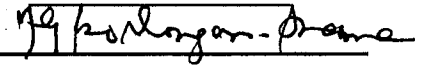


G.R. No. 225973 – SATURNINO C. OCAMPO et al., petitioners, v. REAR ADMIRAL ERNESTO C. ENRIQUEZ, et al., respondents.

Promulgated: November 8, 2016



SEPARATE CONCURRING OPINION

BRION, J.:

I write this Separate Concurring Opinion to express the reasons for my vote to dismiss the petitions assailing President Rodrigo Duterte's order to inter the remains of former President Ferdinand Marcos at the Libingan ng Mga Bayani (*LNMB*).

I opine that the Court cannot grant the petitions as the petitioners presented issues that are outside our judicial authority – as defined by law and jurisprudence – to resolve.

I am not insensitive to the plight of victims of human rights violations, nor am I unaware of the allegations they raised against the Marcos administration. But their emotions and beliefs cannot and should not influence the faithful discharge of my duties as a Member of this Court.

The judicial power that the Court wields is symbolized by a blindfolded lady carrying a set of scales for a reason: it bases its decision, not on who the litigants are, nor on the clout – political, emotional, or financial – they may carry; judicial adjudication is based on law and evidence alone. Under this standard, I cannot grant the petitions without knowingly crossing the line separating judicial power from judicial overreach.

To my mind, the present petitions, however emotionally charged they might be, do not present *an actual case or controversy* that calls for the exercise of the power of judicial review.

Without an actual case or controversy, we cannot and should not exercise this exceptional power; even our expanded jurisdiction under the Constitution does not allow exceptions to this deficiency. For us to indulge in this exercise would not only amount to a judicial overreach, but could possibly thrust this Court into a political minefield that could not be traversed without weakening the public's trust and confidence in our institution.

Ours is a power that emanates from the authority, granted to us under the Constitution, to interpret and apply the law in actual and live disputes. We exercise this power through the decisions we render in cases presented before us; without the public's respect and trust in the legal soundness of our



decisions, our pronouncements would be no different from meaningless doodles that children write on throw away papers.

Even if we were to exercise our power of judicial review in these petitions, the exercise of our judgment should be limited by the following considerations:

First, judicial review, even under our Court's expanded jurisdiction, does not empower the Court to *directly* pass upon allegations involving *violations of statutes*;

Second, the Constitution's "faithful execution" clause cannot be made the basis to question the Executive's manner of implementing our laws;

Third, the petitioners failed to specify any treaty obligation prohibiting Marcos' burial at the LNMB;

Fourth, the Constitution, while built on the ashes of the Marcos regime, should not be interpreted in a way that would prevent reconciliation and the country's move towards national unity; and

Finally, the necessity of Marcos' burial at the LNMB is a political question that the President has decided, and is not without support from the Filipino electorate.

I shall discuss these points in the order posed above.

Judicial review, even under our Court's expanded jurisdiction, does not empower the Court to directly pass upon allegations involving violations of statutes.

The petitions directly assail before this Court the President's decision allowing the interment of the remains of former President Marcos at the LNMB; they impute grave abuse of discretion on President Duterte for this decision and seek, under this Court's expanded jurisdiction, the nullification of his actions. By doing so, the petitioners directly seek the exercise of our power of judicial review.

After due consideration, I find that these petitions failed to establish the necessity of the Court's *direct* exercise of its power of judicial review, as their cited legal bases and arguments largely involve violations of the law or its misapplication. *The remedy available to them, given their objective, is not judicial review under the Court's expanded jurisdiction, but the ordinary remedies available for errors of law under the Rules of Court.*

Thus, we cannot grant to the petitioners the remedy they seek, as their desired remedy lies outside this Court's power to directly provide.



The petitions collectively assert that the burial order violates several statutes and implementing rules and regulations, among them: AFP Regulations G 161-373,¹ Republic Act (RA) No. 289,² and RA 10368.³ The petitions further assert that the President's failure to interpret these laws, together or in relation with one another, to bar Marcos' burial at the LNMB, violates the faithful execution clause and the spirit of the 1987 Constitution.

