Republic of the Philippines
Supreme Court
Manila

EN BANC

G.R. No. 225973 – SATURNINO C. OCAMPO, ET AL. *versus* REAR ADMIRAL ERNESTO C. ENRIQUEZ (in his capacity as the Deputy Chief of Staff for Reservist and Retiree Affairs, Armed Forces of the Philippines), ET AL.

G.R. No. 225984 – REP. EDCEL C. LAGMAN, in his personal and official capacities as a member of Congress and as the Honorary Chairperson of the Families of Victims of Involuntary Disappearance (FIND), ET AL. *versus* EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.

G.R. No. 226097 – LORETTA ANN PARGAS-ROSALES, ET AL. *versus* EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.

G.R. No. 226116 – HEHERSON T. ALVAREZ, ET AL. *versus* EXECUTIVE SECRETARY SALVADOR C. MEDIALDEA, ET AL.

G.R. No. 226117 – ZAIRA PATRICIA B. BANIAGA, ET AL. *versus* SECRETARY OF NATIONAL DEFENSE DELFIN N. LORENZANA, ET AL.

G.R. No. 226120 – ALGAMAR A. LATIPH *versus* SECRETARY DELFIN LORENZANA, sued in his capacity as Secretary of National Defense, ET AL.

G.R. No. 226294 – LEILA M. DE LIMA, in her capacity as SENATOR OF THE REPUBLIC and as TAXPAYER *versus* HON. SALVADOR C. MEDIALDEA, ET AL.

Promulgated:

November 8, 2016

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DISSENTING OPINION

CAGUIOA, *J.*:

I vehemently dissent.

Ultimately, the *ponencia*'s reason to dismiss the petitions is that there is "no clear constitutional or legal basis" to hold that there was a grave abuse of discretion attending President Rodrigo R. Duterte's order to inter former

President Marcos's remains in the *Libingan ng mga Bayani* ("LNMB"). And the premise of the statement is that the sole authority in determining who are entitled and disqualified to be interred at the LNMB is the AFP Regulations.

I cannot, as a magistrate and a citizen, in good conscience, agree. My reasons are set forth below.

The burial of former President Marcos does <u>not</u> raise a political question beyond the ambit of judicial review.

The *ponencia* holds that President Duterte's decision to have the remains interred at the LNMB involves a political question that is not a justiciable controversy.

I disagree.

The issues of justiciability and political question are inextricably intertwined. They are in reality two sides of the same coin. Their resolution usually involves mutually exclusive choices. A determination favoring one necessarily negates the other. It is an "either/or" scenario.

Invariably, any discussion of the political question doctrine will draw in the concept of judicial power and review. In turn, the presence of grave abuse of discretion amounting to lack or excess of jurisdiction is the stimulus for the exercise of judicial review.

As the doctrine of political question evolved in this jurisdiction, so did the concept of judicial power. At present, judicial power, as defined in paragraph 2, Section 1, Article VIII of the 1987 Constitution,[1] includes the duty of the courts 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. This expanded concept of judicial power has consequently bounded, if not marginalized, the political question doctrine.

The petitioners argue that their petitions raise justiciable issues over which the Court has the power of judicial review under its expanded

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[1] Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.

Judicial power includes the duty of the courts of justice 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.

jurisdiction under the 1987 Constitution.[2] They cite, among others, *The Diocese of Bacolod v. COMELEC*,[3] *Marcos v. Manglapus*,[4] *Integrated Bar of the Philippines v. Zamora*,[5] *Estrada v. Desierto*,[6] and *Francisco v. The House of Representatives*[7] in support of their argument. These cases have resolved the political question issue as well.

On the other hand, public respondents argue that President Duterte's determination to have the remains of former President Marcos interred at the LNMB does not pose a justiciable controversy.[8] The Solicitor General claims that the decision involves "wisdom"[9] and thus beyond judicial review. In fine, public respondents pose "policy or wisdom" considerations to thwart the Court from taking cognizance of the petitions.[10] In support of his position, the Solicitor General relies on the cases of *Mamba v. Lara*,[11] *Belgica v. Ochoa*,[12] and *Tañada v. Cuenco*[13] as jurisprudential anchors.

In *Francisco v. The House of Representatives*,[14] the Court, after recalling the deliberations of the 1986 Constitutional Commission in relation to Section 1, Article VIII[15] of the 1987 Constitution, espoused that there are two species of political questions: (1) "truly political questions" or "non-justiciable political questions" and (2) "justiciable political questions" or those which are "not truly political questions." Thus, truly political questions are beyond judicial review while courts can review questions which are not truly political in nature.[16] The Court explained in *Francisco*:

> However, Section 1, Article VIII, of the Constitution does not define what are "truly political questions" and "those which are not truly political. Identification of these two species of political questions may be problematic. There has been no clear standard. The American case of *Baker v. Carr* attempts to provide some:
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> > x x x Prominent on the surface of any case held to involve a political question is found a *textually demonstrable constitutional*

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2 Lagman Petition, p. 3, par. 5.
3 G.R. 205728, January 21, 2015, 747 SCRA 1.
4 258 Phil. 479 (1989).
5 392 Phil. 618 (2000).
6 406 Phil. 1 (2001).
7 460 Phil. 830 (2003).
8 OSG Consolidated Comment, I.A, p. 24.
9 Supra, par. 55, p. 24.
10 OSG Consolidated Comment, par. 51, p. 24; Public Respondent's Memorandum, par. 55, p. 27.
11 623 Phil. 63 (2009).
12 721 Phil. 416 (2013).
13 103 Phil. 1051 (1957).
14 Supra note 7, at 910.
15 Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
Judicial power includes the duty of the courts of justice 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.
16 Supra note 7, at 911-912.

> *commitment* of the issue to a *coordinate political department*; or *a lack of judicially discoverable and manageable standards for resolving it*; or the *impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion*; or the *impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government*; or *an unusual need for questioning adherence to a political decision already made*; or the *potentiality of embarrassment from multifarious pronouncements by various departments on one question.* (Italics supplied)

> Of these standards, the more reliable have been the first three: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) the lack of judicially discoverable and manageable standards for resolving it; and (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion. These standards are not separate and distinct concepts but are interrelated to each in that the presence of one strengthens the conclusion that the others are also present.

> The problem in applying the foregoing standards is that the American concept of judicial review is radically different from our current concept, for Section 1, Article VIII of the Constitution provides our courts with far less discretion in determining whether they should pass upon a constitutional issue.

> In our jurisdiction, the determination of whether an issue involves a truly political question and a non-justiciable question lies in the answer to the question of whether there are constitutionally imposed limits on powers or functions conferred upon political bodies. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits. This Court shall thus now apply this standard to the present controversy. [17] (Citations omitted)

As early as the landmark case of *Tañada v. Cuenco*,[18] the Court has already recognized that, while the action of the executive or legislative department may be dictated by public or political policy, or may involve a question of policy or its wisdom, the judiciary is nonetheless charged with the special duty of determining the limitations which the law places on all official action, *viz*:

> "It is not easy, however, to define the phrase 'political question', nor to determine what matters fall within its scope. It is frequently used to designate all questions that lie outside the scope of the judicial 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." x x x

> x x x x

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[17] Id.

[18] Supra note 13.

> "x x x What is generally meant, when it is said that a question is political, and not judicial, is that it is a matter which is to be exercised by the people in their primary political capacity, or that it has been specifically delegated to some other department or particular officer of the government, with discretionary power to act. x x x Thus the Legislature may in its discretion determine whether it will pass a law or submit a proposed constitutional amendment to the people. The courts have no judicial control over such matters, not merely because they involve [a] political question, but because they are matters which the people have by the Constitution delegated to the Legislature. **The Governor may exercise the powers delegated to him, free from judicial control, so long as he observes the laws and acts within the limits of the power conferred.** His discretionary acts cannot be controllable, not primarily because they are of a political nature, but because the Constitution and laws have placed the particular matter under his control. **But every officer under a constitutional government must act according to law and subject him to the restraining and controlling power of the people, acting through the courts, as well as through the executive or the Legislature.** One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action. The recognition of this principle, unknown except in Great Britain and America, is necessary, 'to the end that **the government may be one of laws and not [of] men**' - words which Webster said were the greatest contained in any written constitutional document." x x x [19]

The Solicitor General argues that the wisdom of the President cannot be questioned when, in the exercise of his powers under the Constitution and the Administrative Code, he deemed it appropriate to inter the remains of former President Marcos in a parcel of land of the public domain devoted for the purpose of being a military shrine, and recognize his having been a former President, a Medal of Valor Awardee, a member of the retired military personnel, and a war veteran.[20]

A mere invocation of the wisdom of the President's actions and orders does not make them untrammeled, as indeed, the exercise of Presidential powers and prerogatives is not without limitations — the exercise of the Presidential power and prerogative under the Constitution and the Administrative Code, which the public respondents invoke, is circumscribed within defined constitutional, legal, and public policy standards.

In fact, the reliance by the Solicitor General on the powers of the President under the Constitution and the 1987 Revised Administrative Code ("RAC") to justify his decision to inter the remains of former President Marcos in the LNMB necessarily calls into play any and all underlying constitutional and legal **limitations** to such powers. Within this paradigm, judicial review by the Court is justifiable, if not called for. There is, thus, no

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[19] Id. at 1066-1067 (emphasis supplied).

[20] OSG Consolidated Comment, par. 60. p. 25; Public Respondents' Memorandum, par. 62, p. 29.

truly political question in relation to the assailed action of the President if this is justified to have been made allegedly pursuant to his purported powers under the Constitution and the RAC.

Apart from his powers under the Constitution and the RAC, the Solicitor General also argues that the President's order to allow former President Marcos' interment at the LNMB is based on his determination that it shall promote national healing and forgiveness, and redound to the benefit of the Filipino people.[21] He further argues that the President's decision is not simply a matter of political accommodation, or even whim, but, viewed from a wider perspective, it is geared towards changing the national psyche and thus begin the painful healing of this country.[22] Lastly, he argues that the said order is in keeping with the President's campaign promise, his quest for genuine change and his desire to efface Marcos' remains as the symbol of polarity.[23]

In fine, the Solicitor General asks the Court to take the foregoing arguments at face value and admit them as truisms without any question, on the proposition that if the Court were to scrutinize them, then the President's wisdom is being doubted. This request, however, the Court cannot grant without abnegating its constitutional *duty*[24] of judicial review.

Requisites of Judicial Review

The flipside to the political question doctrine would be the requisites of judicial review. Before the Court may hear and decide a petition assailing the constitutionality of a law or any governmental act, the following must first be satisfied: (1) there must be an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have standing to question the validity of the subject act or issuance; otherwise stated, 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 opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case.[25] Of these four, the most important are the first two requisites,[26] and thus will be the focus of the following discussion.

The case presents an actual controversy ripe for adjudication.

In *Belgica v. Ochoa,*[27] the Court expounded anew on the requirement of actual case or controversy in this wise:

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21 OSG Consolidated Comment, par. 61, p. 26; Public Respondents' Memorandum, par. 63, p. 29.
22 OSG Consolidated Comment, par. 3, p. 5.
23 *Supra*, Prefatory Statement, pp. 3-5.
24 *Francisco v. The House of Representatives*, supra note 7, at 889-890.
25 *Belgica v. Ochoa,* supra note 12, at 518-519.
26 Id. at 519, citing *Joya v. Presidential Commission on Good Government,* 296-A Phil. 595, 602 (1993).
27 Id. at 519-520.

> By constitutional fiat, judicial power operates only when there is an actual case or controversy. This is embodied in Section 1, Article VIII of the 1987 Constitution which pertinently states that 'judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable x x x.' Jurisprudence provides that an actual case or controversy is one which '**involves a conflict of legal rights, an assertion of opposite legal claims, susceptible of judicial resolution as distinguished from a hypothetical or abstract difference or dispute. In other words, '[t]here must be a contrariety of legal rights that can be interpreted and enforced on the basis of existing law and jurisprudence**.' Related to the requirement of an actual case or controversy is the requirement of 'ripeness,' meaning that the questions raised for constitutional scrutiny are already ripe for adjudication. '**A question is ripe for adjudication when the act being challenged has had a direct adverse effect on the individual challenging it. It is a prerequisite that something had then been accomplished or performed by either branch before a court may come into the picture, and the petitioner must allege the existence of an immediate or threatened injury to itself as a result of the challenged action**.' 'Withal, courts will decline to pass upon constitutional issues through advisory opinions, bereft as they are of authority to resolve hypothetical or moot questions.' (Emphasis supplied).

With these standards, this case presents an actual case or controversy that is ripe for adjudication. The antagonistic claims on the legality of the interment of former President Marcos at the LNMB as shown in petitioners' assertion of legally enforceable rights that may be infringed upon by the subject interment, on the one hand, and the Solicitor General's insistence on the President's prerogative to promote national healing, on the other, clearly satisfy the requirement for contrariety of legal rights. Furthermore, the issues in this case are also ripe for adjudication because it has not been denied that initial preparations and planning for the subject interment have already been undertaken by public respondents.[28]

Petitioners have locus standi.

I do not agree with the *ponencia's* holding that none of the petitioners had standing to file the petitions for failure to show direct and personal injury.

Locus standi is defined as a right of appearance in a court of justice on a given question.[29] It refers to a personal and substantial interest in a case such that the party has sustained or will sustain direct injury as a result of the challenged governmental act.[30] To satisfy the requirement of legal standing,

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[28] *Gov't now preparing for Marcos burial at Libingan*, available at <http://www.rappler.com/nation/142266-philippines-malacanang-preparations-ferdinand-marcos-burial-libingan-ng-mga-bayani>, last accessed on October 17, 2016.

[29] *Araullo v. Aquino*, 737 Phil. 457, 535 (2014), citing Black's Law Dictionary, 941 (6th Ed. 1991).

[30] *Spouses Imbong v. Ochoa, Jr.*, G.R. Nos. 204819, etc. April 8, 2014, 721 SCRA 146, citing *Anak Mindanao Party-list Group v. Ermita*, 558 Phil. 338, 350 (2007).

one must allege such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions.[31]

In *Agan, Jr. v. Philippine International Air Terminals Co., Inc.*,[32] the Court recognized that in public actions, suits are not usually brought by parties who have been personally injured by the operation of a law or any other government act but by concerned citizens, taxpayers or voters who actually sue in the public interest. Thus, in a long line of cases, non-traditional plaintiffs, such as concerned citizens, taxpayers and legislators, who have not been personally injured by the assailed governmental act, have been given standing by this Court provided specific requirements have been met.[33]

For legislators, they have standing to maintain inviolate the prerogatives, powers, and privileges vested by the Constitution in their office and are allowed to sue to question the validity of any official action, which infringe upon their legislative prerogatives.[34]

In the case of taxpayers, they are allowed to sue where there is a claim that public funds are illegally disbursed or that public money is being deflected to any improper purpose, or that public funds are wasted through the enforcement of an invalid or unconstitutional law.[35]

When suing as a concerned citizen, the person complaining must allege that he has been or is about to be denied some right or privilege to which he is lawfully entitled or that he is about to be subjected to some burdens or penalties by reason of the statute or act complained of. When the issue concerns a public right, however, it has been held that being a citizen and having an interest in the execution of the laws is already sufficient.[36]

Applying the foregoing standards to the present case:

(1) Victims of human rights violations during martial law have the requisite legal standing to file their respective petitions. Their personal and direct interest to question the interment and burial of former President Marcos at the LNMB rests on their right to a full and effective remedy and entitlement to monetary and non-monetary reparations guaranteed by the State under the Constitution, domestic and international laws.

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31 *Galicto v. Aquino,* 683 Phil. 141, 170 (2012).
32 450 Phil. 744, 803 (2003).
33 *Francisco v. The House of Representatives,* supra note 7, at 895.
34 *Osmena III v. PSALM,* G.R. No. 212686, September 28, 2015, p. 9.
35 *Chavez v. JBC,* 691 Phil. 173, 196 (2012).
36 *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, 589 Phil. 387, 486 (2008).

