

**DESPERATE TRANSITIONAL TIMES,  
DESPERATE TRANSITIONAL MEASURES:  
USING TRANSITIONAL JUSTICE MECHANISMS  
IN CONFRONTING CORRUPTION IN THE PHILIPPINES\***

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*“Whenever there is injustice, there is resistance, and this is true now as in past ages, for there can be no peace in an unjust world; there can only be constant conflict.”<sup>1</sup>*

**INTRODUCTION**

The Arab order is crumbling.<sup>2</sup>

Fueled by the widespread public dissatisfaction over oppressive and corrupt regimes, a wave of protests has swept the Arab world from North Africa to the Persian Gulf. Just this year, Zine el Abidine Ben Ali of Tunisia and Hosni Mubarak of Egypt have stepped down from power after decades of despotic rule. Other leaders in neighboring countries confront similar crises at home. Yet even while the “Arab spring”<sup>3</sup> is gaining momentum in a region unaccustomed to some of the freedoms enjoyed by democratic Western countries, people in the Arab world remain haunted by regimes that were once backward and corrupt.

Emergence from authoritarian rule is often accompanied by sweeping changes in systems of governance.<sup>4</sup> In situations of transitioning democratization, substantial questions of law and justice inevitably become paramount in nation-

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<sup>1</sup> GARY TEEPLE, *THE RIDDLE OF HUMAN RIGHTS* (2004), cited in Robert Kwame Ameh, *Exceptions, Excuses and Norms: Doing Justice After Conflict: The Case for Ghana's National Reconciliation Commission*, 21 CAN. J. L. & SOC'Y 85 (2006).

<sup>2</sup> Roger Hardy, *Egypt protests: an Arab spring as old order crumbles?* available at <http://www.bbc.co.uk/news/world-middle-east-12339521>, last visited May 2, 2011.

<sup>3</sup> The *Arab spring* was a term coined to describe the start of the movement of democracy in the Arab world beginning with the American liberation of Iraq. (Charles Krauthammer, *An Arab Spring?*, 2005 HOOVER DIGEST 2, available at <http://www.hoover.org/publications/hoover-digest/article/7361>).

<sup>4</sup> Tom Allen, *Resitution and Transitional Justice in the European Court of Human Rights*, 13 COLUM. J. EUR. L. 1 (2006).

building.<sup>5</sup> Hence, if the succeeding democratic government is to deliver its promises of liberation from the problems of the past, a holistic understanding of the faults and shortcomings of the previous regime is an imperative. In this respect, the discourse on transitional justice approaches and their history in democratizing countries such as the Philippines offer a framework to investigate past excesses of a corrupt rule, while building on the future under a democratic regime.

This paper adds to the growing study of transitional justice mechanisms in democratizing societies, by reviewing and evaluating the Philippines' own approaches in confronting corruption during a period of transitional regime change. The first part provides a genealogy of transitional justice, tracing its different phases in world history and its modern developments. The shift in transitional justice from investigating violations of civil and political rights to including economic crimes and corruption is given attention in the paper's second part. Finally, the Philippines' own history of transitional justice approaches in prosecuting corruption, as epitomized by the Presidential Commission on Good Government, will be discussed with the aim of highlighting its strengths and of analyzing its lessons for future improvement.

The Philippines' own history of confronting corruption during its own transition from martial law into the post-EDSA democracy provides a useful insight into the challenges faced by fledgling Arab countries emerging from a similar despotic rule. In some Arab countries where corruption is rampant, their transitioning democracies can learn from the successes and limitations in the Philippines' strategy of transitional justice models and adopt individualized and indigenous approaches to looking at their dark past. There is no arguing that "[c]ountries now emerging from a conflict could learn from the experience of countries before them."<sup>6</sup> Revisiting the Philippine model of transitional justice in facing corruption will hopefully stimulate and inspire discussion of applicable transitional justice mechanisms in the Arab world, desperate to ensure that the promises of their revolution are fulfilled.

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<sup>5</sup> Geoff Gentilucci, *Truth-Telling and Accountability in Democratizing Nations: The Cases Against Chile's Augusto Pinochet and South Korea's Chun Doo-Hwan and Roh Tae-Woo*, 5 CONN. PUB. INT. L.J. 79 (2005).

<sup>6</sup> Anna Triponel and Stephen Pearson, *What Do You Think Should Happen?: Public Participation in Transitional Justice*, 22 PACE INT'L L. REV. 103, 142 (2010).