Indeed, our Court now possesses the duty to determine and to act when "grave abuse of discretion amounting to lack or excess of jurisdiction on the part of ... the government" exists. This is a grant of power under the second paragraph of Article VIII, Section 1 of the 1987 Constitution.

Under the expanded jurisdiction that the Constitution granted this Court, our duty to exercise judicial review runs broad and deep; it exists even when an aspect of the case involves a political question. We have in fact cited this duty to justify the relaxation of the "standing" requirement for judicial review when the case presents a matter of transcendental importance, a standard that the Court has formulated and self-defined to allow for the exceptional application of our jurisdiction.

Separately from all these, I have also been pushing for an alternative approach in invoking our expanded jurisdiction, by recognizing that a *prima facie* showing of grave abuse of discretion on the part of the government in *cases involving constitutional violations*, should be sufficient to give a Filipino citizen the standing to seek judicial remedy.

The Court's expanded jurisdiction, however, affects only the *means* of invoking judicial review, and does not change the nature of this power at all. The power of judicial review pertains to the power of the courts to test the validity of executive and legislative acts for their conformity with the Constitution.⁴ As a requirement for its *direct exercise* by this Court, the "grave abuse of discretion" that triggers the Court's expanded jurisdiction must necessarily involve a violation of the Constitution.

¹ AFP Regulations G 161-373 Allocation of Cemetery Plots at the LNMB, issued on 9 April 1986 by then AFP Chief of Staff General Fidel V. Ramos and then President Corazon Aquino.

² An Act Providing for the Construction of a National Pantheon for Presidents of the Philippines, National Heroes, and Pantheon for Presidents of the Philippines, National Heroes, and Patriots of the Country, 16 June 1948. "Section 1: To perpetuate the memory of all the Presidents of the Philippines, national heroes and patriots for the inspiration and emulation of this generation and of generations still unborn, x x x" (Emphasis by petitioner)

³ Human Rights Victims Reparation and Recognition Act of 2013.

⁴ *Garcia v. Executive Secretary*, G.R. No. 157584, April 2, 2009. Note, at this point, that judicial review is an aspect of judicial power, which the Constitution defines as the power to "settle actual controversies involving rights which are legally demandable and enforceable"; thus the Court necessarily exercises judicial power when engaging in judicial review, but not all exercises of judicial power includes, or needs, the exercise of the judicial review power. Judicial review, when approached through the traditional route, requires the existence of four requirements, viz: (1) an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have "standing" to challenge; he must have a personal and substantial interest in the case such that he has sustained, or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest possible opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.

In other words, the Court's direct authority to exercise its expanded jurisdiction is limited to the determination of the *constitutionality* of a governmental act. Grave abuse of discretion arising from mere violations of statutes cannot, as a rule, be the subject of the Court's direct exercise of its expanded jurisdiction. *The petitioners' recourse in this situation lies with other judicial remedies or proceedings, allowed under the Rules of Court, that may arrive in due course at the Court's portals for review.*

In the context of the present case, for the Court to directly exercise its expanded jurisdiction, the petitioners carry the burden of proving, *prima facie*, that the President's decision to inter Marcos at the LNMB violates the Constitution.

This view is not only in accord with existing pronouncements on judicial review and the exercise of judicial power; it is also the more prudent and practicable option for the Court.

Opening the Court's direct exercise of its expanded jurisdiction to acts that violate statutes, however grave the abuse of the statute might be, significantly dilutes the doctrines of *hierarchy of courts*,⁵ *primary jurisdiction*,⁶ and *exhaustion of administrative remedies*.⁷ In short, the necessity for the application of these doctrines diminishes when recourse to the Court is immediately and directly made available.

The practice of directly accessing this Court could also possibly add petitions that are jointly cognizable with the lower courts, to the Court's already clogged dockets, and deluge this Court with matters that are highly technical in nature or are premature for adjudication. Let it be remembered that the Supreme Court is not a trier of facts; this adjudicatory role belongs, as a rule, to the lower courts.