(2) Petitioners also have standing as citizens-taxpayers. The public character of the LNMB and the general appropriations for its maintenance, preservation and development satisfy the requirements for a taxpayer's suit. To be sure, petitioners' assertion of every citizen's right to enforce the performance of a public duty and to ensure faithful execution of laws suffices to clothe them with the requisite legal standing as concerned citizens.

(3) However, Members of Congress in the Lagman petition and petitioner De Lima have no personality to maintain the suit as legislators because they failed to allege, much less show, how the President's directive to have the remains of former President Marcos interred at the LNMB usurps or infringes upon their legislative functions.

(4) Similarly, petitioners Saguisag, *et al.*, as intervenors in the case, have no legal standing to maintain the suit in regard to their claim as human rights lawyers as this is too general to clothe them the legal interest in the matter in litigation or in the success of either of the parties required under the Rules of Court.[37]

Be that as it may, the question of *locus standi* is but corollary to the bigger question of the proper exercise of judicial power.[38] The Court may brush aside technical rules when the matter is of transcendental importance deserving the attention of the Court in view of their seriousness, novelty and weight as precedents.[39]

The *ponencia* concludes by saying that "[the interment] would have no profound effect on the political, economic, and other aspects of our national life considering that more than twenty-seven years since his death and thirty years after his ouster have already passed." Prescinding from this statement's sheer and utter disregard of Philippine history, the implications that the assailed act bear on the State's policy to guarantee full respect for human rights embodied in the Constitution, on the body of jurisprudence acknowledging the atrocities committed during martial law, and on the legislative enactments and treaty obligations granting full protection and reparation to the victims of human rights violations, undoubtedly elevate this case to the level of transcendental importance. A relaxation of the rules of legal standing is thus properly called for.

Certiorari and prohibition are proper remedies.

The Solicitor General assails the propriety of the remedies sought by petitioners. He argues that a petition for *certiorari* and prohibition does not lie

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[37] See *Province of North Cotabato v. Government of the Republic of the Philippines Peace Panel on Ancestral Domain (GRP)*, id. at 487.

[38] *David v. Macapagal-Arroyo*, 522 Phil. 705, 763 (2006).

[39] *Biraogo v. The Philippine Truth Commission of 2010,* 651 Phil. 374, 442 (2010).

against public respondents inasmuch as the President, in directing the interment of former President Marcos at the LNMB, did not exercise judicial, quasi-judicial or ministerial functions.

The petitioners' resort to *certiorari* and prohibition was proper. A petition for *certiorari* or prohibition under Rule 65 is an appropriate remedy to question, on the ground of grave abuse of discretion, the act of any branch or instrumentality of government, even if the latter does not exercise judicial, quasi-judicial or ministerial functions.[40]

To reiterate, the expanded definition of judicial power, under Article VIII, Section 1 of the Constitution, imposes upon the Court and all other courts of justice, the power and the duty not only to "settle actual controversies involving rights which are legally demandable and enforceable" but also "to determine whether or not there has been a grave abuse of discretion on the part of any branch or instrumentality of the Government".

In the case of *Araullo v. Aquino,*[41] the Court clarified that the special civil actions of *certiorari* and prohibition under Rule 65 of the Rules of Court are remedies by which the courts discharge this constitutional mandate. Thus, it was ruled that:

> [T]he remedies of *certiorari* and prohibition are necessarily broader in scope and reach, and the writ of *certiorari* or prohibition may be issued to correct errors of jurisdiction committed not only by a tribunal, corporation, board or officer exercising judicial, quasi-judicial or ministerial functions but also to set right, undo and restrain any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, *even if the latter does not exercise judicial, quasi-judicial or ministerial functions.*
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> Thus, petitions for *certiorari* and prohibition are appropriate remedies to raise constitutional issues and to review and/or prohibit or nullify the acts of legislative and executive officials.
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> Necessarily, in discharging its duty under Section 1, *supra,* to set right and undo any act of grave abuse of discretion amounting to lack or excess of jurisdiction by any branch or instrumentality of the Government, the Court is not at all precluded from making the inquiry provided the challenge was properly brought by interested or affected parties. The Court has been thereby entrusted expressly or by necessary implication with both the duty and the obligation of determining, in appropriate cases, the validity of any assailed legislative or executive action. This entrustment is consistent with the republican system of checks and balances.[42]

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40 *Jardeleza v. Sereno*, G.R. No. 213181, August 19, 2014, 733 SCRA 279, 328, citing *Araullo v. Aquino*, supra at 531; *Villanueva v. Judicial and Bar Council*, G.R. No. 211833, April 7, 2015.

41 Supra note 29.

42 Id. at 531.

Therefore, that the assailed act and/or issuances do not involve the exercise of judicial, quasi-judicial or ministerial functions is of no moment. Under the Court's expanded jurisdiction, the validity of the President's directive to have the remains of former President Marcos interred and buried at the LNMB and the legality of the assailed Memorandum and Directive issued by public respondents, are proper subjects of a petition for *certiorari* and prohibition.

Petitioners did not violate the rule on hierarchy of courts.

The *ponencia* holds that petitioners failed to observe the rule on hierarchy of courts as they should have filed with the Regional Trial Court exercising jurisdiction over public respondents, and that there exist no special, compelling and important reasons to justify direct resort to this Court.

I disagree.

In *The Diocese of Bacolod* v. *COMELEC,*[43] citing *Bañez, Jr. v. Concepcion*[44], the Court held:

> The Court must enjoin the observance of the policy on the hierarchy of courts, and now affirms that the policy is not to be ignored without serious consequences. The strictness of the policy is designed to shield the Court from having to deal with causes that are also well within the competence of the lower courts, and thus leave time to the Court to deal with the more fundamental and more essential tasks that the Constitution has assigned to it. The Court may act on petitions for the extraordinary writs of *certiorari*, prohibition and *mandamus* only when absolutely necessary or when serious and important reasons exist to justify an exception to the policy.
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> x x x x
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> The Supreme Court is a court of last resort, and must so remain if it is to satisfactorily perform the functions assigned to it by the fundamental charter and immemorial tradition. It cannot and should not be burdened with the task of dealing with causes in the first instance. Its original jurisdiction to issue the so-called extraordinary writs should be exercised only where absolutely necessary or where serious and important reasons exist therefore. Hence, that jurisdiction should generally be exercised relative to actions or proceedings before the Court of Appeals, or before constitutional or other tribunals, bodies or agencies whose acts for some reason or another are not controllable by the Court of Appeals. Where the issuance of an extraordinary writ is also within the competence of the Court of Appeals or a Regional Trial Court, it is in either of these courts that the specific action for the writ's procurement must be presented. This is and

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43 Supra note 3.

44 693 Phil. 399, 412 (2012).

> should continue to be the policy in this regard, a policy that courts and lawyers must strictly observe. x x x[45]

In the same case, ***however***, the Court recognized that hierarchy of courts is not an iron-clad rule. Direct invocation of this Court's jurisdiction may be allowed for special, important and compelling reasons clearly spelled out in the petition, such as: (a) when there are genuine issues of constitutionality that must be addressed at the most immediate time; (b) *when the issues involved are of transcendental importance;* (c) *in cases of first impression*; (d) when the constitutional *issues raised are best decided by this Court*; (e) w*hen the time element presented in this case cannot be ignored;* (f) when the petition reviews the act of a constitutional organ; (g) when there is no other plain, speedy, and adequate remedy in the ordinary course of law; (h) when public welfare and the advancement of public policy so dictates, or *when demanded by the broader interest of justice*; (i) when the orders complained of are patent nullities; and (j) when appeal is considered as clearly an inappropriate remedy.[46]

Contrary to the *ponencia*'s holding, there **are** special and compelling reasons attendant in the case at bar which justify direct resort to this Court. Apart from the fact that the issues presented here are of transcendental importance, as earlier explained, they are being brought before the Court for the first time. As no jurisprudence yet exists on the matter, it is best that this case be decided by this Court.

Moreover, while the petitions may have been directed against the Memorandum and Directive issued by public respondents, the ultimate act assailed is an executive action. In *Drilon v. Lim,*[47] the Court ruled:

> In the exercise of this jurisdiction, lower courts are advised to act with the utmost circumspection, bearing in mind the consequences of a declaration of unconstitutionality upon the stability of laws, no less than on the doctrine of separation of powers. As the questioned act is usually the handiwork of the legislative or the executive departments, or both, it will be prudent for such courts, if only out of a becoming modesty, to defer to the higher judgment of this Court in the consideration of its validity, which is better determined after a thorough deliberation by a collegiate body and with the concurrence of the majority of those who participated in its discussion.[48]

Furthermore, time was of the essence in this case. The public pronouncement of Presidential Spokesman Ernesto Abella that the burial for former President Marcos would push through "unless the Supreme Court will issue a TRO"[49]; news reports that the burial would be scheduled on September

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45 Supra note 3, at 42-43.
46 *The Diocese of Bacolod* v. *COMELEC*, id. at 44-49.
47 G.R. No. 112497, August 4, 1994, 235 SCRA 135.
48 Id. at 140.
49 *Palace: Hero's burial for Marcos to proceed unless there's a TRO,* available at <http://www.gmanetwork.com/news/story/577948/news/nation/palace-hero-s-burial-for-marcos-to-proceed-unless-there-s-a-tro>, last accessed on October 17, 2016.

18, 2016,[50] and the President's statement that he was willing to allow the Marcos family to decide on the date of the burial and adding that they could even set the date of the burial on September 11, 2016,[51] cannot be ignored.

Exhaustion of administrative remedies does not apply in this case.

The *ponencia* upholds the Solicitor General's claim that petitioners failed to exhaust administrative remedies because they should have first sought with the Office of the President the reconsideration of the subject directives.

This is untenable.

The doctrine of exhaustion of administrative remedies is not absolute as there are numerous exceptions laid down by jurisprudence, namely: (a) when there is a violation of due process; (b) *when the issue involved is purely a legal question*; (c) when the administrative action is patently illegal amounting to lack or excess of jurisdiction; (d) when there is estoppel on the part of the administrative agency concerned; (e) when there is irreparable injury; (f) *when the respondent is a department secretary whose acts as an alter ego of the President bear the implied and assumed approval of the latter*; (g) *when to require exhaustion of administrative remedies would be unreasonable*; (h) when it would amount to a nullification of a claim; (i) when the subject matter is a private land in land case proceedings; (j) when the rule does not provide a plain, speedy and adequate remedy; or (k) *when there are circumstances indicating the urgency of judicial intervention.*[52]

In the petitions before the Court, circumstances (b), (f), (g) and (k) are present.

First, as already mentioned, the case involves a matter of extreme urgency. The urgency of judicial intervention is self-evident in the Court's decision to issue a Status Quo Ante Order on August 23, 2016, which was extended until November 8, 2016.

Second, the principal issue in this case of whether the President, in ordering the interment and burial of the remains of former President Marcos at the LNMB, committed grave abuse of discretion and/or violated the Constitution and other statutes is purely of law and will ultimately be decided

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[50] *Palace clueless on who will pay for Marcos funeral,* available at <http://manilastandardtoday.com/news/-main-stories/top-stories/213621/palace-clueless-on-who-will-pay-for-marcos-funeral.html>, last accessed on October 17, 2016.

[51] *Duterte confirms Marcos burial at the Libingan ng mga Bayani,* available at <http://cnnphilippines.com/news/2016/08/07/marcos-libingan-ng-mga-bayani-burial.html>, last accessed on October 17, 2016.

[52] *The Diocese of Bacolod v. COMELEC,* supra note 3, at 59-60, citing *Spouses Chua v. Ang*, 614 Phil. 416, 425-426 (2009).

by the courts of justice. In this regard, *Vigilar v. Aquino*[53] explains the reason for the exception, *viz:*

> Said question at best could be resolved only *tentatively* by the administrative authorities. **The final decision on the matter rests not with them but with the courts of justice. Exhaustion of administrative remedies does not apply, because nothing of an administrative nature is to be or can be done. The issue does not require technical knowledge and experience but one that would involve the interpretation and application of law.** (Emphasis supplied.)

Third, it was upon the verbal order of the President that the assailed Memorandum and Directive were issued by public respondents. This, in fact, is extant in the very language of the Memorandum itself. Moreover, the President, on numerous occasions, had insisted that, notwithstanding oppositions, including the filing of the consolidated petitions, he would make good his promise to allow the burial of the former President Marcos at the LNMB[54] and even allow the Marcos family to decide on the date of the burial. With these pronouncements, seeking relief with the Office of the President would have been an exercise in futility.

Substantive Issues

Having established the jurisdiction of this Court to rule upon these consolidated petitions under Rule 65, pursuant to its power of judicial review under the expanded definition of judicial power in Article VIII, Section 1 of the Constitution, I now proceed to the substantive issues.

Grave abuse of discretion

The office of the writs of *certiorari* and prohibition is to correct errors of jurisdiction arising from grave abuse of discretion. Very simply, then, the most important question that needs to be answered in this case is fairly straightforward: whether or not public respondents acted with grave abuse of discretion amounting to lack or excess of jurisdiction in ordering the interment of former President Marcos in the LNMB.

Restated, in ordering the interment of former President Marcos in the LNMB, did public respondents contravene or violate the Constitution, the law, or existing jurisprudence?[55] If they did, then they committed grave abuse

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[53] 654 Phil. 755, 761-762 (2011), citing *Republic v. Lacap,* G.R. No. 158253, March 2, 2007.

[54] *Duterte asked to reconsider Marcos burial at Libingan ng mga Bayani,* available at <http://www.gmanetwork.com/news/story/568973/news/nation/duterte-asked-to-reconsider-marcos-burial-at-libingan-ng-mga-bayani>, last accessed on October 17, 2016; *Duterte: Follow the law on hero's burial for Marcos available at* <http://news.abs-cbn.com/news/08/11/16/duterte-follow-the-law-on-heros-burial-for-marcos>, last accessed on October 17, 2016.

[55] See *Perez v. Court of Appeals*, 516 Phil. 204, 209 (2006); *Dueñas, Jr. v. House of Representative Electoral Tribunal*, 610 Phil. 730, 760 (2009).

of discretion,[56] the *ponencia* concedes as much. Whimsicality, caprice and arbitrariness are also considered in determining the existence of grave abuse. I fully concur with Justice Leonen's discussion on the subject, and will confine my discussion to whether the interment violates the Constitution, law or jurisprudence.

Directly answering the question, I believe that the petitions are with merit, and that the order to inter the remains of former President Marcos in the LNMB is contrary to the Constitution, the law, and several executive issuances that have the force of law, as well as the public policy that the Constitution, the said laws, and executive issuances espouse and advance. The argument that burying former President Marcos in the LNMB does not make him a hero disregards the status of the LNMB as a national shrine, the public policy in treating national shrines, the standards set forth in these laws and executive issuances as well as in the AFP LNMB burial regulations ("AFP Regulations").

Before explaining how the intended interment of former President Marcos violates the Constitution, law, executive issuances, public policy, and custom, it would be *apropos* to examine the legal bases offered by the Solicitor General and private respondents Heirs of Marcos in defending the legality of the President's act of allowing the interment and burial of former President Marcos in the LNMB, as upheld by the *ponencia*.

The President's power to reserve tracts of land of the public domain for a specific public purpose.

The *ponencia* considers the President's power to reserve land for public purpose, under Section 14, Chapter IV of Book III, Title I of the RAC, as basis for the decision to inter former President Marcos in the LNMB.[57] Section 14 provides:

> SECTION 14. *Power to reserve Lands of the Public and Private Domain of the Government.* — (1) The President shall have the power to reserve for settlement or public use, and for specific public purposes, any of the lands of the public domain, the use of which is not otherwise directed by law. The reserved land shall thereafter remain subject to the specific public purpose indicated until otherwise provided by law or proclamation.
>
> (2) He shall also have the power to reserve from sale or other disposition and for specific public uses or purposes, any land belonging to the private domain of the Government, or any of the Friar lands, the use of which is not otherwise directed by law, and thereafter such land shall be

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[56] See *Spouses Balangauan v. CA, et al.* 584 Phil. 183 (2008); *Banal III v. Panganiban, et al.,* 511 Phil. 605 (2005); *Republic of the Philippines v. COCOFED,* 423 Phil. 735 (2001).

