immunity from suit, and the nature of political questions.

On De Lima's side:

In case she manages to pass the incredible hurdle of having the High Court reverse a long-settled doctrine in the Philippine legal system, she still has yet another impediment for complete relief, if to bring to an end the drug war be her main objective. That is, the nature of political questions.

As ruled in *International Catholic Migration Commission v. Calleja* (G.R. No. 85750), the SC reiterated that the basis of political questions which prevent the courts from assuming jurisdiction, stems from the principle of separation of powers.

The Senator however has in her favor, the fact that the doctrine of political questions have prevented the Courts from assuming jurisdiction have been significantly abated by the 1987 Constitution. That is, through the inclusion of Section 1, Paragraph 2, of Article VIII thereof. This provides for the Supreme Court's power of Judicial Review.

This power is defined thereunder as the *"duty of the courts to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."* Thus, the Court, *Marcos vs Manglapus (G.R. No. 88211[1988])* said, *"The framers of the Constitution believed that the free use of the political question doctrine allowed the Court during the Marcos years xxx where it refused to examine and strike down an exercise of authoritarian power. xxx We are now precluded from refusing to invalidate by its mandate from refusing to invalidate a political use of power through a convenient resort to the political question doctrine."*

There is therefore some substance in the contention. It is however up to the Senator to establish a showing of grave abuse of discretion on the part of the executive branch, in the conduct of its war against drugs.

Conclusion

There is therefore support to sustain either side. All things being equal, without regard for any malice, political motives, or gain, this begs the question whether we will support on one side a radical leader, prepared to face legal intricacies in achieving his goals, and on the other side, a leader who seeks to maintain ideals and decency. The former a revolutionary, capable

of setting goals and providing immediate results, while the latter, aims to persist on our current legal system, and maintain a gradual progress in the pursuit of development within the legal machinery.