⁵ Under the principle of hierarchy of courts, direct recourse to this Court is improper because the Supreme Court is a court of last resort and must remain to be so in order for it to satisfactorily perform its constitutional functions, thereby allowing it to devote its time and attention to matters within its exclusive jurisdiction and preventing the overcrowding of its docket. *Republic of the Philippines v. Caguioa*, G.R. No. 174385, February 20, 2013

⁶ The doctrine of primary jurisdiction holds that if a case is such that its determination requires the expertise, specialized training and knowledge of an administrative body, relief must first be obtained in an administrative proceeding before resort to the courts is had even if the matter may well be within their proper jurisdiction. It applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative agency. In such a case, the court in which the claim is sought to be enforced may suspend the judicial process pending referral of such issues to the administrative body for its view or, if the parties would not be unfairly disadvantaged, dismiss the case without prejudice. *Euro-med Laboratories Phil v. Province of Batangas*, G.R. No. 148106, July 17, 2006.

⁷ The general rule is that before a party may seek the intervention of the court, he should first avail of all the means afforded him by administrative processes. The issues which administrative agencies are authorized to decide should not be summarily taken from them and submitted to a court without first giving such administrative agency the opportunity to dispose of the same after due deliberation.

Corollary to the doctrine of exhaustion of administrative remedies is the doctrine of primary jurisdiction; that is, courts cannot or will not determine a controversy involving a question which is within the jurisdiction of the administrative tribunal prior to the resolution of that question by the administrative tribunal, where the question demands the exercise of sound administrative discretion requiring the special knowledge, experience and services of the administrative tribunal to determine technical and intricate matters of fact. *Republic v. Lacap*, G.R. No. 158253, March 2, 2007, 517 SCRA 255, 265.

In these lights, I find that the petitioners' allegations equating President Duterte's alleged statutory violations (when he issued his burial order) to grave abuse of discretion, are not the proper subject of judicial review under the Court's *direct* exercise of its expanded jurisdiction.

Assuming, hypothetically, that several statutes have indeed been erroneously applied by the President, the remedy for the petitioners is not the *direct and immediate* recourse to this Court for the nullification of the illegal acts committed. Violations of statutes by the Executive may be assailed through administrative bodies that possess the expertise on the applicable laws and that possess as well the technical expertise on the information subject of, or relevant to, the dispute.

For these statutory violations, recourse may be made before the courts through an appeal of the administrative body's ruling, or by filing for a petition for declaratory relief before the lower court with jurisdiction over the matter. Only when these lower courts have rendered their decisions should these matters be elevated to this Court by appeal or *certiorari*; even then, the issues the petitioners may present are limited to questions of law, not to questions of fact.

The faithful execution clause does not allow the constitutionalization of issues that, if proven to be true, would amount to the violation of statutes.

Neither can I agree that the "faithful execution" clause found in the Constitution may be used to constitutionalize issues that primarily involve the manner by which laws are implemented.

The Constitution vests in the President the power to execute laws under Section 1, Article VII of the 1987 Constitution which provides:

SECTION 1. The executive power shall be vested in the President of the Philippines.

The Constitution has apparently left out from this provision a definition of what "executive power" exactly is, in order to give the President sufficient flexibility and leeway in the implementation of laws. We thus have jurisprudence recognizing the vast and plenary nature of executive power,⁸ and the President's vast discretion in implementing laws.

⁸ In *Sanalakas v. Executive Secretary*, G.R. No. 159085, February 3, 2004, for instance, the Court noted:

In *The Philippine Presidency A Study of Executive Power*, the late Mme. Justice Irene R. Cortes, proposed that the Philippine President was vested with residual power and that this is even greater than that of the U.S. President. She attributed this distinction to the "unitary and highly centralized" nature of the Philippine government. She noted that, "There is no counterpart of the several states of the American union which have reserved powers under the United States constitution." Elaborating on the constitutional basis for her argument, she wrote:



This immense executive power, however, is not without limitations. The Constitution provides clear and categorical limits and any violation of these limits could amount to a grave abuse of discretion on the part of the President.

The Constitution has as well defined how the President is to relate to other officials within his own department. Article VI, Section 17 of the 1987 Constitution provides that:

SECTION 17. The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.