[57] OSG Comment ¶131-138, pp. 42-44.

> used for the **purposes specified by such proclamation** until otherwise provided by law.

This power is, in turn, traced by the Solicitor General to the President's power to reserve lands under Commonwealth Act No. 141, or the Public Land Act.[58] The provision that empowers the President to reserve tracts of land of the public domain for a specific purpose, in turn, reads:

> **CHAPTER XI**
> *Reservations for Public and Semi-Public Purposes*
>
> SECTION 83. Upon the recommendation of the Secretary of Agriculture and Commerce, the President may designate **by proclamation** any tract or tracts of land of the public domain as reservations for the use of the Commonwealth of the Philippines or of any of its branches, or of the inhabitants thereof, in accordance with regulations prescribed for this purpose, or for quasi-public uses or purposes when the public interest requires it, including reservations for highways, rights of way for railroads, hydraulic power sites, irrigation systems, communal pastures or *leguas comunales,* public parks, public quarries, public fishponds, workingmen's village and other improvements for the public benefit.

First of all, it bears noting that under the provisions of both the RAC and the Public Land Act, this power to reserve government lands of the public and private domain is exercised through a Presidential Proclamation[59] or, under the Revised Administrative Code of 1917, by executive order.[60] Elsewhere in the Public Land Act, the proclamation where the reservation is made is forwarded to the Director of Lands, and may require further action from the Solicitor General.[61]

An illustration is found in the factual milieu of *Republic v. Octobre,*[62] wherein a particular tract of land of the public domain was reserved for a public purpose by proclamation, and thereafter released through a subsequent proclamation by President Magsaysay. The Court cited therein the authority of the President under Section 9 of the Public Land Act to reclassify lands of the public domain "*at any time and in a similar manner*, transfer lands from one class to another," to validate the release of the reservation through the subsequent proclamation. This supports the conclusion that the positive act that "perfects" the reservation for public purpose (or release) is the issuance of a proclamation. In fact, in *Republic v. Estonilo*,[63] this mode was considered necessary for a reservation to be effective or valid:

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58 OSG Comment ¶131-138, pp. 42-44.

59 Under Section 4, Chapter II of Book III, Title I of the Revised Administrative Code, a proclamation is an "act of the President fixing a date or declaring a status or condition of public moment or interest, upon the existence of which the operation of a specific law or regulation is made to depend.

60 CA 141, Sec. 64(d) and (e).

61 CA 141, Sec. 86 to 88.

62 123 Phil. 698 (1966).

63 512 Phil. 644, 646 (2005).

> To segregate portions of the public domain as reservations for the use of the Republic of the Philippines or any of its branches, like the Armed Forces of the Philippines, all that is needed is a **presidential proclamation** to that effect.

In this case, however, there is no dispute that this power, argued by the Solicitor General as belonging exclusively to the President, was exercised through a verbal order. Based on the foregoing, this falls short of the manner prescribed by law for its exercise. Accordingly, absent a Presidential Proclamation, I fail to fathom how these laws (the RAC and the Public Land Act) can be used to justify the decision to inter former President Marcos in the LNMB. Moreover, without any showing that the interment is consistent with LNMB's purpose as a national shrine, it cannot be undertaken as no change in the said specific purpose has been validly made.

But even assuming arguendo that the President can exercise the power to reserve lands of the public domain through a verbal order, the exercise of this power as basis for the decision to inter former President Marcos in the LNMB must still be scrutinized in two ways: first, does the interment constitute public use or public purpose; and second, is there any law that directs the use of the land the President seeks to reserve.[64]

Based on the language of Section 14, Chapter IV of Book III, Title I of the RAC itself, the power to reserve land is qualified by the standards stated therein:

(1) That the reservation be for settlement or public use, and for specific public purposes;

(2) That the use of the land sought to be reserved is not otherwise directed by law.

First requirement: reserve tracts of land of the public domain for a specific public purpose.

On the first standard, petitioners argued during the oral arguments that the fulfillment of the President's campaign promise, made in favor of a private party, or to inter a dictator or plunderer does not constitute a legitimate public purpose as it does not serve public good. During the interpellation by Justice Carpio, this was discussed:

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64 "The matter to be considered then is whether there is any law that directs or authorizes the President to release a disposable public land from a reservation previously made" *(Republic v. Octobre,* supra note 62, at 701).

JUSTICE CARPIO:

If you bury somebody in the *Libingan*, you have to spend money, correct?

ATTY. COLMENARES:

Yes, Your Honor.

JUSTICE CARPIO:

Funds will be spent?

ATTY. COLMENARES:

Yes, Your Honor.

JUSTICE CARPIO:

And you will be using public property, correct?

ATTY. COLMENRES:

Yes, Your Honor.

JUSTICE CARPIO:

Now, the rule is public funds and public property can be used only for a public purpose, not a private purpose, correct?

ATTY. COLMENARES:

Yes, Your Honor.

JUSTICE CARPIO:

So, when you bury somebody in the *Libingan* who has been dishonorably discharged or separated from service, are you using public funds and property for a public purpose or for a private purpose?

ATTY. COLMENARES:

That is not transformed, Your Honor. The shrine is intended for, the public purpose or the shrine is for enshrinement or the recognition of those who are revered and esteemed and now you are going to put someone who is not revered and esteemed. That will be a violation of that, Your Honor.

JUSTICE CARPIO:

Public purpose means is that (sic), means the use of the funds or the property is for the general welfare for the public good?

ATTY. COLMENARES:

Yes, Your Honor.

JUSTICE CARPIO:

But if a person has been dishonorably discharged from service and you bury him there in a government property that is for a private purpose to extol or honor the family or the person?

ATTY. COLMENARES:

Yes, Your Honor.

JUSTICE CARPIO:

That is not for the public, there is no public good there, correct?

ATTY. COLMENARES:
Yes, Your Honor.

JUSTICE CARPIO:
So if the President now amends the regulations because the regulations state, that if you are dishonorably discharged, you cannot be buried in the Libingan and former President Marcos was dishonorably separated by the people in 1986, he cannot be buried but if the President now, the incumbent President amends the regulation to say that he can still be buried upon my instruction that cannot be done because that's against the Constitution because you're using public funds or property for a private purpose, correct?

ATTY. COLMENARES:
Yes, Your Honor, in that sense and also in addition, if you agree with the petitioner's contention that R.A. 289 has a standard, the President's directive cannot amend R.A. 289 and now must therefore also be struck down, Your Honor.

JUSTICE CARPIO:
Okay, thank you counsel, that's all.[65]

For his part, the Solicitor General stood firm and insisted that the subject interment serves a public purpose, when interpellated by Justice Leonen:

SOLICITOR GENERAL CALIDA:
I have here an excerpt, Your Honor, Section 14. "*The Power to Reserve Lands of the Public and Private Domain of the Government – (1) The President shall have the power to reserve for settlement or public use, and for specific public purposes, any of the lands of the public domain, the use of which is not otherwise directed by law.*"

JUSTICE LEONEN:
So there are two things there, public use and public purpose.

SOLICITOR GENERAL CALIDA:
Yes, Your Honor.

JUSTICE LEONEN:
Okay. Is the creation of a Libingan ng mga Bayani falling under that power of the president, that statutory power, for public use?

SOLICITOR GENERAL CALIDA:
Yes, Your Honor.

JUSTICE LEONEN:
Can any member of the public use the Libingan?

SOLICITOR GENERAL CALIDA:
Not any member, Your Honor. It should be within the guidelines of the AFP Regulations.

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[65] TSN, August 31, 2016, pp. 55-63.

JUSTICE LEONEN:
So is it still public use?

SOLICITOR GENERAL CALIDA:
It will be public use, Your Honor, depending on the observance of the classifications which allow certain persons to be interred at the Libingan ng mga Bayani.

JUSTICE LEONEN:
But if it's not public, if only a few individuals, select individuals, can use the Libingan, therefore, it is not public use.

SOLICITOR GENERAL CALIDA:
Maybe it can be public use but for a limited and classified persons (sic) only, Your Honor.

JUSTICE LEONEN:
Is that the concept of public use? Is it your submission that that is the concept of public use?

SOLICITOR GENERAL CALIDA:
Because the cemetery can only accommodate so much, it cannot accommodate the entire public of the Philippines, Your Honor.

JUSTICE LEONEN:
Okay, we'll go to that later. In fact, you cited the case in your consolidated comment. Chinese Cemetery, I think, vs. the City of Manila where you said, that it does not need to have a character of everybody using it to be public use, correct? And therefore, the key there...

SOLICITOR GENERAL CALIDA:
If there is a public purpose for it, yes, Your Honor.

JUSTICE LEONEN:
Yes. So the key there is public purpose.[66]

There appears to be some confusion on the part of the Solicitor General as to the difference between the terms "public use" and "public purpose". "Public use" connotes the traditional concept of use by the public while "public purpose" is understood more to mean in furtherance of the public good, or in the public interest.[67] The requirement of public purpose is necessary because public funds and properties cannot be used to serve primarily private benefit.

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66 TSN, September 7, 2016, pp. 139-141.

67 There has been a shift from the literal to a broader interpretation of "public purpose" or "public use" for which the power of eminent domain may be exercised. The old concept was that the condemned property must actually be used by the general public (e.g. roads, bridges, public plazas, etc.) before the taking thereof could satisfy the constitutional requirement of "public use". Under the more current concept, "public use" means public advantage, convenience or benefit, which tends to contribute to the general welfare and the prosperity of the whole community, like a resort complex for tourists or housing project (*Heirs of Juancho Ardano v. Reyes*, 125 SCRA 220 [1983]; *Sumulong v. Guerrero*, 154 SCRA 461 [1987]). (*Province of Camarines Sur v. Court of Appeals*, G.R. No. 103125, May 17, 1993).

This Court, in rejecting the validity of appropriating public funds for a private purpose, explained in *Pascual v. Secretary of Public Works and Communications*:[68]

> As regards the legal feasibility of appropriating public funds for a private purpose, the principle according to Ruling Case Law, is this:
>
> > "It is a general rule that *the legislature is without power to appropriate public revenue for anything but a public purpose* x x x It is the essential character of the *direct* object of the expenditure which must determine its validity as justifying a tax, and not the magnitude of the interests to be affected nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion. ***Incidental* advantage to the public or to the state, which results from the promotion of private interests and the prosperity of private enterprises or business, does *not* justify their aid by the use of public money.**" (25 R. L. C. pp. 398-400; italics supplied)
>
> The rule is set forth in Corpus Juris Secundum in the following language:
>
> > "In accordance with the rule that the *taxing power must be exercised for public purposes only,* discussed *supra* sec. 14, money raised by taxation can be expended *only for public purposes and* ***not for the advantage of private individuals.***" (85 C.J.S. pp. 645-646; italics supplied.)
>
> Explaining the reason underlying said rule, Corpus Juris Secundum states:
>
> > "Generally, under the express or implied provisions of the constitution, *public funds may be used only for a public purpose.* The right of the legislature to appropriate funds is *correlative with its right to tax,* and, under constitutional provisions against taxation except for public purposes and prohibiting the collection of a tax for one purpose and the devotion thereof to another purpose, *no appropriation of state funds can be made for* ***other than a public purpose*** x x x
> >
> > x x x x
> >
> > "The test of the constitutionality of a statute requiring the use of public funds is whether the statute is designed to promote the public interests, as opposed to the furtherance of the advantage of individuals, although each advantage to

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[68] 110 Phil. 331 (1960).

> individuals might *incidentally* serve the public x x x" (81 C.J.S. p. 1147; italics supplied.)[69]

While the Solicitor General argues that expenditures for the interment are supported by AFP appropriations, the President's discretion in spending AFP appropriations to support the interment of former President Marcos in the LNMB, by virtue of his power of budget implementation and his power to reserve the tract of land, remains, as stated, subject to the public purpose requirement. In this case, the legitimateness of the purpose will depend on what this Court determines to be the nature of the interment — public or private. Does it serve the public at large, or merely the partisan interests of certain individuals?

The *ponencia* holds that the recognition of the former President Marcos's status or contributions as a President, veteran or Medal of Valor awardee satisfies the public use requirement, and the interment as compensation for ***valuable services rendered*** is public purpose that justifies use of public funds. Apart from lacking legal basis, this holding conveniently overlooks the primary purpose of the interment extant in the records — the Solicitor General has admitted that the burial of former President Marcos was a campaign promise of the President to the Marcos family:

> **JUSTICE CAGUIOA:**
> Before the President gave his verbal order to have the remains of President Marcos interred in the *Libingan*, did the heirs of President Marcos make a personal request to that effect?
>
> **SOLICITOR GENERAL CALIDA:**
> In fact, Your Honor, that was a campaign promised (sic) even before he was a President.
>
> **JUSTICE CAGUIOA:**
> And that was a promised (sic) given to, whom?
>
> **SOLICITOR GENERAL CALIDA:**
> To the heirs of President Marcos, Your Honor.[70]

This admission by the Solicitor General indicates to me that the interment is primarily to favor the Marcos family, and serves no legitimate public purpose. Therefore, the first requirement for the legitimate exercise of the President's power to reserve has not been met. Moreover, any disbursement of public funds in connection with the interment will not be for a public purpose, as it is principally for the advantage of a private party — separate from the motivation for the same.

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[69] Id. at 340. Emphasis and underscoring supplied.
[70] TSN, September 7, 2016, pp. 39-40.

The holding of the *ponencia*, shown in this light, is illogical: Marcos is not a hero, and burying him in the LNMB will not convert him into a hero. But somehow, his interment primarily serves a public purpose or otherwise serves the interest of the public at large, and this Court will allow the expenditure of public funds to inter him as a President, veteran, and/or a Medal of Valor awardee as compensation for valuable public services rendered — **turning a blind eye to the disservice, damage and havoc that former President Marcos caused to this country**.

Second requirement: the use of the land sought to be reserved not otherwise directed by law.

The second requirement for the validity of a reservation requires the determination of the existence of a law that requires a different use for the land to be reserved. This was the standard in *Republic v. Octobre*,[71] when the Court interpreted Section 64(e) of the Revised Administrative Code of 1917, the applicable provision then in force, *viz*:

> SEC. 64. *Particular powers and duties of President of the Philippines.* — In addition to his general supervisory authority, the President of the Philippines shall have such specific powers and duties as are expressly conferred or imposed on him by law and also, in particular, the powers and duties set forth in this chapter.
>
> Among such special powers and duties shall be:
>
> x x x x
>
> [(d) To reserve from settlement or public sale and for specific public uses any of the public domain of the (Philippine Islands) Philippines the use of which is not otherwise directed by law, the same thereafter remaining subject to the specific public uses indicated in the executive order by which such reservation is made, until otherwise provided by law or executive order.]
>
> (e) To reserve from sale or other disposition and for specific public use or service, any land belonging to the private domain of the Government of the Philippines, the use of which is not otherwise directed by law; and *thereafter such land shall be used for the specific purposes directed by such executive order until otherwise provided by law.*[72]

and held that "[t]he matter to be considered then is whether there is any law that directs or authorizes the President to release a disposable public land from a reservation previously made." Plainly, the powers in Section 64(d) and (e) are restated in Section 14 of the RAC cited by the Solicitor General. The Court's interpretation of Section 64(e), and by necessary extension now

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71 Supra note 62, at 700-701.

72 Italics supplied.

to Section 14 of the RAC, has two implications: *first*, the existence of a law directing the use of the land sought to be reserved affects the validity of the reservation — and the provisions of the said law will form part of the standards by which the court can determine the existence of grave abuse in case of violation, and *second*, the original specific public use or purpose continues until a subsequent law or executive issuance releases or changes the said specific public use or purpose for which the land was originally reserved.

In other words, the Solicitor General's invocation of Section 14 of the RAC, as intimated earlier, confirms that the decision to inter former President Marcos in the LNMB is not a truly political question as said decision is, in law, subject to the Court's power of judicial review — to determine whether the standards of Section 14 of the RAC have been met, and alongside all other laws, issuances, judicial decisions and state of facts subject to judicial notice that relate to former President Marcos as the intended beneficiary of the directive to be interred in the LNMB. Moreover, since the land that is the present site of the LNMB is already reserved by Presidential Proclamation for a specified public use or purpose — for national shrine purposes — then such specified use or purpose **continues** until the land is released by another Presidential Proclamation. Since in this case, there is no such Presidential Proclamation, the interment and concomitant expenditure of public funds must, if justified by Section 14 of the RAC, constitute public purpose and be consistent with the specified purpose of its reservation, *i.e.* Proclamation No. 208 (s. 1967).

In fine, the verbal order to inter falls short of the required manner of exercising the power to reserve. Moreover, the interment cannot be justified by the power to reserve because it is not a legitimate public purpose, and is not consistent with the national shrine purposes of LNMB's reservation. **For the same reasons that the interment serves no legitimate public purpose, no use of public property or public funds can be made to support it.**

Faithful execution and power of control

As another basis for the power to order the interment of former President Marcos in the LNMB, the Solicitor General cites the President's power of control over the executive department. On the other hand, Heirs of Marcos insist that the President's order merely implements the express provisions of RA 289 and the pertinent AFP Regulations and, as such, cannot be considered as capricious or whimsical, nor arbitrary and despotic.

Petitioners, however, aver the opposite – that the Memorandum and Directive to bury former President Marcos at the LNMB violate the faithful execution clause because it disregards the clear and unequivocal declaration made by Congress in RA 10368 that former President Marcos is a recognized human rights violator.

There is no argument as to the existence of the power of control and duty of faithful execution. However, as applied to the case at bar, it bears to revisit the extent of the power of control and duty to faithfully execute laws.

The President's power of control and duty to faithfully execute laws are found in Article VII, Section 17 of the 1987 Constitution, which provides:

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

In Book IV, Chapter 7, Section 38(a) of the RAC, control is defined to include "authority to act directly whenever a specific function is entrusted by law or regulation to a subordinate; direct the performance of duty; restrain the commission of acts; review, approve, reverse or modify acts and decisions of subordinate officials or units; determine priorities in the execution of plans and programs; and prescribe standards, guidelines, plans and programs." It has also been jurisprudentially defined as the "power of an officer to alter or modify or nullify or set aside what a subordinate officer had done in the performance of his duties and to substitute the judgment of the former for that of the latter."[73]

In *Phillips Seafood (Philippines) Corp. v. The Board of Investments,*[74] the Court held that the power of control is not absolute, and may be effectively limited:

> **Such "executive control" is not absolute.** The definition of the structure of the executive branch of government, and the corresponding degrees of administrative control and supervision is not the exclusive preserve of the executive. **It may be effectively limited by the Constitution, by law, or by judicial decisions.** x x x (Emphasis supplied)

Therefore, while the order to inter former President Marcos in the LNMB may be considered an exercise of the President's power of control, this is necessarily subject to the limitations similarly applicable to his subordinate, the Philippine Veterans Affairs Office ("PVAO") or the Quartermaster General — found in the Constitution, laws and executive issuances.

This is consistent with the duty imposed upon the President by the faithful execution clause, which this Court explained, thus:

> That the President cannot, in the absence of any statutory justification, refuse to execute the laws when called for is a principle fully recognized by jurisprudence. In *In re Neagle*, the US Supreme Court held that the faithful execution clause is "not limited to the enforcement of acts

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73 *Ham v. Bachrach Motor Co., Inc.,* 109 Phil. 949-957 (1960).

74 597 Phil. 649, 661 (2009).

> of Congress according to their express terms." According to Father Bernas, *Neagle* "**saw as law that had to be faithfully executed not just formal acts of the legislature but any duty or obligation inferable from the Constitution or from statutes.**"[75] (Emphasis and underscoring supplied)

Verily, the claim that the President is merely faithfully executing law (i.e. the AFP Regulations) when he ordered the interment must be examined in the context of the other duties or obligations inferable from the Constitution and from statutes that relate to the facts of this case. And the order to inter cannot be considered a valid exercise of his power of control, or his duty to faithfully execute the laws because the interment violates the Constitution, laws and executive issuances — how it violates these provisions are discussed subsequently in this dissent.

Residual powers of the President

In default of, or in addition to, the President's power to reserve lands, power of control, and faithful execution of the laws, the Solicitor General claims that the decision to inter former President Marcos is an exercise of the residual powers of the President. And, in this connection, the Solicitor General harps on the inherent and exclusive prerogative of the President to determine the country's policy of national healing.[76]

Residual powers are provided in Book III, Title I, Chapter 7, Section 20 of the RAC, thus:

> **SECTION 20.** Residual Powers. — Unless Congress provides otherwise, the President shall exercise such other powers and functions vested in the President which are provided for under the laws and which are not specifically enumerated above, or which are not delegated by the President in accordance with law.

In *Larin v. Executive Secretary,*[77] the claim of exercise of residual power to validate the streamlining of the Bureau of Internal Revenue was examined in light of whether or not a law exists that gives the President the power to reorganize.

> Another legal basis of E.O. No. 132 is Section 20, Book III of E.O. No. 292 which states:
>
> > "Sec. 20. Residual Powers. -- Unless Congress provides otherwise, the President shall exercise ***such other powers and functions vested in the President which are provided for under the laws*** and which are not specifically enumerated above or which are not delegated by the President in accordance with law." (italics ours)

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[75] *Biraogo v. Philippine Truth Commission of 2010,* supra note 39, at 538-539.
[76] OSG Memorandum or Consolidated Comment.
[77] 345 Phil. 961 (1997).

> This provision speaks of such other powers vested in the President under the law. What law then which gives him the power to reorganize? It is Presidential Decree No. 1772 which amended Presidential Decree No. 1416. These decrees expressly grant the President of the Philippines the continuing authority to reorganize the national government, which includes the power to group, consolidate bureaus and agencies, to abolish offices, to transfer functions, to create and classify functions, services and activities and to standardize salaries and materials. The validity of these two decrees are unquestionable. x x x[78]

On the other hand, in *Sanlakas v. Reyes,*[79] this Court made the following observation on "residual powers":

> The lesson to be learned from the U.S. constitutional history is that the Commander-in-Chief powers are broad enough as it is and become more so when taken together with the provision on executive power and the presidential oath of office. Thus, the plenitude of the powers of the presidency equips the occupant with the means to address exigencies or threats which undermine the very existence of government or the integrity of the State.[80]

Inasmuch as the Solicitor General has failed to provide the persuasive constitutional or statutory basis for the exercise of residual power, or even the exigencies which "undermine the very existence of the government or the integrity of the State" that the order to inter former President Marcos in the LNMB seeks to address, the Court should have been left with no recourse except to examine the factual bases, if any, of the invocation of the residual powers of the President, as this is the duty given to the Court pursuant to its power of judicial review. Jurisprudence mandates that there is no grave abuse of discretion provided there is sufficient factual basis for the exercise of residual powers.[81] Conversely, when there is absence of factual basis for the exercise of residual power, this will result in a finding of arbitrariness, whimsicality and capriciousness that is the essence of grave abuse of discretion.

As early as *Marcos v. Manglapus*,[82] the Court, after conceding to then President Corazon Aquino the discretion to prohibit the Marcoses[83] from returning to the Philippines under the "residual unstated powers of the President x x x to safeguard and protect general welfare," proceeded to still ascertain if her decision had factual basis, *viz*:

> Under the Constitution, judicial power includes the duty to determine whether or not there has been a grave abuse of discretion

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78 Id. at 979.

79 466 Phil. 482 (2004).

80 Id. at 518.

81 *Marcos v. Manglapus,* supra note 4; *Sanlakas v. Reyes*, supra note 79; and *Integrated Bar of the Philippines v. Zamora,* supra note 5.

82 Supra note 4.

83 Ferdinand E. Marcos, Imelda R. Marcos, Ferdinand R. Marcos, Jr., Irene M. Araneta, and Imee Manotoc.

amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government." [Art. VIII, Sec. 1] Given this wording, we cannot agree with the Solicitor General that the issue constitutes a political question which is beyond the jurisdiction of the Court to decide.

The present Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry into areas which the Court, under previous constitutions, would have normally left to the political departments to decide. But nonetheless there remain issues beyond the Court's jurisdiction the determination of which is exclusively for the President, for Congress or for the people themselves through a plebiscite or referendum. We cannot, for example, question the President's recognition of a foreign government, no matter how premature or improvident such action may appear. We cannot set aside a presidential pardon though it may appear to us that the beneficiary is totally undeserving of the grant. Nor can we amend the Constitution under the guise of resolving a dispute brought before us because the power is reserved to the people.

There is nothing in the case before us that precludes our determination thereof on the political question doctrine. The deliberations of the Constitutional Commission cited by petitioners show that the framers intended to widen the scope of judicial review but they did not intend courts of justice to settle all actual controversies before them. **When political questions are involved, the Constitution limits the determination to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned**. If grave abuse is not established, the Court will not substitute its judgment for that of the official concerned and decide a matter which by its nature or by law is for the latter alone to decide. In this light, it would appear clear that the second paragraph of Article VIII, Section 1 of the Constitution, defining "judicial power," which specifically empowers the courts to determine whether or not there has been a grave abuse of discretion on the part of any branch or instrumentality of the government, incorporates in the fundamental law the ruling in *Lansang v. Garcia* [G.R. No. L-33964, December 11, 1971, 42 SCRA 448] that:

> Article VII of the [1935] Constitution vests in the Executive the power to suspend the privilege of the writ of habeas corpus under specified conditions. Pursuant to the principle of separation of powers underlying our system of government, the Executive is supreme within his own sphere. However, the separation of powers, under the Constitution, is not absolute. What is more, it goes hand in hand with the system of checks and balances, under which the Executive is supreme, as regards the suspension of the privilege, but only if and when he acts within the sphere allotted to him by the Basic Law, and the authority to determine whether or not he has so acted is vested in the Judicial Department, which, in this respect, is, in turn, constitutionally supreme.
>
> In the exercise of such authority, the function of the Court is merely to check — not to supplant — the Executive, or to ascertain merely whether he has gone beyond the constitutional limits of his jurisdiction, not to exercise the

> power vested in him or to determine the wisdom of his act x x x [At 479-480].
>
> Accordingly, **the question for the Court to determine is whether or not there exist factual bases for the President to conclude that it was in the national interest to bar the return of the Marcoses to the Philippines. If such postulates do exist, it cannot be said that she has acted, or acts, arbitrarily or that she has gravely abused her discretion in deciding to bar their return**.
>
> We find that from the pleadings filed by the parties, from their oral arguments, and the facts revealed during the briefing in chambers by the Chief of Staff of the Armed Forces of the Philippines and the National Security Adviser, wherein petitioners and respondents were represented, **there exist factual bases for the President's decision.**[84] (Emphasis supplied)

In *Integrated Bar of the Philippines v. Zamora*,[85] the Court, while conceding that the President has the power to call out the armed forces to prevent or suppress lawless violence, invasion or rebellion, **again** inquired into the factual determination by then President Joseph Ejercito Estrada as to the necessity to call out the armed forces, particularly the Marines, to aid the PNP in visibility patrols around the metropolis before it ruled that he did not gravely abuse his discretion. The Court observed:

> The 1987 Constitution expands the concept of judicial review by providing that "[T]he Judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law. Judicial power includes the duty of the courts of justice 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." Under this definition, the Court cannot agree with the Solicitor General that the issue involved is a political question beyond the jurisdiction of this Court to review. **When the grant of power is qualified, conditional or subject to limitations, the issue of whether the prescribed qualifications or conditions have been met or the limitations respected, is justiciable - the problem being one of legality or validity, not its wisdom**. Moreover, the jurisdiction to delimit constitutional boundaries has been given to this Court. **When political questions are involved, the Constitution limits the determination as to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned**.
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> x x x x
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> Thus, it is the unclouded intent of the Constitution to vest upon the President, as Commander-in-Chief of the Armed Forces, full discretion to call forth the military when in his judgment it is necessary to do so in order

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84 *Marcos v. Manglapus*, supra note 4, at 506-508.

85 Supra note 5.

> to prevent or suppress lawless violence, invasion or rebellion. Unless the petitioner can show that the exercise of such discretion was gravely abused, the President's exercise of judgment deserves to be accorded respect from this Court.
>
> **The President has already determined the necessity and factual basis for calling the armed forces**. In his Memorandum, he categorically asserted that, [V]iolent crimes like bank/store robberies, holdups, kidnappings and carnappings continue to occur in Metro Manila x x x. **We do not doubt the veracity of the President's assessment of the situation, especially in the light of present developments. The Court takes judicial notice of the recent bombings perpetrated by lawless elements in the shopping malls, public utilities, and other public places. These are among the areas of deployment described in the LOI 2000. Considering all these facts, we hold that the President has sufficient factual basis to call for military aid in law enforcement and in the exercise of this constitutional power.**[86] (Citations omitted; emphasis supplied)

In both *Marcos v. Manglapus* and *Integrated Bar of the Philippines v. Zamora*, the Court, pursuant to the expanded concept of judicial power under the 1987 Constitution, took the "pragmatist" approach that a political question[87] should be subject to judicial review to determine whether or not there had been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action was being questioned. In turn, a determination of the existence or non-existence of grave abuse of discretion is greatly dependent upon a finding by the Court that the concerned official had adequate factual basis for his questioned action.

Thus, conceding to the President the power to order the interment of the former President in the LNMB, did he, however, have competent factual basis to conclude that his decision would promote national healing, genuine change and forgiveness, redound to the benefit of Filipino people, change the national psyche, begin the painful healing of this country, and efface the Marcos' remains as a symbol of polarity?

National healing, genuine change, forgiveness, change in national psyche, and effacing the Marcos's remains as the symbol of polarity are not matters which the Court can or may take judicial notice of.[88] They are not self-evident or self-authenticating. The public respondents and the private respondents, Heirs of Marcos, have, therefore, the burden to factually

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86 *Integrated Bar of the Philippines v. Zamora*, supra note 5, at 638-645.

87 Not to be confused with a "truly political question" pursuant to the *Francisco v. HRET* formulation.

88 Rule 129, Section 1 provides that judicial notice is mandatory with respect to "the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of the legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions," while Section 2 provides that judicial notice is discretionary with respect to matters which are of public knowledge, or are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions.".

substantiate them. The Court cannot be left, on its own, to divine their significance in practical terms and flesh them out.

Regarding national healing, does the Solicitor General expect the Court to commiserate with and feel for whatever "pain and suffering" the Marcos family may stand to endure if former President Marcos is not interred in the LNMB? The Court has not even been apprised of the nature of such "pain and suffering." In fact, counsel for the heirs of Marcos refused to provide an answer when asked on this issue during the oral arguments, thus:

> **JUSTICE CAGUIOA**:
> Can you tell me what injuries the Marcos family is suffering because President Marcos is (has) not been interred in the Libingan? Is there any injury?
>
> **ATTY. RAFAEL-ANTONIO**:
> Your Honor, with all due respect the issue here is the propriety of the decision of President Duterte to inter him. The injury which the Marcos family may be suffering would be, to discuss this, would be amounting to an academic discussion, Your Honor.
>
> **JUSTICE CAGUIOA**:
> Not necessarily, we are a court of law and a court of equity and as judges we are mandated to find a solution to any legal controversy prescinding from the emotions...
>
> **ATTY. RAFAEL-ANTONIO**:
> Your Honor...
>
> **JUSTICE CAGUIOA**:
> That is the basis of my question.
>
> **ATTY. RAFAEL-ANTONIO**:
> Yes, Your Honor. I agree, Your Honor, but equity must follow the law and in this case, the laws applicable do not consider the injuries on the family of the deceased.
>
> **JUSTICE CAGUIOA**:
> So do I take it that you will not answer my question?
>
> **ATTY. RAFAEL-ANTONIO**:
> Yes, Your Honor.[89]

"[T]he painful healing of this country," borrowing the words of the Solicitor General, of the wounds brought about by the Marcos martial rule actually started with his ouster in 1986 and has progressed significantly throughout the ensuing three decades. Indeed, as far as Heirs of Marcos are concerned, they have almost regained their former political stature. At present, there is a Marcos senator,[90] who almost made it to the Vice

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89 TSN, September 7, 2016, pp. 50-51.
90 Ferdinand "Bongbong" R. Marcos, Jr.