Through jurisprudence, we have recognized that this provision vests in the President the *power of control and supervision* over all the executive departments, bureaus, and offices.⁹ The first sentence pertains to the President's *power of control*, while the latter, to his *power of supervision*. His duty to "ensure that the laws be faithfully executed" pertains to his power (and duty) of supervision over the executive branch, and when read with Section 4, Article X of the 1987 Constitution, over local government

.... The [1935] Philippine [C]onstitution establishes the three departments of the government in this manner: "The legislative power shall be vested in a Congress of the Philippines which shall consist of a Senate and a House of Representatives." "The executive power shall be vested in a President of the Philippines." The judicial powers shall be vested in one Supreme Court and in such inferior courts as may be provided by law." These provisions not only establish a separation of powers by actual division but also confer plenary legislative, executive, and judicial powers. For as the Supreme Court of the Philippines pointed out in *Ocampo v. Cabangis*, "a grant of legislative power means a grant of all the legislative power; and a grant of the judicial power means a grant of all the judicial power which may be exercised under the government." If this is true of the legislative power which is exercised by two chambers with a combined membership [at that time] of more than 120 and of the judicial power which is vested in a hierarchy of courts, it can equally if not more appropriately apply to the executive power which is vested in one official – the president. He personifies the executive branch. There is a unity in the executive branch absent from the two other branches of government. The president is not the chief of many executives. He is the executive. His direction of the executive branch can be more immediate and direct than the United States president because he is given by express provision of the constitution control over all executive departments, bureaus and offices.⁵⁵

The esteemed Justice conducted her study against the backdrop of the 1935 Constitution, the framers of which, early on, arrived at a general opinion in favor of a strong Executive in the Philippines.⁵⁶ Since then, reeling from the aftermath of martial law, our most recent Charter has restricted the President's powers as Commander-in-Chief. The same, however, cannot be said of the President's powers as Chief Executive.

In her ponencia in *Marcos v. Manglapus*, Justice Cortes put her thesis into jurisprudence. There, the Court, by a slim 8-7 margin, upheld the President's power to forbid the return of her exiled predecessor. The rationale for the majority's ruling rested on the President's

... unstated residual powers which are implied from the grant of executive power and which are necessary for her to comply with her duties under the Constitution. The powers of the President are not limited to what are expressly enumerated in the article on the Executive Department and in scattered provisions of the Constitution. This is so, notwithstanding the avowed intent of the members of the Constitutional Commission of 1986 to limit the powers of the President as a reaction to the abuses under the regime of Mr. Marcos, for the result was a limitation of specific powers of the President, particularly those relating to the commander-in-chief clause, but not a diminution of the general grant of executive power.⁵⁷ [Underscoring supplied. Italics in the original.]

⁹ See *de Leon v. Carpio*, G.R. No. 85243, October 12, 1989, 178 SCRA 457, *Blaquera, et. al. v. Alcasid*, GR No. 109406, September 11, 1998.

units.¹⁰ Notably, the provision on the President's supervision over autonomous regions follows a similar language, thus:

SECTION 16. The President shall exercise general supervision over autonomous regions to ensure that the laws are faithfully executed.

How laws are to be "faithfully executed" provides a broad standard generally describing the expectations on how the President is to execute the law. The nature and extent of the constitutionally-granted presidential powers, however, negate the concept that this standard can be used as basis to constitutionally question the *manner* by which the President exercises executive power.

To hold otherwise is inconsistent with the *plenary* nature of executive power that the Constitution envisions. The Constitution intends as well a tripartite system of government where each branch is co-equal and supreme in its own sphere.

These intents could be defeated if the standard of "faithfulness" in executing our laws would be a constitutional standard measuring the manner of the President's implementation of the laws. In the first place, it places the Court in the position to pass upon the scope and parameters of the vague and not-easily determinable "faithfulness" standard. Putting the Court in this position (especially when considered with the Court's expanded jurisdiction) amounts to placing it in a higher plane from where it can dictate how laws should be implemented. In fact, it is hard to discern how the Court can apply a standard for the faithful execution of the laws, without determining *how* the law should be implemented in the first place.

Additionally, characterizing the failure to ensure faithful execution of the laws as a constitutional violation can prove to be an unreasonably restricting interpretation. It could possibly paralyze executive discretion, and expose the Executive to constant lawsuits based on acts of grave abuse of discretion he or she allegedly committed.