Presidency, a Marcos representative[91] to the Congress of the Philippines, and a Marcos governor.[92] On the other hand, the victims of the Marcos martial rule have partly won their day in court and have been so far awarded sizeable judgments.[93] Several laws (e.g. RA 10368) have been enacted that recognize the deaths, sufferings, injuries, deprivations that they endured, and accord them reparation. In simple terms, there appears to be no perceptible empirical correlation between the intended burial of former President Marcos and the supposed national healing the President seeks to promote. To be sure, no reason has been offered that would clothe the President's decision as essential to this supposed national healing.

"Genuine change", without more, may have been an excellent slogan during the campaign period, but as a reason for the decision to inter former President Marcos in the LNMB, is too amorphous and nebulous. What is it in the present Filipino life that requires "genuine change", the Solicitor General has not even attempted to explain. How does the interment of former President Marcos in the LNMB effect this "genuine change"? Again, the Solicitor General has not proffered any kind of explanation.

As defined, forgiveness is a "conscious, deliberate decision to release feelings of resentment or vengeance" toward a person or group who has caused harm, regardless of whether such persons are deserving of the same.[94] Conversely, forgiveness does not mean glossing over or denying the seriousness of an offense committed against one's person, nor does it mean condoning or excusing offenses or legal accountability.[95] Instead, forgiveness entails the recognition of the pain that one has suffered, without letting such pain prevent one from attaining healing or moving on with their life.[96]

On the part of the Marcos heirs, the Solicitor General quotes in their Memorandum Ilocos Norte Governor Imee Marcos' message[97] of "simple sorry"[98] during the recent commemoration of her father's birthday, wherein she purportedly "humbly sought forgiveness."[99] Is this the forgiveness that the President is after? But, forgiveness cannot be exacted from the victims of the Marcos martial rule because the State has no right to **impose** the same upon them. The Court is helpless in the absence of a reasonable and acceptable explanation how the President's objective of "forgiveness" is achieved by the intended interment.

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91 Representative Imelda R. Marcos.
92 Ilocos Norte Governor Imee Marcos.
93 *In Re: Estate of Marcos Human Rights Litigation,* 910 F. Supp. 1460 (D. Haw. 1995), upheld in *Hilao v. Marcos,* 103. F.3d 762 (9th Cir. 1996).
94 *What Is Forgiveness?*, available at <http://greatergood.berkeley.edu/topic/forgiveness/definition>, last accessed on October 17, 2016.
95 Id.
96 Id.
97 Public Respondents' Memorandum, p. 4.
98 Id.
99 Id.

Unlike in *Marcos v. Manglapus* where "from the pleadings filed by the parties [therein], from their oral arguments, and the facts revealed during the briefing in chambers by the Chief of Staff of the Armed Forces of the Philippines and the National Security Adviser, wherein petitioners and respondents [therein] were represented, there exist factual bases for the President's decision" to bar the return of the Marcoses to the Philippines in the national interest,[100] the Solicitor General has not identified any tangible and material benefit that the nation will reap with the interment of former President Marcos in the LNMB. Thus, the Court is left with no alternative but to conclude that it will only be Heirs of Marcos, who are private citizens, who will stand to benefit from the interment.

The Solicitor General's postulate that the burial of the former President's remains in the LNMB is "geared towards changing the national psyche" is, again, as vague as the other motherhood statements that have been bandied about.

"Psyche" is simply defined as the soul, mind or personality of a person or group[101] and the mental or psychological structure of a person, especially as a motive force.[102] Conversely, "national psychology" may refer to the soul, mind, or personality of a nation, or the mental psychological structure of a nation.

The Solicitor General cannot just presume that the Court is knowledgeable of the "national psyche" that the President desires to engender or change. The President's intentions may be noble, but the Court cannot be expected to speculate as to what he understands "national psyche" to be or how the interment will engender or change the "national psyche".

As to the burial of former President Marcos being in keeping with the President's campaign promise, the Solicitor General effectively takes the position that with the President's proclamation as such, he must now keep his campaign promise because the electorate "has spoken".[103]

But again, this is equivocal to say the least. To some, the campaign promise is but a political concession to the Heirs of Marcos and to attract the votes of the Marcos loyalists. To others, who are perennially political cynics, campaign promises are made to be broken, not cast in stone, and are like debts listed on water. As to the reasons why the voters' preference in the last national elections tilted in favor of the President over the other presidential candidates, political analysts can have their field day. The Court should not try to second guess.

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100 *Marcos v. Manglapus*, supra note 4, at 507-508.

101 *"Psyche"*, available at <http://www.merriam-webster.com/dictionary/psyche>, last accessed on October 17, 2016.

102 http://www.dictionary.com/browse/psyche, last accessed on October 17, 2016.

103 TSN, September 7, 2016, pp. 83-87.

Regarding the Solicitor General's premise that former President Marcos' remains have become the symbol of polarity, again, the necessary foundation for this was not laid.

What the Court can take judicial notice of is that, at present, former President Marcos lies in repose at the Ferdinand E. Marcos Presidential Center,[104] which is situated in Batac, Ilocos Norte. The Center has a museum which showcases memorabilia of the former President, and a mausoleum where his remains lie inside a glass-encased coffin which has been on public display since 1993. Many flock to the mausoleum to view the remains of former President Marcos and he continues to be admired by his loyalists. Those who are presently vehemently opposing the burial of former President Marcos in the LNMB have not, for more than 20 years, questioned the right and decision of the Heirs of Marcos to have his remains lie in repose at his mausoleum. The so-called "polarity" symbolized by the remains of the former President is, again, not apparent.

Thus, the mere incantation of buzzwords such as "national psyche," "national healing," "genuine change," "campaign promise" and "effacing symbol of polarity" as the wisdom underlying the challenged order of the President appears – in the absence of anything other than such incantation – is nothing more than a legerdemain resorted to to prevent the Court from taking judicial cognition thereof and to make the President's action inscrutable. Without sufficient factual bases, these magic words are ephemeral and ambiguous. The Solicitor General has failed to provide even the minimum specifics as to how such objectives, as lofty as they are or pretended to be, will be achieved if the President's order is implemented. Consequently, this failure to substantiate the factual bases of the President's assailed action should have left the Court with no option but to rule that the President's intended action is bereft of any factual basis — and, for that reason, following *Marcos v. Manglapus*, already constitutes grave abuse of discretion.

Summation

To recapitulate: (1) there was no valid exercise of the power to reserve under Section 14 of the RAC; (2) the President may validly order the interment of former President Marcos in the LNMB pursuant to his power of control and his duty to faithfully execute laws, provided that no contravention of the Constitution, laws, executive issuances, public policy, customs and international obligations arises therefrom or is committed; (3) the Solicitor General failed to show any contingency for the valid exercise of the President's residual powers, and likewise failed to demonstrate sufficient

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[104] *Despite tourism loss, Batac mayor backs hero's burial for Marcos*, available at <http://www.rappler.com/nation/145804-batac-mayor-her-burial-marcos >, last accessed on October 17, 2016.

factual basis to justify the interment of former President Marcos in the LNMB.

Turning now to the relevant provisions of the Constitution, laws, executive issuances, public policy, customs and international obligations, I will explain in turn how the interment violates them, and thus, constitutes grave abuse.

The laws, executive issuances, public policy and customs that were violated.

Republic Act No. 289

Petitioners' reliance on RA 289 as anchor for their argument that the intended burial of former President Marcos is prohibited by this law is misplaced.

RA 289 directed the construction of a National Pantheon intended to be the burial place for all the Presidents of the Philippines, national heroes and patriots,[105] and established the Board of National Pantheon that is mandated to cause the interment in the National Pantheon of the mortal remains of all Presidents of the Philippines, national heroes and patriots.[106] Subsequently, in Proclamation No. 431 issued by President Quirino in 1953, a parcel of land in Quezon City was reserved. Thereafter, by virtue of Proclamation No. 42 (s. 1954), this reservation was withdrawn. No other property has been thus earmarked or reserved for the construction of a National Pantheon.

I agree that RA 289 is not applicable. Reading RA 289 together with Proclamation No. 431 leads to no other conclusion than that the land on which the National Pantheon was to be built refers to a discrete parcel of land that is different from site of the LNMB. To be sure, the history of the LNMB, is that of a parcel of land identified by Proclamation No. 208 Series of 1967, dated May 28, 1967, which is parcel 3, Psu-2031, consisting of 1,428,800 square meters and whose technical description is reflected in said Proclamation No. 208. Accordingly, it is *non sequitur* to argue the applicability of RA 289, or the standards indicated therein, to the LNMB, which is a parcel of land that is totally different and distinct.

That said, I fully concur with Justice Leonen that RA 289 remains an effective law consistent with Article 7 of the Civil Code.

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[105] Sec. 1, RA 289.
[106] Sec. 2., id.

PD 105, RA 10066 and 10086, and the specific policy in the treatment of national shrines

It has to be acknowledged that there is no dispute that the present LNMB is rightfully a **military memorial declared as a national shrine**. The history of the LNMB, as it is expressed in the different PDs and executive issuances, shows that it is not an ordinary cemetery; it is not an ordinary gravesite. Truthfully, and legally, its status as a national shrine is beyond cavil.

In this regard, PD 105 squarely directs how national shrines should be regarded. And while the decree specifically mentions several places as national shrines, it also unequivocally provides that all national shrines "and others which may be proclaimed in the future as national shrines" are to be regarded and treated as "hallowed places".

Thus, the third *Whereas* clause of PD 105 **mandates** that "it is the **policy** of the Government to **hold** and **keep** said National Shrines as **sacred and hallowed place**."[107]

PD 105 is not a mere executive issuance. It is law. And this law establishes a specific State policy in the treatment of all national shrines declared before and after its issuance. Accordingly, since the LNMB has been declared as a national shrine, the specific State policy to hold and keep national shrines as a "sacred and hallowed place" necessarily covers the LNMB. To be sure, this policy extends to the LNMB despite the fact that its declaration as a national shrine predated PD 105 as there is no rational basis why the LNMB, already declared a national shrine by Proclamation No. 208 in 1967, should be treated differently from those sites that have been declared as national shrines after PD 105.

The argument that PD 105 applies only to places of birth, exile, imprisonment, detention or death of great and eminent leaders of the nation is too narrow and myopic a reading that it deserves scant consideration. Indeed, this interpretation is contradicted and belied by the very language of PD 105 itself which recognizes all other national shrines that "may be declared in the future" as also being sacred and hallowed places. The Court can take judicial notice of a number of places declared as national shrines after PD 105 – and therefore to be treated as sacred and hallowed places – that are **not** places of birth, exile, imprisonment, detention or death of great and eminent leaders, such as the Kiangan War Memorial Shrine which was established to perpetuate the surrender site for the Japanese Imperial Forces and to serve as a reminder of the "uselessness of war as a means of solving international

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[107] P.D. No. 105, 3rd Whereas Clause.

differences",[108] the Quezon Memorial Circle which was established in memory of the late President Manuel L. Quezon even as President Quezon died in New York, and the Balete Pass[109] which was a battlefield where the Americans and the Filipinos fought against the Japanese Imperial Forces. To insist that the provisions of PD 105, and the proscription against the prohibited acts listed therein, will apply to a national shrine only if said national shrine is the place of birth, exile, imprisonment, detention or death of a great and eminent leader is plainly ridiculous and downright error.

I find that PD 105 **is** applicable. No proposition is being made to expand the import of the decree beyond its express terms; no penalty is sought against any act involved in this case. What is inescapable, however, is the explicit statement of government policy to hold national shrines sacred. As well, the same policy is reiterated in RA 10066 and RA 10086 —order the preservation or conservation of the cultural significance of national shrines.

In this connection, the policy of PD 105 to hold and keep the LNMB as a "**sacred and hallowed place**" is in keeping with, and completely aligned with, the **esteem and reverence** that Proclamation No. 89 accords to the fallen soldiers, war dead and military personnel who were meant to be buried in the LNMB.

As admitted by the Solicitor General during oral arguments, the words "esteem and reverence" in Proclamation No. 89 and "sacred and hallowed" in PD 105 are not empty and meaningless. The words "esteem and reverence" set and mandate how the LNMB, in particular, should be regarded, whereas the words "sacred and hallowed" direct how national shrines, in general, should be treated.

Truly, it is precisely because of the country's collective regard of the LNMB as the memorial in honor of the heroism, patriotism and nationalism of its war dead as well as its fallen soldiers and military personnel that President Duterte held the rites honoring the country's national heroes at the LNMB in the morning of August 29, 2016.[110] There is no question that LNMB has traditionally been the site where National Heroes Day is commemorated.

The main premise of the *ponencia* appears to be that the LNMB is still primarily and essentially a military memorial, or a military shrine, notwithstanding the fact that it was purposely excluded from the military reservation for **national shrine purposes** by Proclamation No. 208. The

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[108] Presidential Decree No. 1682.

[109] R.A. 10796 (2016).

[110] http://www.gmanetwork.com/news/story/579292/news/nation/duterte-leads-national-heroes-day-rites; http://news.abs-cbn.com/news/08/29/16/look-duterte-leads-national-heroes-day-rites, last accessed on October 17, 2016.

military nature of the LNMB is seemingly relied upon to argue that standards relating to national shrines in general, and to the LNMB in particular, outside of the standards expressly embodied in the AFP Regulations, cannot apply.

To me this is egregious error. The dual nature of the LNMB as a military memorial and a national shrine cannot be denied.

Former President Marcos himself appeared to have recognized the distinction in the discerning manner that he declared sites as military memorials or shrines and national shrines — some he declared solely as military shrines or memorial shrines, while others sites with military significance were declared as national shrines. To illustrate, he declared the Tirad Pass National Park.[111] Fort San Antonio Abad,[112] "Red Beach" (the landing point of General Douglas MacArthur and the liberating forces),[113] and an area of Mt. Samat,[114] as national shrines, while a parcel of land in Cavinti was declared as a memorial shrine.[115]

The best exemplar, perhaps, is the *Bantayog ng Kiangan*, the site in Ifugao where General Yamashita surrendered to the Allied Forces. On July 9, 1975, former President Marcos issued Proclamation No. 1460, declaring the same as a military shrine under the administration and control of the Military Memorial Division, Department of National Defense.[116] Two years later, on October 17, 1977, he issued Proclamation No. 1682, declaring the previously declared military shrine as a national shrine.[117]

Even PD 1076,[118] issued by former President Marcos on January 26, 1977, that transferred the functions of administration, maintenance and development of national shrines to the PVAO, found its impetus, not on the ground that PVAO should have exclusive jurisdiction over these national shrines, but on the fact that the (then) Department of National Department of Defense had greater capabilities and resources to more effectively administer, maintain and develop the national shrines, and exercised functions more closely related to the significance of the national shrines.[119]

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[111] July 23, 1968 *(Declaring the Tirad Pass National Park as Tirad Pass National Shrine, Proclamation No. 433, [1968])*

[112] May 27, 1967 *(Reserving for National Shrine Purposes a Certain Parcel of Land of the Private Domain Situated in the District of Malate, City of Manila, Proclamation No. 207, [1967])*

[113] *Reserving Certain Parcel of Land of the Private Domain in Baras, Palo, Leyte for the Province of Leyte, PROCLAMATION NO. 1272, [1974]*

[114] April 18, 1966 *(Excluding from the Operation of Proclamation No. 24, s. 1945, Proclamation No. 25, [1966]*

[115] March 27, 1973 *(Reserving for Memorial Shrine for the War Dead a Certain Parcel of Land of the Public Domain in Cavinti, Laguna, PROCLAMATION NO. 1123, [1973])*

[116] *Declaring the "Bantayog sa Kiangan" as a Military Shrine, Proclamation No. 1460, [1975]*

[117] *Declaring the Kiangan War Memorial Shrine in Linda, Kiangan, Ifugao as a National Shrine, Proclamation No. 1682, [1977])*

[118] *Amending Part XII (Education) and Part XIX (National Security) of the Integrated Reorganization Plan, Presidential Decree No. 1076, [1977]*

[119] Second and Third Whereas Clauses of PD 1076.