Thus, the duty to "ensure that laws are faithfully executed" *should not be read as the constitutional standard to test the legality of the President's acts so that a legal error in the implementation of a law becomes a constitutional violation of his faithful execution duty.*

Incidentally, the interpretation that the faithful execution clause refers to the President's power of control and supervision is in line with US jurisprudence interpreting the "take care" clause of the United States Constitution, which – as everyone knows – served as the 1935 Philippine Constitution's model from which our later constitutions have not departed. Article II, Section 3 of the United States Constitution provides:

¹⁰ See *Pimentel v. Aguirre*, G.R. No. 132988, July 19, 2000, 336 SCRA 201, *Taule v. Santos, Dadole et. al. v COA*, G.R. No. 90336, August 12, 1991, 200 SCRA 512.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; ***he shall take care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.***

In the United States, the take care clause has generally been accepted as imposing a constitutional duty on the President not to suspend or refuse the enforcement of laws, particularly of statutes.¹¹

In *Kendall v. United States ex rel. Stokes*,¹² for instance, the US Supreme Court characterized a provision requiring the Postmaster General to provide back pay to mail courier providers as a ministerial duty that the President had no authority to prevent. The US Court arrived at this ruling in *Kendall* using the take care clause as basis to prevent the President from stopping the implementation of a ministerial duty that Congress imposed.

On the flipside, the take care clause has likewise been used to invalidate laws that rob the President of his powers of control and supervision over the Executive. In *Buckley v. Valeo*,¹³ for instance, the US Court held that the Congress cannot arrogate unto itself the power to appoint officials to an independent commission that exercises executive powers. The reason for this ruling is the President's duty to ensure that the laws are faithfully executed.

While the two functions of the take care clause in US jurisprudence could at times seem to conflict with each other (one imposes a duty on the President, the other recognizes his authority)¹⁴ *it has never been used to question the manner by which the President's executive power is exercised.*

Notably, the President's duty to implement laws under the take care clause is judicially enforceable only where the statute in question provides a clear and categorical directive to the President. Where a statute leaves to the executive the details of its implementation, the latter should be given sufficient leeway in exercising its duty.

In sum, the petitioners' insistence that the burial order's violation of various laws amounts to a constitutional violation involving the faithful execution clause, rests on a very tenuous interpretation of this clause that stretches it to its breaking point. The faithful execution clause does not allow litigants to question – as a constitutional violation – the manner by

¹¹ See Todd Garvey, *The Take Care Clause and Executive Discretion in the Enforcement of Law*, September 4, 2014, available at <https://www.fas.org/sgp/crs/misc/R43708.pdf>.

¹² 37 U.S. 524 (1838).

¹³ 424 U.S. 1 (1970).

¹⁴ *Supra* note 6.

which the President implements a law. The Court, for its part, has no authority to *directly* resolve the alleged statutory violations that, in this case, allegedly attended the burial order.

The burial order does not violate international law obligations.

The petitioners' international law arguments, in my view, likewise fail to establish the unconstitutionality of the President's burial order.

The petitioners argue that the burial order violates several international law obligations, based on the Philippines' status as a signatory to the Universal Declaration of Human Rights (*UDHR*), the International Covenant for Civil and Political Rights (*ICCPR*), the Rome Statute, and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (*CAT*).

While I agree that these international agreements (except for the *UDHR*, which is a non-binding document with provisions attaining the status of customary international law) had been ratified by the Philippine government and hence have the force and effect of law in the Philippines, the petitioners failed to point to any specific treaty obligation prohibiting Marcos' burial at the LNMB or at any other public cemetery.

These treaties prohibit torture or cruel, inhuman or degrading treatment or punishment,¹⁵ and recognize these acts as crimes against humanity¹⁶ falling within the jurisdiction of the International Criminal Court.¹⁷ State parties to *CAT* are likewise obliged to criminalize torture and take effective legislative, administrative, judicial, and other measures to prevent torture.¹⁸ Parties also have the obligation to investigate claims of torture¹⁹ and ensure that torture victims have an enforceable right to fair and adequate compensation.²⁰

Article 14 of the *CAT*, in particular, requires state parties to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."