Verily, the argument that the LNMB was initially, primarily, or truly a military memorial to maintain that only the express disqualifications in the AFP Regulations should control in the determination of who may be interred therein, to the exclusion of the provisions of the Constitution, laws and executive issuances, disregards the fact that its status as a national shrine has legal consequences.

The policy of PD 105 with respect to national shrines is reiterated, or more accurately, expanded in the statement of policy in RA 10066[120] that has the objective of "protect[ing], preserv[ing], conserv[ing] and promot[ing] the nation's cultural heritage, its property and histories;[121] and RA 10086[122] that states the policy of the State to conserve, promote and popularize the nation's historical and cultural heritage and resources.[123] Even assuming that PD 105 does not apply to the LNMB, there can be no argument that the later expression of legislative will in RA 10066 and RA 10086 accords even fuller protection to national shrines, which includes the LNMB.

The term "*national shrine*" escapes express legal definition. However, sufficient guidance is found in RA 10066[124] that uses different permutations of the term: "*national historical shrines*" is a category of cultural property[125] while the term "*historical shrines*" is defined to refer to historical sites or structures hallowed and revered for their history or association as declared by the National Historical Institute.[126] Thereafter, RA 10066 uses the term "*national shrines*" in its penal provision[127] which could only mean national historical shrine previously defined. Under this law, the National Historical Institute ("NHI"), the body once given powers of administration over the LNMB, was responsible for significant movable and immovable cultural property that pertains to Philippine history, heroes and the conservation of historical artifacts.[128]

In RA 10086, "*national historical shrines*" refers to "sites or structures hallowed and revered for their history or association declared as such by the NHCP,"[129] which is the successor of the NHI mentioned in RA 10066. RA 10086 interchangeably uses shrines[130] and national shrines.[131] In both laws, the word "*conservation*" is defined as "processes and measures of maintaining the cultural significance of a cultural property including, but not

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120 *National Cultural Heritage Act of 2009,* Republic Act No. 10066, March 24, 2010.
121 Article 2(a) of RA 10066.
122 *Strengthening Peoples' Nationalism Through Philippine History Act,* Republic Act No. 10086, May 12, 2010.
123 Section 2, RA 10086.
124 *National Cultural Heritage Act of 2009,* Republic Act No. 10066, March 24, 2010.
125 Section 4, RA 10066 uses the term "national historical shrine".
126 Section 3, RA 10066.
127 Section 48, id.
128 Section 31, id.
129 Section 3(n), RA 10086.
130 Sections 7(d) and (n), id.
131 Sections 3(b), 7(e) and 20, id.

limited to, physical, **social or legal preservation**, restoration, reconstruction, **protection**, adaptation or any combination thereof," respectively,[132] which is consistent with, and in fact expanded the protection beyond, what may be argued as merely prohibiting physical desecration in PD 105. The clear legislative mandate in RA 10066 and 10086 require conservation, not only of the physical integrity of national shrines as cultural and historical resources, but also of the cultural significance thereof.

These laws operate to accord legal protection to the LNMB so that the standard applicable to it, in particular, esteem and reverence in Proclamation No. 86, and to national shrines, in general, as sacred and hallowed under PD 105, will be upheld and maintained. In other words, if a person who is not worthy of or held in esteem and reverence is sought to be interred in the LNMB, then this would be contrary to the policy to hold LNMB as a sacred and hallowed place — and the Court must step in to preserve and protect LNMB's cultural significance. Relevantly, the NHCP, which has the mandate to discuss and resolve, with finality, issues or conflicts on Philippine history under Section 7 of RA 10086, opposes the interment — another fact completely disregarded by the *ponencia.*

Verily, **the interment of former President Marcos constitutes a violation of the physical, historical and cultural integrity of the LNMB as a national shrine, which the State has the obligation to conserve.**

AFP Regulations

Concededly, the LNMB is also a military grave site. The Quartermaster General of the Armed Forces of the Philippines ("AFP") exercises over-all supervision in the implementation of the AFP Regulations concerning burials at the LNMB, specifically, AFP Regulations 161-373 dated April 9, 1986 and the subsequent regulations (AFP Regulations G 161-374 dated March 27, 1998,[133] and AFP Regulations G 161-375 dated September 11, 2000[134] [the AFP Regulations] while the Graves Services Unit ("GSU") is charged with the registration of deceased/graves, allocation of specific section/area, preparation of grave sites, and supervision of burials at the LNMB.[135]

The fact that the LNMB is an active military grave site or cemetery, however, does **not** diminish, and **cannot be used as an excuse** to denigrate, its status as a national shrine. The PDs discussed above are laws while the presidential issuances have the force of law. They must be observed in the use of the LNMB.

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[132] Section 3(i) in RA 10066 and Section 3(c), id.
[133] Annex 6, Consolidated Comment.
[134] Annex 7, Consolidated Comment.
[135] AFP Regulations G 161-375.

National Heroes Day is a regular holiday under Act No. 3827 intended for the Filipinos to reflect on the heroism of our countrymen. This Court can take judicial notice of the custom[136] or tradition of the sitting President to celebrate this national holiday by visiting the LNMB, which, if accorded a most reasonable interpretation, can be taken to mean that LNMB **does** symbolize heroism, or that it is the place where the nation's heroes lie. To argue, therefore, that the word "bayani" in the LNMB is a misnomer, and that no symbolism of heroism should be attached thereto or to those that lie therein as heroes, is, at the very least, contrary to well-established custom.

And this is precisely how the provisions in the AFP Regulations regarding those who are not qualified to be interred in the LNMB should be construed – as an acknowledgment that it is a national shrine, and must be treated as a "sacred and hallowed" resting place. Surely, if "personnel who were **dishonorably** separated/reverted/discharged from service" are to be interred in the LNMB, then LNMB, being a "sacred and hallowed place,"[137] would be **desecrated**. In the same vein, if "authorized personnel who were convicted by final judgment of an offense involving **moral turpitude**"[138] are to be interred in the LNMB, then the status of LNMB as a national shrine would be **tarnished**. Without these disqualifications, the sacredness and hallowedness of the LNMB would be hollow and meaningless.

In other words, it would be, as it is, error, to view or understand the AFP Regulations in a vacuum, independent of or apart from, the policy expressed in Proclamation No. 86 which renamed the Republic Memorial Cemetery as "*Libingan ng mga Bayani*" (**Cemetery of the Heroes**[139]) and established therein the standards of "**ESTEEM and REVERENCE**", Proclamation No. 208 which constituted LNMB as a national shrine, PD 105 which specifically provides the specific policy that all national shrines shall be sacred and hallowed places, RA 10086 that characterizes LNMB as a "*national historic shrine*" or a historical site or structure hallowed and revered for its history or association.

These laws and presidential proclamations that have the force of law should be read into, and considered part of, the AFP Regulations.

Basic is the principle in statutory construction that interpreting and harmonizing laws is the best method of interpretation in order to form a uniform, complete, coherent, and intelligible system of jurisprudence, in accordance with the legal maxim *interpretare et concordare leges legibus est optimus interpretandi modus*.[140]

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[136] The Requisites of Custom are (1) a number of acts; (2) uniformity: (3) juridical intent; (4) lapse of time; and not contrary to law. 1 Manresa p. 76.

[137] AFP Regulations G 161-374; AFP Regulations G 161-375. Emphasis supplied.

[138] Id; id. Emphasis supplied.

[139] http://corregidorisland.com/bayani/libingan.html.

[140] *Pabillo v. COMELEC*, G.R. Nos. 216098 & 216562, April 21, 2015, 756 SCRA 606, 672.

Thus, the disqualifications contemplated under the AFP Regulations should be construed under the aegis of the foregoing laws and executive issuances and their interpretation should not be narrowed by the language used therein. Accordingly, I fully agree with Justice Carpio's position that when Marcos was forcibly taken out of office and removed as a President and a Commander-in-Chief by the sovereign act of the people expressed in the EDSA Revolution – which is an act higher than an act of a military tribunal or of a civilian administrative tribunal – then it can reasonably be said that he was dishonorably separated as a President and dishonorably discharged as a Commander-in-Chief. During the oral arguments, Justice Carpio further clarified that a military personnel, who is a Medal of Valor awardee, retires from the military, joins the government, and while in government, he is dishonorably separated for an offense, then upon his death, he should not be qualified to be interred in the LNMB pursuant to the AFP Regulations themselves because LNMB, being a sacred and hallowed ground, would be besmirched.[141]

In the same manner, the disqualification of those who have been convicted by final judgment of an offense involving moral turpitude should be understood in its normal and ordinary acceptation. In his concurring opinion in *Teves v. COMELEC*,[142] Justice Brion cites the Black's Law Dictionary definition of moral turpitude as an "act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general," and Bouvier's Law Dictionary as including "everything which is done contrary to justice, honesty, modesty, or good morals." Citing *In re Basa*[143] and *Zari v. Flores*,[144] Justice Brion lists, among others, estafa, theft, murder, whether frustrated or attempted, attempted bribery, robbery, direct bribery, embezzlement, extortion, frustrated homicide, falsification of document, fabrication of evidence, evasion of income tax, and rape as crimes involving moral turpitude. The commission by a person of any such crimes when proven should surely disqualify him from being buried in the LNMB as it would blacken the sacredness and hallowedness of the LNMB.

In *Republic v. Sandiganbayan*,[145] a *certiorari* petition filed by the Republic of the Philippines (Republic) against the Sandiganbayan, former President Marcos, represented by his heirs: Imelda R. Marcos, Maria Imelda [Imee] Marcos-Manotoc, Ferdinand R. Marcos, Jr. and Irene Marcos-Araneta, and Imelda Romualdez Marcos, which sought to reinstate the Sandiganbayan's earlier decision dated September 19, 2000 that forfeited in favor of the Republic Swiss bank accounts in the aggregate amount of US$658,175,373.60 as of January 31, 2002, claimed by the Marcoses as theirs

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141 TSN, August 31, 2016, p. 55.
142 604 Phil. 717, 735-742 (2009).
143 41 Phil. 275 (1920).
144 94 SCRA 317.
145 453 Phil. 1059 (2003).

and held in escrow in the Philippine National Bank (PNB), this Court made this factual finding and ruling:

> In the face of **undeniable circumstances** and the **avalanche of documentary evidence against them, respondent Marcoses failed to justify the lawful nature of their acquisition of the said assets**. Hence, the Swiss deposits should be considered **ill-gotten wealth** and forfeited in favor of the State in accordance with Section 6 of RA 1379[.][146] (Emphasis and underscoring supplied)

In *Marcos, Jr. v. Republic*,[147] this Court ruled that all the assets, properties and funds of Arelma, S.A., an entity created by former President Marcos, with an estimated aggregate amount of US$3,369,975.00 as of 1983, which the Marcos claimed as theirs, were declared ill-gotten wealth and forfeited in favor of the Republic.

This Court, in *Republic v. Sandiganbayan* and *Marcos, Jr. v. Republic*, noted with approval the Solicitor General's evidence, culled from the Income Tax Returns (ITRs) and Balance Sheets filed by the Marcoses, that showed their total income from 1965 to 1984 in the amount of ₱16,408,442.00, with 67.71% thereof or ₱11,109,836.00 allegedly coming from the legal practice of the former President as compared to the official salaries of former President Marcos and Imelda R. Marcos of ₱2,627,581.00 or 16.01% of the total, and the Solicitor General's findings that:

> x x x FM [Ferdinand Marcos] made it appear that he had an extremely profitable legal practice before he became a President (FM being barred by law from practicing his law profession during his entire presidency) and that, incredibly, he was still receiving payments almost 20 years after. **The only problem is that in his Balance sheet attached to his 1965 ITR immediately preceding his ascendancy to the presidency he did not show any Receivables from client at all, much less the ₱10.65-M that he decided to later recognize as income. There are no documents showing any withholding tax certificates. Likewise, there is nothing on record that will show any known Marcos client as he has no known law office.** As previously stated, his networth was a mere ₱120,000.00 in December, 1965. The joint income tax returns of FM and Imelda cannot, therefore, conceal the skeletons of their **KLEPTOCRACY**.[148] (All caps and its emphasis supplied)

This Court also observed the very thorough presentation of the Solicitor General's evidence, *viz*:

> The following presentation very clearly and overwhelmingly show in detail how both respondents clandestinely stashed away the country's wealth to Switzerland and hid the same under layers upon layers of foundations and other corporate entities to prevent its detection. Through

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146 Id. at 1149.

147 686 Phil. 980 (2012).

148 *Republic v. Sandiganbayan*, supra note 146, at 1091; *Marcos, Jr. v. Republic*, id. at 1003-1004.

> their dummies/nominees, fronts or agents who formed those foundations or corporate entities, they opened and maintained numerous bank accounts. x x x[149]

Marcos v. Manglapus[150] recognized the plunder of the economy attributed to the Marcoses and their cronies and relied thereon as basis to bar the return of the remains of former President Marcos to the country, *viz*:

> We cannot also lose sight of the fact that the country is only now beginning to recover from the **hardships brought about by the plunder of the economy attributed to the Marcoses and their close associates and relatives**, many of whom are still here in the Philippines in a position to destabilize the country, while **the Government has barely scratched the surface, so to speak, in its efforts to recover the enormous wealth stashed away by the Marcoses in foreign jurisdictions**. Then, We cannot ignore the continually increasing burden imposed on the economy by the excessive foreign borrowing during the Marcos regime, which stifles and stagnates development and is one of the root causes of widespread poverty and all its attendant ills. The resulting precarious state of our economy is of common knowledge and is easily within the ambit of judicial notice. (Emphasis and underscoring supplied)

In *PCCG v. Peña*,[151] this Court recalled the economic havoc engendered by the Marcos regime through the plunder of the country's wealth, *viz*:

> x x x Given the magnitude of the [Marcos] regime's "organized pillage" and the ingenuity of the plunderers and pillagers with the assistance of the experts and best legal minds available in the market, it is a matter of sheer necessity to restrict access to the lower courts, which would have tied into knots and made impossible the Commission's gigantic task of recovering the plundered wealth of the nation, whom the past regime in the process had saddled and laid prostrate with a huge $27 billion foreign debt that has since ballooned to $28.5 billion.

Indeed, as correctly pointed out by petitioner Latiph, this Court has referred to former President Marcos as a dictator in 20 cases and his rule was characterized as authoritarian in 18 cases.

That is not all. Section 2 of RA 10368 is a recognition by legislative fiat that "summary execution, torture, enforced or involuntary disappearance and other gross human rights violations [were] committed during the regime of former President Ferdinand E. Marcos covering from September 21, 1972 to February 25, 1986."

In two United States cases, the United States District Court of Hawaii[152] awarded US$1.2 Billion in exemplary damages and over US$770

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149 *Republic v. Sandiganbayan*, id. at 1093.
150 Supra note 4, at 509.
151 243 Phil. 93, 107 (1988).

Million in compensatory damages to 10,059 plaintiffs for acts of torture, summary execution, disappearance, arbitrary detention and numerous other atrocities, which the jury found former President Marcos personally liable for, and the US 9th Circuit Court of Appeals,[153] applying the "command responsibility" principle, ruled that the district court properly held former President Marcos liable for human rights abuses which occurred and which he knew about and failed to use his power to prevent.

The NHCP, in its study, "Why Ferdinand Marcos should not be buried at the Libingan ng mga Bayani," which it undertook as part of its mandate to conduct and disseminate historical research and resolve historical controversies, has concluded, among others, that former President Marcos had lied about receiving U.S. medals and that certain actions committed by him as a soldier amounted to "usurpation" and could be characterized as "illegal" and "malicious criminal act." Significantly, the NHCP opposes the proposed burial of former President Marcos.[154]

In the Memorandum filed by petitioners Rosales, et al., they question the basis of the Solicitor General's claim that former President Marcos was a Medal of Valor Awardee. Based on a copy of General Order No. 167 dated October 16, 1958 ("GO 167"), which is Annex "A" to the Rosales Memorandum, former President Marcos obtained not a Medal of Valor but a Medal **for** Valor. A reading of the contents of GO 167 reveals that the account of the purported Marcos' bravery therein had been debunked in the aforementioned study of the NHCP. There is thus reliable basis to seriously doubt the authenticity of the Medal of Valor award of former President Marcos. As the NHCP concluded:

> Mr. Marcos's military record is fraught with myths, factual inconsistencies, and lies. The rule in history is that when a claim is disproven – such as Mr. Marcos's claims about his medals, rank, and guerilla unit – it is simply dismissed. When, moreover, a historical matter is under question or grave doubt, as expressed in the military records about Marcos's actions and character as a soldier, the matter may not be established or taken as fact. A doubtful record also does not serve as sound, unassailable basis of historical recognition of any sort, let alone burial in a site intended, as its name suggests, for heroes.

This Court's and the United States courts' pronouncements, the provisions of RA 10368, coupled with the observations of the NHCP, on the perniciousness, gravity and depravity of the acts (e.g., plunder, falsification, human rights abuse, dictatorship, authoritarianism) that former President Marcos perpetrated and allowed to be perpetrated are sufficient to qualify them as acts involving moral turpitude, justifying the application of the

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[152] *In Re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460 (D. Haw. 1995).

[153] *Hilao v. Marcos*, 103 F.3rd 762(9th Cir. 1996).

[154] The NHCP is the independent government entity that has the mandate to resolve, with finality, issues or conflicts on Philippine history.

provision on disqualification in the AFP Regulations. The overwhelming import of all these simply cannot be cast aside as irrelevant just because former President Marcos was not convicted of such crimes by a criminal court. Certainly, this Court cannot close its eyes to these established facts from which it can be legitimately concluded that former President Marcos was guilty of crimes involving moral turpitude, and would have been convicted thereof were it not for his flight and his subsequent death. Unfortunately, the *ponencia* is content to brush aside these determinations on the ground that without a conviction these do not amount to a disqualification provided in the AFP Regulations.

Just as the LNMB should be looked at as one integral whole, as one and indivisible national shrine, despite the presence of a military grave site within its confines, former President Marcos should be viewed and judged in his totality. His soldier persona cannot be separated from his private citizen cum former President persona, and *vice versa*, unless by some miracle one can be excised from the other. Either the entire remains of former President Marcos are allowed to be buried in the LNMB or none of his parts. Whether as a soldier or as a President, former President Marcos does not deserve a resting place together with the heroes at the LNMB.

In the end, the argument that burying former President Marcos in the LNMB does not make him a hero disregards the status of the LNMB as a national shrine. And, even if the standards set forth in the AFP Regulations were to be followed, former President Marcos would still be disqualified to be interred in the LNMB.

Thus, recalling the earlier discussion on the second requirement of the President's power to reserve, it is now clear that the interment violates the specific public purpose, *i.e.*, national shrine purposes/policies, for which the LNMB was reserved.

To recapitulate, the order to inter former President Marcos in the LNMB is clearly contrary to law (PD 105, RA 10066, RA 10086, and the presidential issuances abovementioned), the AFP Regulations, and the public policy that the said laws, executive issuances, and regulations espouse and advance. In light of the foregoing violations, it is also clear that the interment cannot be justified by the exercise of the President's power of control and duty to faithfully execute laws.

The 1987 Constitution

The *ponencia* disposes of petitioners' invocation of the provisions of Article II of the Constitution by holding that these are not self-executing, citing *Tanada v. Angara*. However, it fails to recognize at the same time that,

since then, several laws have been passed that "enabled" Article II, Section 11, among which are RA 10353[155] and RA 10368. In this respect, the applicability of these laws, especially RA 10368, as basis to oppose the proposed interment will be addressed below.

The applicable treaties and international law principles stand to be violated with the burial of former President Marcos in the LNMB.

Article II, Section 2 of the 1987 Constitution provides that the Philippines "adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations". One of these principles — as recognized by this Court in a long line of decisions[156] — is the rule of ***pacta sunt servanda*** in Article 26[157] of the 1969 Vienna Convention on the Law of Treaties[158] ("VCLT"), or the performance in good faith of a State's treaty obligations. Borrowing the words of this Court in *Agustin v. Edu,*[159] "[i]t is not for this country to repudiate a commitment to which it had pledged its word. The concept of *pacta sunt servanda* stands in the way of such an attitude, which is, moreover, at war with the principle of international morality."[160]

The Philippines became signatory to the Universal Declaration on Human Rights ("UDHR"),[161] and State-party, **without reservations**, to the International Covenant on Civil and Political Rights ("ICCPR")[162] on October 23, 1966, the Rome Statute[163] on August 30, 2011, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") on June 18, 1986.[164]

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155 "Anti-Enforced or Involuntary Disappearance Act of 2012".

156 *Government of Hongkong Special Administrative Region v. Muñoz*, G.R. No. 207342, August 16, 2016; *Commissioner of Internal Revenue v. Pilipinas Shell Petroleum Corp.*, 727 Phil. 506 (2014); *Bayan v. Zamora*, 396 Phil. 623 (2000); *Magallona v. Ermita*, G.R. No. 187167, August 16, 2011; *Bayan Muna v. Romulo*, 656 Phil. 246 (2011); *CBK Power Company Ltd. v. Commissioner of Internal Revenue*, G.R. Nos. 193383-84 & 193407-08, January 14, 2015, 746 SCRA 93; *Abaya v. Ebdane, Jr.*, 544 Phil. 645 (2007); *Department of Budget and Management Procurement Service (DBM-PS) v. Kolonwel Trading*, 551 Phil. 1030 (2007); *Deutsche Bank AG v. Commissioner of Internal Revenue*, 716 Phil. 676 (2013); *Secretary of Justice v. Lantion*, 379 Phil. 165 (2000); *La Chemise Lacoste, S.A. v. Fernandez*, 214 Phil. 332 (1984); *Tañada v. Angara*, 338 Phil. 546, 592 (1997); *Pharmaceutical and Health Care Association of the Phils. v. Duque III*, 561 Phil. 386 (2007).

157 "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

158 1155 U.N.T.S. 331, 8 I.L.M. 679, opened for signature May 23, 1969, entered into force Jan. 27, 1980.

159 G.R. No. L-49112 February 2, 1979.

160 *Agustin v. Edu*, G.R. No. L-49112 February 2, 1979.

161 Adopted by the United Nations General Assembly on December 10, 1948; see *Poe-Llamanzares v. Commission on Elections*, G.R. Nos. 221697 & 221698-700 (Dissenting Opinion, March 8, 2016.

162 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM 368 (1967); the Philippines signed the ICCPR on December 19, 1966 and ratified the same on October 23, 1986.

163 A/CONF.183/9 of 17 July 1998.

164 The Philippines ratified the CAT on June 26, 1987.

The UDHR is an international document recognizing inalienable human rights, which eventually led to the creation of several legally-binding treaties, such as the ICCPR and International Covenant on Economic, Social and Cultural Rights ("ICESCR").[165] The Philippines signed the UDHR *because* of its recognition of the rights and values enumerated in the UDHR, and it is that same recognition that led the Philippines to sign and ratify both the ICCPR and the ICESCR.[166]

Article VII, Section 21[167] and Article II, Section 2 of the Constitution[168] adopt the *doctrine of transformation*. Treaties, which have been duly entered and ratified pursuant to the Constitution, must be transformed into municipal law so that they can be applied to domestic conflicts.[169] Once so transformed, treaty obligations enjoy the same legal force and effect as domestic statutes.[170]

The CAT was transformed by virtue of Republic Act 9745 or the "Anti-Torture Act of 2009".[171] Subsequently, echoing its commitment to the UDHR, the Philippines transformed its obligations under the ICCPR and the CAT, on July 23, 2012, with the enactment of Republic Act No. 10368. The enactment of RA 10368 is, in truth, in fulfillment of the country's duty under Article 2(2) of the ICCPR to "take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

Section 2 of RA 10368, echoing the State's policy enshrined in Article II, Section 11 of the Constitution on the value of the dignity of every human person and the guarantee of full respect for human rights, is an acknowledgment of the Philippines' obligations as State-party to the UDHR, ICCPR, and the CAT.

Particularly, in enacting RA 10368, the Philippines categorically recognized its obligation to: (1) "give effect to the rights recognized [in the

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[165] The Philippines signed the ICESCR on December 19, 1966 and ratified the same on June 07, 1974; see: J. von Bernstorff. "The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law" 19 (5) European Journal of International Law 903, 913-914 (2008), cited in *Poe-Llamanzares v. Commission on Elections*, G.R. Nos. 221697 & 221698-700 (Dissenting Opinion), March 8, 2016.

[166] See: *Secretary of National Defense v. Manalo*, 589 Phil. 1, 50-51 (2008) and Separate Opinion of C.J. Puno in *Republic v. Sandiganbayan*, in *Poe-Llamanzares v. Commission on Elections*, G.R. Nos. 221697 & 221698-700 (Dissenting Opinion), March 8, 2016.

[167] Art. VII, Sec. 21. "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate."

[168] Art. II, Sec. 2. "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations."

[169] *Pharmaceutical and Health Care Association of the Phils. v. Duque III*, supra note 156; *Commissioner of Customs v. Eastern Sea Trading*, No. L-14279, October 31, 1961, 3 SCRA 351, 356 cited in *Intellectual Property Association of the Philippines v. Ochoa*, G.R. No. 204605, July 19, 2016.

[170] *Secretary of Justice v. Ralph Lantion*, supra note 156.

[171] AN ACT PENALIZING TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT AND PRESCRIBING PENALTIES THEREFOR, November 10, 2009.

UDHR, ICCPR and the CAT]"[172] (2) ensure that any person whose rights or freedoms have been violated shall have an effective remedy, even if the violation is committed by persons acting in an official capacity; (3) "recognize the heroism and sacrifices of all Filipinos who were victims of summary 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"; and (4) "restore the victims' honor and dignity."

More importantly, the Philippines acknowledged, through RA 10368, its "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" and to "acknowledge the sufferings and damages inflicted upon persons whose properties or businesses were forcibly taken over, sequestered or used, or those whose professions were damaged and/or impaired, or those whose freedom of movement was restricted, and/or such other victims of the violations of the Bill of Rights."[173]

The obligations listed in Section 2 of RA 10368 are **not** to be read in a vacuum. Neither should they be read as bounded by the four corners of that law.

Considering that the enactment of RA 10368 was precisely to "***give effect***"[174] to the rights of human rights victims recognized in the ICCPR and

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[172] R.A. 10368, Sec. 2. "xxx By virtue of Section 2 of Article II of the Constitution adopting generally accepted principles of international law as part of the law of the land, the Philippines adheres to international human rights laws and conventions, the Universal Declaration of Human Rights, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment which imposes on each State party the obligation to enact domestic legislation to give effect to the rights recognized therein and to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, even if the violation is committed by persons acting in an official capacity. xxx"

[173] R.A. 10368, Sec. 2.

[174] R.A. 10368, Sec. 2. "xxx By virtue of Section 2 of Article II of the Constitution adopting generally accepted principles of international law as part of the law of the land, the Philippines adheres to international human rights laws and conventions, the Universal Declaration of Human Rights, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment which imposes on each State party the obligation to enact domestic legislation to give effect to the rights recognized therein and to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, even if the violation is committed by persons acting in an official capacity. In fact, the right to a remedy is itself guaranteed under existing human rights treaties and/or customary international law, being peremptory in character (*jus cogens)* and as such has been recognized as non-derogable.

Consistent with the foregoing, it is hereby declared the policy of the State to recognize the heroism and sacrifices of all Filipinos who were victims of summary 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 and restore the victims' honor and dignity. The State hereby acknowledges its 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. xxx"

the CAT, which the Philippines ratified **without reservations**,[175] then RA 10368 must be understood and interpreted within the broader context of the treaties which it effectuates. Consistent with this, I concur with the Chief Justice's discussion on the proper interpretation of the rights of HRVVs and the corollary state obligations under RA 10368.

It is very significant to note that RA 10368, Section 2 which provides: "x x x the Universal Declaration of Human Rights, including the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment which imposes on each State party the obligation to enact domestic legislation to give effect to the rights recognized therein and to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, even if the violation is committed by persons acting in an official capacity" is an almost **verbatim** reproduction of Article 2(3) of the ICCPR,[176] which provides:

> 3. Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity x x x.

In addition, in interpreting the State's obligations relative to human rights violations, Article 38(1)(d)[177] of the Statute of the International Court of Justice ("ICJ Statute")[178] specifically recognizes "judicial decisions and the teachings of the most highly qualified publicists ("MHQPs") of the various nations, as subsidiary means for the determination of rules of law." In this regard, it is significant to note that as original member of the United Nations ("UN"), the Philippines is *ipso facto* State-party to the ICJ Statute in

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[175] On May 23, 1969 – the very same day the Convention was opened for signature —the Philippines signed the 1969 Vienna Convention on the Law of Treaties ("***VCLT***") *(1155 U.N.T.S. 331, 8 I.L.M. 679, opened for signature May 23, 1969, entered into force Jan. 27, 1980)* and ratified the same on November 15, 1972. Enshrined in Article 26 of the VCLT is the principle of *pacta sunt servanda*, which requires that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" *(1969 VCLT 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 26.)*.

Further, pursuant to the principle of *pacta tertiis nec nocent nec prosunt (1969 VCLT, art. 34. "A treaty does not create either obligations or rights for a third State without its consent"; see in Brownlie, Principles of Public International Law 598, 6th ed., 2003)* under Article 34 of the VCLT, treaties bind only States parties to it (Id.). Consequently, in cases where a State does not want certain provisions of a treaty to apply to it, such exception must be expressed by the State by means of a **reservation,** done at the time the State ratifies the treaty (Art. 2(1)(d), 1969 VCLT).

A reservation is a unilateral statement made by a State whereby the State "purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State" (Art. 2(1)(d), 1969 VCLT). In addition, the reservation must be made "when signing, ratifying, accepting, approving, or acceding to a treaty" (Id). In effect, a reservation *removes* the obligation referred to by the State from its legal obligations arising from that treaty (Rhona K.M. Smith, Texts and Materials on International Human Rights 67 (2013)). No such reservations have been made by the Philippines when it to the ICCPR, the Rome Statute, and the CAT.

[176] Sec. 2.

[177] Art. 38(1)(d). "[s]ubject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

[178] 3 Bevans 1179; 59 Stat. 1031; T.S. 993; 39 AJIL Supp. 215 (1945).

accordance with Article 93, Chapter XIV of the UN Charter[179]. In other words, the Court can rely on what are called subsidiary sources of international law such as judicial decisions and teachings of MHQPs.

Finally, decisions of various tribunals[180] authorize the use of the text of the relevant convention as an aid to interpretation even if the statute does not incorporate the convention or even refer to it.

Given the foregoing, which are the parameters that are considered in understanding and interpreting RA 10368, the question before the Court is how to determine whether petitioners, who claim to be victims of human rights violations under the Marcos martial law regime,[181] can rightfully be considered HRVVs.

In an attempt to strip MLHRV petitioners of their characterization as HRVVs and to dilute their rights as such, the Solicitor General argues that the lack of specific mention of "state agents" in Sec. 3 of RA 10368 means that former President Marcos could not be held liable as Commander-in-Chief for human rights abuses suffered by them.[182] This argument, however, fails to consider the 2001 Articles on Responsibility of States for Internationally Wrongful Acts or the Articles on State Responsibility ("ASR").[183]

Contrary to the Solicitor General's claims, the absence of the words "state agents" in RA 10368 does not, by itself, remove the basis for holding former President Marcos liable as Commander-in-Chief of the armed forces for the crimes committed during his martial law regime. To begin with, the principle of "state agents" would only be relevant for purposes of attributing responsibility to a *State*, as reflected in Article 4 of the ASR, viz:

> Article 4. *Conduct of organs of a State.*
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
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> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

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179 Article 93 (1). All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice.