The petitioners assert that the burial order amounts to a state-sanctioned narrative that violates the Philippines' duty to provide a "full and effective reparation" for human rights violations victims. The petitioners cite

¹⁵ Article 7 of the *ICCPR* provides:

Article 7 - No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹⁶ Article 7, Section 1, (g) of the Rome Statute.

¹⁷ Article 5, Section 1 (b) of the Rome Statute.

¹⁸ Article 2, *CAT*.

¹⁹ Article 12 and 13, *CAT*.

²⁰ Article 14, *CAT*.

as legal bases Principle 22 and Principle 23 of the Basic Principles and Guidelines on the right to a remedy; Reparation for Victims of Gross Violations of International Human Rights Law (*IHRL*); Serious Violations of International Humanitarian Law (*IHL*); and Principle 2 and Principle 3 of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity.

These principles, however, do not create *legally binding obligations*. They are not international agreements that states accede to and ratify, as states have not agreed to formally be bound by them. Declarations, principles, plans of action and guidelines are considered “soft law” because they do not bind states, although they may carry considerable political and legal weight. They are considered statements of moral and political intent that, at most, may subsequently ripen into international norms.²¹

Paragraph 7 of the Preamble of The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law (*IHRL*), for instance, does not create new international or domestic legal obligations, viz:

Emphasizing that the Basic Principles and Guidelines contained herein *do not entail new international or domestic legal obligations* but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms,

That these principles do not create obligations legally binding on the State means that they cannot be interpreted as constraints on the discretion of the President who acts, not only as the government’s chief executive, but as its chief architect in foreign affairs.

Without any specific and legally binding prohibition limiting the President’s actions, no basis exists to nullify his order and to disregard the presumption of regularity that exists in the performance of his duties.

Lastly, it must be considered that the burial order does not have the effect of rewriting jurisprudence and excusing the ills of the Marcos administration; neither does it amend Republic Act No. 10368 (“Human Rights Victims Reparation and Recognition Act of 2013”), a law that had been enacted as part of the Philippines’ compliance with its obligations in the ICCPR and CAT.

RA 10368, among others, creates a Human Rights Victims Claims Board tasked to recognize victims of human rights violations and to recommend their claims for reparation. RA 10368 even recognizes the “heroism and sacrifices of all Filipinos who were victims of summary

²¹ See The International Council on Human Rights Policy, *Human Rights Standards: Learning from Experience*, (2006) pp.11, 14 – 18, available at http://www.ichrp.org/files/reports/31/120b_report_en.pdf



execution, torture, enforced or involuntary disappearance, and other gross human rights violations committed during the regime of former President Ferdinand E. Marcos covering the period from September 21, 1972 to February 25, 1986.” The law makes it a policy to “restore the victims’ honor and dignity” and acknowledge the State’s moral and legal obligation to recognize and/or provide reparation to said victims and/or their families for the deaths, injuries, sufferings, deprivations, and damages they suffered under the Marcos regime.”

These terms and provisions, however, while critical of the Marcos regime hardly amount to a prohibition barring the interment of his remains in a resting place duly *reserved by law* for soldiers; former President Marcos indisputably was a soldier during his lifetime and was one long before the human rights violations attributed to him took place. To deny him now, despite the law entitling him to a LNMB resting place, may only lay the petitioners to the charge that they are now doing to another what they have accused former President Marcos of doing – denying another of the rule of law.

Divining the spirit of the Constitution is acceptable only to clarify ambiguities in its provisions, and not to create entirely new provisions.

a. The Spirit of the 1987 Constitution

The petitioners further argue that Marcos’ interment at the LNMB violates the spirit of the 1987 Constitution which was crafted as a reaction to the abuses during the Marcos regime. Limitations and restrictions to the President’s power, in particular, had been introduced because of former President Marcos’ abuses during his regime. Thus, to inter him at the LNMB would amount to a violation of the reasons underlying the Constitution.

In particular, the petitioners assert that former President Marcos’ burial at the LNMB violates two other principles enshrined in the 1987 Constitution: ***first***, it violates Section 27, Article II of the Constitution as the burial of a dishonest and disgraced public official will not promote honesty and integrity in public service; ***second***, it violates Section 1, Article XI of the Constitution²² because it goes against the precept that corruption is never forgotten.

Constitutional provisions, read by themselves for the principles and precepts they embody, hardly reveal the clear intents that drove the constitutional framers to incorporate these provisions in the Constitution. These intents, however, are neither lost nor hidden as they can be gleaned from the deliberations of the Constitutional Commission which drafted the Constitution.

²² “Public office is a public trust. x x x”

In this Court, we use and have used these deliberations as guides to interpret the Constitution when there exist ambiguous or seemingly conflicting provisions crucial to the resolution of a case. We look to these deliberations to find the intent behind the constitutional provisions to clarify how they should be applied.

While constitutional intent serves as a valuable guide in undertaking our adjudicatory duties, *it does not embody a right and, by itself, is not a basis for the enforcement of a right.* Neither does it provide a standard on how the President should act and enforce the laws, without prior reference to specific provisions or legislations applying the intent of the Constitution.

In the context of the present petitions, without any specific provision alleged to have been violated by the burial order, the constitutional intents that the petitioners brought to light cannot be used as a measure to resolve the issues that bedevil us in these cases. Specifically, they cannot be used as basis to determine the existence of grave abuse of discretion under the Court's expanded jurisdiction. As we have done by long established practice, we rely on intent only to settle ambiguities that cross our paths in the course of reading and considering constitutional provisions.

To go to the concrete and the specific demands of the issues at hand, we cannot use the faithful execution clause as basis to question the manner by which the Executive implements a law.

Neither can we interpret Article II, Section 27 and Article XI, Section 1 to prohibit former President Marcos' interment at the LNMB. To be sure, these are provisions that cannot be faulted as they enshrine honesty, integrity, and accountability in the public service, and require government officials to exercise their functions "with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives."

Despite their high minded terms, however, these provisions can hardly be claimed as basis, in the absence of clear and concrete legislation embodying actionable standards, for the petitioners' claims; these provisions can only describe our aspirations for our government and government officials, and could not have been meant to dilute the President's prerogatives in making his political moves, among them, his decision on the interment of a previously deposed president.

It should be noted, too, that Article II, Section 27 does not appear to be a self-executing provision. Its location, *i.e.*, under Article II, Declaration of State Principles, strongly hints of its non-self-executing²³ nature. The

²³ In *Manila Prince Hotel v. GSIS*, G.R. No. 122156, February 3, 1997, the Court has distinguished between self-executing and non-self-executing provisions of the Constitution, viz:

Admittedly, some constitutions are merely declarations of policies and principles. Their provisions command the legislature to enact laws and carry out the purposes of the framers who merely establish an



language itself of the provision obligates the State to “take positive and effective measures against graft and corruption.” Under these terms and circumstances, this provision merely reflects a statement of an ideal that cannot be realized independently of a concrete congressional enactment. Its goal of maintaining honesty and integrity in the public service cannot likewise be implemented without laws defining and promoting these values.

b. *No Express Constitutional Bar to Interment*

The Constitution was undeniably forged out of the ashes of the Marcos regime. Its enactment after the Marcos regime collapsed, however, does not suggest and cannot be translated into an implied command preventing his burial at the LNMB or in a shrine of national significance. Had such prohibition been the intent, the Constitution’s transitory provisions would have specifically so provided in the manner these provisions incorporated terms that the framers wanted to implement within intended and foreseeable time frames.²⁴

c. *Historical Perspectives*

Unfortunately, both in the pleadings and in the media, the Court majority has been accused of being quick to forget the lessons of the Martial Law Era. I see no point in directly answering this charge as this Opinion has not been written to consider historical perspectives except to the extent that they bear on the immediate business an concern of the Court – the interpretation and application of the Constitution.

The Court, of course, is not blind to history but is not a judge of history; it is a judge of the interpretation and application of the terms of the Constitution.²⁵ When the time comes therefore when we are tested by push and pull of history and those of the Constitution, an answer is not difficult to make even if we are dealing with an exceptional historical figure.