180 Ian Brownlie, Principles of Public International Law 45 (6th ed., 2003), citing *Salomon v. Commissioners of Customs and Excise* [1967], 2 QB 116, CA, at 141 (per Lord Denning, MR), 143 (per Diplock, LJ); ILR 41; Post Office v. Estuary Radio [1967] 1 WLR 1396, CA, at 1404; [1968] 2 QB 740 at 757; Cococraft Ltd. V. Pan American Airways Inc. [1969] 1 QB 616; [1968] 3 WLR 1273, CA at 1281.

181 Hereinafter referred to as "MLHRV".

182 OSG Memorandum, par. 245, p. 93.

183 53 UN GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/83 (2001).

In these petitions, responsibility for the human rights violations committed during the martial law regime is anchored not on the attribution to the *State* through state agents, but on attribution to former President Marcos, as an individual and Commander-in-Chief.

It is also incorrect to argue that the application of "command responsibility" to former President Marcos would violate the constitutional prohibition on bills of attainder and *ex post facto* laws.[184]

In *Hilao v. Estate of Ferdinand Marcos*,[185] the "command responsibility" principle was applied to hold former President Marcos liable for human rights abuses during his martial law regime, which occurred and which he knew about and failed to use his power to prevent. In *In Re: Estate of Marcos*,[186] it was ruled that the estate of former President Marcos was not immune even if the acts of torture, execution, and disappearance were clearly acts outside of his authority as President and were not taken within any official mandate.

While the foregoing cases were decided by United States of America courts, the rulings therein are binding in this jurisdiction by virtue of the act of state doctrine. The act of state doctrine is the "recognition by a country of the legal and physical consequences of all acts of state in other countries,"[187] and "a recognition of the effects of sovereignty, the attributes and prerogatives of sovereign power."[188] In *Presidential Commission on Good Government v. Sandiganbayan and Officeco Holdings N.V.*,[189] this Court had occasion to rule that the *act of state* doctrine prohibits States from sitting in judgment on the acts of the government of another State done within its territory.[190] It requires the forum court to exercise restraint in the adjudication of disputes by foreign courts performed within its jurisdiction.[191]

Simply put, convicting former President Marcos for whatever past crimes he might have committed would not only be legally untenable but also

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184 OSG Memorandum, par. 242, p. 93.

185 Maximo HILAO, Class Plaintiffs, Plaintiff-Appellee, v. ESTATE OF Ferdinand MARCOS, Defendant-Appellant. No. 95-15779, December 17, 1996.

186 In re: Estate of Ferdinand Marcos, 25 F.3d at 1472 (9th Cir. 1994).

187 *Berstein v. Van Heyden Fieres Societe' Anonyme*, 163 F.2d 246, 249 (2nd Cir. 1947) (L. Hand, J.), in Ifeanyi Achebe, The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?, 13 Md. J. Int'l L. 247 (1989).

188 Ifeanyi Achebe, The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?, 13 Md. J. Int'l L. 247 (1989). Available at: http://digitalcommons.law.umaryland.edu/mjil/vol13/iss2/4, last accessed on October 17, 2016.

189 556 Phil. 664 (2007).

190 *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923 (1964), citing *Blad v. Bamfield*, 3 Swans. 604, 36 Eng.Rep. 992; *PCGG v. Sandiganbayan and Officeco Holdings N.V.*, id. at 678, citing Evans, M.d. (Ed.), International Law (First Edition), Oxford University Press, p. 357; *Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897).

191 *PCGG v. Sandiganbayan and Officeco Holdings N.V.*, id., citing Evans, M.D. (Ed.), International Law (First Edition), Oxford University Press, p. 357.

absurd; however, the Court must recognize what has already been previously and legally determined and settled.

In light of the foregoing, and given the fact that MLHRV petitioners, who by their personal accounts (narrated during the Oral Arguments held on August 31, 2016)[192] and as alleged under oath in their respective petitions, have suffered human rights violations during martial law, there is no legal obstacle in recognizing them as HRVVs as this is defined under RA 10368. As HRVVs, they have several rights under international law, which the State has the duty to protect.

As culled from the primary sources of international law (the ICCPR and the CAT), and the subsidiary sources of international law — namely, the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("UN Guidelines") — as well as RA 10368, HRVVs are entitled to the following rights: (1) the non-derogable right to an effective remedy; (2) the right against re-traumatization; (3) the right to truth and the State's corollary duty to preserve memory; and (4) the right to reparation.

1. The right to an effective remedy

Prescinding from the various laws that have been enacted by the Philippine legislature to promote and protect human rights[193] and the availability of judicial remedies,[194] it must be clarified that the Philippines' obligations do not cease by the mere enactment of laws or the availability of judicial remedies. Article 2 of the ICCPR provides:

> Article 2 (3). Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

In turn, General Comment No. 31 to the ICCPR states that the purpose of Article 2 will be defeated if there is no concurrent obligation on the part of the State-party **to take measures to prevent a recurrence** of a violation of the ICCPR.[195] In other words, when RA 10368 recognized the obligation of the Philippines to provide an effective remedy to HRVVs, this can only be understood as the Philippines also having the concurrent obligation to prevent a recurrence of the violation of the ICCPR.

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[192] TSN, August 31, 2016, pp. 199-215.

[193] OSG Memorandum, par. 332, p. 116.

[194] Id.

[195] General Comment No. 31, par. 17, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 1326 May 2004. See par. 17, which states:

> 17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant.

This is not the first time this Court has been asked to recognize the obligatory nature of the ICCPR and the General Comments interpreting their provisions. In *Echegaray v. Secretary of Justice,*[196] the Court recognized the binding nature of the ICCPR and relied on General Comment 6 (to Article 6 of the ICCPR) to resolve the issues raised by petitioner Echegaray with respect to the death penalty allegedly violating the Philippines' international obligations. In *Razon, Jr. v. Tagitis*[197] the Court relied upon the U.N. Human Rights Committee ("UNHRC")'s interpretation of Article 2 of the ICCPR on the right to an effective domestic remedy. According to the UNHRC, the act of enforced disappearance violates Articles 6 (right to life), 7 (prohibition on torture, cruel, inhuman or degrading treatment or punishment) and 9 (right to liberty and security of the person) of the ICCPR, and the act may also amount to a crime against humanity.[198]

The obligation to provide effective remedy, and concurrently, to prevent a recurrence, by its nature, is not discharged by the mere passage of laws. This obligation, by necessity, is a continuing one.

2. ***The right to be protected from re-traumatization***

Petitioner Latiph claims that the burial of former President Marcos in "a state funeral as a hero and extending to him full military honors"[199] violates the Philippines' obligations under the UN Guidelines.[200] In response, the Solicitor General merely stated that the premise of these alleged violations is "flawed"[201], in that there is no causal relation between the Philippines' compliance with its international law obligations and former President Marcos burial at the LNMB.

First of all, the claim that the Philippines is not bound by the UN Guidelines because they are merely "guidelines" and "not treaties"[202] or "sources of international law"[203] is inaccurate. While it is true that a treaty only binds States parties to it and generally does not create obligations for States not parties to it pursuant to the principle of *pacta tertiis nec nocent nec prosunt*,[204] the rule does not operate to preclude the application of the UN Guidelines to the Philippines. This is because the UN Guidelines **do not** create new international or domestic legal obligations, but merely identify

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196 358 Phil. 410 (1998).
197 621 Phil. 536 (2009).
198 *Razon, Jr. v. Tagitis*, id at 603-604.
199 Latiph Petition, p. 22.
200 See also OSG Memorandum, par. 310, p. 110.
201 OSG Memorandum, par. 312, p. 110.
202 OSG Memorandum, par. 344, p. 119.
203 OSG Memorandum, par. 344, p. 119.
204 ICJ Statute, Art. 34.

mechanisms, modalities, procedures and methods for the implementation of ***existing*** legal obligations under international human rights law.[205]

Quite the contrary, and as earlier adverted to,[206] the UN Guidelines constitute subsidiary sources of International Law under Article 38(1)(d) of the ICJ Statute. Principle 10 of the UN Guidelines, pertaining to the treatment of victims, provides:

> 10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her **re-traumatization** in the course of legal and administrative procedures designed to provide justice and reparation.

Significantly, Principle 10 is mirrored by Article II, Section 11 of the Constitution and Section 2 of RA 10368, stating that the "State values the dignity of every human, person and guarantees full respect for human rights."

Based on the narrations of the HRVV petitioners, it is the intended interment that would reopen wounds and re-traumatize them. In this regard, international law has recognized that impunity must be considered as a continued and ongoing form of torture.[207] To bury the architect of martial law in the LNMB would be an act of impunity.

3. The right to truth and the States' duty to preserve memory[208]

Under Principle 2 of the UN Principles on Impunity[209], the right to truth pertains to the right to know about past events concerning the violations and about the circumstances and reasons that led to the perpetration of those crimes.

The duty to preserve memory, in Principle 3 of the UN Principles on Impunity, requires that people's knowledge of the history of its oppression be part of its heritage and as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

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205 Preamble to the Principles and Guidelines, par. 7.

206 Supra.

207 Nora Sveass, Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation, European Journal of Psychotraumatology, Eur J Psychotraumatol. 2013; 4, May 8, 2013.

208 Rosales Petition.

209 Subsidiary source of international law under Article 38(1)(d) of the ICJ Statute, supra.

The burial of former President Marcos in the LNMB which, as already explained, is not a mere cemetery but a memorial for heroes, will certainly not further or advance the Philippines' obligation to accord HRVVs their right to truth and preserve memory. Indeed, such an act would blur the real role of former President Marcos in the country's history and in the human rights abuses that the HRVVs suffered under his martial law regime. This is the causal connection between the proposed interment and the violation of the HRVV's right to truth, and the Philippines' duty to preserve memory.

4. ***The right to specific forms of reparation for harm suffered under Principles 19, 21, 22, 23 of the UN Guidelines***

The Solicitor General claims that the "Philippines had already taken legislative and other measures to give effect to human rights, and provided not only adequate remedies against human rights violations and procedures for the investigation of these violations and for the prosecution of the perpetrators thereof and the penalties therefor, but also reparation to victims."[210] He further claims that RA 10368 has no bearing on the powers of the President and his subordinates under the Constitution and E.O. 292 and that HRVVs can "be very assured that the interment of the remains of the former President Marcos at the *Libingan* will neither prevent them from claiming any entitlements to reparations under RA 10368 nor dilute their claims, moral or legal, monetary or non-monetary, thereunder.[211]

In other words, the Solicitor General is saying that the existence of several laws[212] and the judicial decisions describing former President Marcos as a plunderer and human rights violator already "restored the dignities and reputation of the victims of the regime"[213] and constitute sufficient reparation to the HRVVs.

I cannot agree. The UN Guidelines, as cited in the CHR's Memorandum, and as explained by CHR Chairman Chito Gascon during the Oral Arguments, provide five general forms of reparation: (1) restitution, (2) compensation, (3) rehabilitation, (4) satisfaction and (5) guarantees of non-repetition.

Restitution requires that the victim be restored to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.

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[210] OSG Memorandum, p. 322, p. 114.

[211] OSG Memorandum, p. 238, p. 91.

[212] R.A. 9851 or the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes against Humanity"; R.A. 10353 or the "Anti-Enforced or Involuntary Disappearance Act of 2012"; R.A. 9201 or the "National Human Rights Consciousness Week Act of 2002" and R.A. 10368; see OSG Memorandum, p. 332, p. 116.

[213] Rosales Petition, par. 8.7, pp. 63-64; OSG Memorandum, par. 400, p. 136.

Compensation is provided for any economically assessable damage resulting from gross violations of human rights. In this regard, Article 14 of the CAT 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 [a] 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."

Rehabilitation includes medical and psychological care as well as legal and social services. There are a number of definitions of rehabilitation.[214] General Comment 3 to Article 14 of the CAT suggests that rehabilitation *"should be holistic and include medical and psychological care as well as legal and social services."* Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society."[215]

Satisfaction includes, among others: (i) the "verification of the facts and full and public disclosure of the truth to assist the victim or prevent the occurrence of further violations," (ii) an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (iii) a public apology, (iv) commemorations and tributes to victims, and (v) the inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

Guarantees of non-repetition pertain to measures that may be taken which will contribute to the prevention of the reoccurrence of the human rights violations. This includes "strengthening the independence of the judiciary."

Notably, the Human Rights Committee, in General Comment No. 2 (1992) and General Comment No. 31 (2004)[216] defined rehabilitation as a form of reparation. In particular, General Comment No. 20 states that **amnesties are unacceptable**, among other reasons, because they would "deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible."

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[214] Redress. Rehabilitation as a form of reparation under international law. 2009. Dec, Retrieved April 5, 2011, from http://www.redress.org/smartweb/reports/reports, in Nora Sveass, Gross human rights violations and reparation under international law: approaching rehabilitation as a form of reparation, European Journal of Psychotraumatology, Eur J Psychotraumatol. 2013; 4, May 8, 2013.

[215] General Comment No. 3, Art. 14, CAT.

[216] Human Rights Committee. General comments to the international covenant on civil and political rights (ICCPR) 1992/2004.

The arguments of the Solicitor General are thus belied, and shown to be erroneous, by the breadth and extensiveness of the above-described forms of reparation.

To summarize, there is sufficient basis to rule that the burial of former President Marcos in the LNMB will violate certain international law principles and obligations, which the Philippines has adopted and must abide by, and RA 10368 which transformed the principle and State policy expressed in Article II, Section 11 of the Constitution which states: "The State values the dignity of every human person and guarantees full respect for human rights". In this sense, therefore, a violation of RA 10368 is tantamount to a violation of Article II, Section 11 of the Constitution.

Summation

For all the reasons stated, the directive to inter former President Marcos in the LNMB constitutes grave abuse of discretion amounting to lack or excess of jurisdiction for being in violation of: (1) Presidential Proclamations 86 and 208, (2) PD 105, (3) RA 10066, (4) RA 10086, (5) AFP Regulations G 161-375 and (6) RA 10368, which is tantamount to a violation of Article II, Section 11 of the Constitution.

When all is said and done, when the cortege led by pallbearers has reached the plot in the LNMB dedicated to the newest "hero" of the land and the coffin containing what is claimed to be the remains of former President Marcos has been finally buried in the ground or entombed above ground, this DISSENT, along with the dissents of the Chief Justice and Justices Carpio and Leonen, will be a fitting eulogy to the slaying of the might of judicial power envisioned in the 1987 Freedom Constitution by the unbridled exercise of presidential prerogative using *vox populi* as the convenient excuse.

Above all, this is a tribute to the fallen, *desaparecidos*, tortured, abused, incarcerated and victimized so that the dictator could perpetuate his martial rule, and to those who fought to attain the freedom which led to the very Constitution from which this Court derives the power to make the decision that it reached today — that their sacrifices, sufferings and struggles in the name of democracy would be duly acknowledged and immortalized.

> *"For the survivor who chooses to testify, it is clear: his duty is to bear witness for the dead and for the living. He has no right to deprive future generations of a past that belongs to our collective memory. To forget would be not only dangerous but offensive; to forget the dead would be akin to killing them a second time."*
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> - Elie Wiesel, Night[217]

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[217] Wiesel, E. Night, xv (2006 translation with preface to the new translation); Eliezer "Elie" Wiesel (September 30, 1928-July 2, 2016) was born in the town of Sighet, Transylvania. He was a teenager when he and his family were taken from their home in 1944 to the Auschwitz concentration camp, and

For these reasons, I vote to grant the petitions.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

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then to Buchenwald. *Night* is the terrifying record of his memories of the death of his family, the death of his own innocence, and his despair as a deeply observant Jew confronting the absolute evil of man.