The clear and simple response is that concerns raised by the Constitution must first be addressed; historical considerations follow unless the constitutional concern is so affected or intertwined with history that we cannot consider one without the other. Fortunately for us in the present case,

outline of government providing for the different departments of the governmental machinery and securing certain fundamental and inalienable rights of citizens. A provision which lays down a general principle, such as those found in Art. II of the 1987 Constitution, is usually not self-executing. But a provision which is complete in itself and becomes operative without the aid of supplementary or enabling legislation, or that which supplies sufficient rule by means of which the right it grants may be enjoyed or protected, is self-executing. Thus a constitutional provision is self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.

²⁴ The transitory provisions, for example, specifically laid down the rule that after the expiration of the Military Bases Agreement, military bases, troops and facilities shall not be introduced into the Philippines except through a treaty concurred in by the Senate.

²⁵ *Gudani v. Senga Corona*, G.R. No. 170165, August 15, 2006.

no such consideration requires to be taken as the way is clear: we rule based on the standards of our Constitution.

Based on these considerations, I believe we should not be charged with being blind to the lessons of the past, in particular of what transpired during the martial law era. Rather than being blind, we simply do not look first to history in resolving disputes before us; we look to the law as our primary guide and consideration.

Thus, if we do rule in favor of the burial of former President Marcos at the LNMB, we do not thereby dishonor those who believe they suffered under his regime. Nor are we unmindful of the laws crafted in their favor; we considered these laws but they are simply not the laws primarily relevant and applicable to the issue before us – the interment of former President Marcos at the LNMB.

d. Considerations of Policy

I do know as a matter of law and history that the framers of our Constitution crafted it with the intent of preventing another tyrant from rising to power and from consolidating the State's might for himself. A stronger tripartite government with a system of checks and balances became the cornerstone of our new democracy. Under this system, each of the three branches of government perform specific, distinct, and clearly delineated functions. The intent is to prevent one branch from encroaching on the prerogatives of another and to characterize any usurpation as an act of tyranny. These constitutional principles are the policies that receive primary consideration from us as a Court.

The Constitution vested the Supreme Court with judicial power – the power and duty to settle actual controversies involving rights which are legally demandable and enforceable, and 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. Considering that Justices of this Court are not elected by the sovereign people, the framers did not see it fit to give us dominion over matters of policy.

From these perspectives, this Court is clearly not a court of public opinion; we are court of law. With respect to matters of policy, we have no right to substitute our wisdom over that of duly elected political branches. They carry the mandate of the popular will – we do not.

Under the impetus of these constitutional realities, **the wisdom of or need for** the interment of former President Marcos at the LNMB is a political question²⁶ that our President decided after an assessment of the

²⁶ A political question refers to "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



thoughts and sentiments of the people from all the regions in our country; it is a policy determination that is outside the Court's jurisdiction to pass upon or interfere with *as a matter of law*.

Separately from our consideration of the Executive and its policy, we are also aware that strong sentiments exist against the burial of former President Marcos at the LNMB. We hear the loud and strident voices that proclaim these sentiments. But we are likewise aware that against the pull by those who voice these sentiments are counterforces pulling into other directions, specifically, the pull of the law and those of policy.

As I have already indicated, I again say that the law must prevail under the unwavering standard we observe. But we recognize at the same time that policy has its own demands. Ultimately, we recognize that vowing to the raucous crowd may temporarily signify harmony, but we do so at the expense of disregarding Executive policy and weakening the political branches, and indeed, the very institution of government itself.

Thus, we have no choice if we are to truly serve as guardians of the Constitution. In the absence of any countervailing legal considerations, we give primacy to the Executive's policy as this is the law – the constitutional separation of power – that we have to fully respect.

As my last point, that the burial of Marcos had been a campaign promise strengthens the nature of former President Marcos' burial at the LNMB as a political question. Voters knew of his plan to bury Marcos at the LNMB at the time he campaigned, and might have voted for him because or regardless of this plan. President Duterte's victory in the polls signifies, at the very least, the electorate's tolerance of his decision and, at most, the electorate's support.

In sum and without hesitation, we must now recognize that the petitioners have failed to establish any clear constitutional breach attendant to the President's burial order. We must therefore respect and abide by the Executive's decision to allow the interment of former President Marcos at the LNMB.

WHEREFORE, I vote to **DISMISS** the petitions, and to lift the *status quo ante* order this Court issued to avoid rendering the petitions moot and academic prior to our decision.


ARTURO D. BRION
Associate Justice