## PART I. TRANSITIONAL JUSTICE: A GENEALOGY

"Justice" is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs.<sup>7</sup> Conventional criminal justice relates to the prevailing legal and procedural system of responsibility and accountability imposed by society against persons who violate written laws governing their relationships.<sup>8</sup> In its most basic conception, persons who contravene a generally accepted standard of behavior in society must be made to answer for their actions before a tribunal vested with authority.<sup>9</sup> However, during periods of transition or fundamental social change, difficulties arise which place a strain on the regular process of justice and call for alternative approaches to addressing injury or damage. The central issue during these regime shifts focuses on "how to transform a society that has been subjected to illiberal rule and the extent to which this shift is guided by conventional notions of the rule of law."<sup>10</sup>

Countries ravaged by war, revolution or regime change suffer from varying degrees of institutional vulnerability.<sup>11</sup> In periods of conflict, mass atrocities or grossly inhuman acts are rarely prosecuted during the violence, especially when judicial offices are closed and public concern is more skewed towards human survival. In instances where the country is utterly shattered by the crisis, there is even less hope that these abuses can be properly addressed by the country unless foreign intervention is permitted, as what happened in the Nuremberg Trials in post-World War II Germany.<sup>12</sup> Even in cases where remnants of the country's old justice system have endured after the conflict, the succeeding regime may not have the desire or luxury of prosecuting the perpetrators of violence, especially when rebuilding society and normalizing living conditions are

<sup>7</sup> Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT'L L. & POL. 1, 4 (2007).

<sup>8</sup> "Historically, criminal law in the United States has been based upon a retributive justice system. Under such a system, 'perpetrators commit crimes against the state, not against other people.' Central to a retributive justice system is the concept of just deserts. That is, the system's primary focus is to make sure that 'offenders get what they deserve.'" (Dana Micheal Hollywood, *The Search for Post-Conflict Justice In Iraq: A Comparative Study Of Transitional Justice Mechanisms And Their Applicability To Post-Saddam Iraq*, 33 BROOK. J. INT'L L. 59, 67 [2007])

<sup>9</sup> Some authors have pointed to the view of ordinary justice as "one in which laws are always prospective, individuals always costlessly obtain compensation for harms to person or property inflicted by others, and transitions essentially never occur because the legal system runs smoothly in settled equilibrium." (Eric A. Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 764 [2004])

<sup>10</sup> Ruti G. Teitel, *Transitional Justice: Post-War Legacies*, 27 CARDOZO L. REV. 1615, 1617 (2006)

<sup>11</sup> It is not uncommon for high-ranking officials to "misuse state power to further their own political objectives" by emasculating state institutions or organizations, which may pose a challenge to their rule. (See Rena L. Scott, *Moving From Impunity To Accountability In Post-War Liberia: Possibilities, Cautions, And Challenges*, 33 INT'L J. LEGAL. INFO. 345 [2005])

<sup>12</sup> Ruti G. Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 842 (2005).

seen as more pressing affairs.<sup>13</sup> The cause of justice becomes a more thorny issue when the persons responsible for the systematic abuse in the past remain in power and have brokered a tenuous alliance with the succeeding regime.<sup>14</sup> Conventional legal systems may be incapable, unable, or unwilling to dispense justice for acts committed during these troubled periods. These complex regime changes offer challenges that transitional justice studies hope to address.<sup>15</sup>

#### A. *Concept of Transitional Justice Explained*

Transitional justice is “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”<sup>16</sup> It is an extraordinary approach to justice that adjusts to the needs of extraordinary times of flux or tension especially when the usual rules (including the rule of law) cannot, *or should not*, apply.<sup>17</sup> When persons previously in power have committed violence or injustice and have been deposed either through armed conflict, revolution or other similar transitions of government, their victims may now be in a position in the new society to demand satisfaction for the wrongs committed against them.

The United Nations approached the concept of transitional justice in this wise:

The notion of ‘transitional justice’ ... comprises the full range of processes and mechanisms associated **with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.** These may include both judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissal, or a combination thereof.<sup>18</sup> (Emphasis supplied)

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<sup>13</sup> “Scholars have identified two competing challenges that transitional societies face: establishing democracy and pursuing justice for abuses of previous regimes.” (Matthew Draper, *Justice as the Building Block in Transitional Societies: The Case of Indonesia*, 40 Colum. J. Transnat’l L. 391, 392 [2002])

<sup>14</sup> “Yet the more deeply the old regime was entrenched, and the longer it persisted, the more likely it is that its functionaries hold a monopoly on administrative and technical expertise in the ordinary business of government, making them indispensable to the new regime.” (Posner and Vermeule, *supra* note 9)

<sup>15</sup> “The fundamental challenge for transitional regimes is a disparity between needs and resources. In addition to justice, new governments must ensure peace, achieve stability, reform public institutions, repair infrastructure, and institutionalize commitments to human rights and the rule of law. These demands are extraordinary, and even with aid from friendly states and international institutions, all transitions must make difficult decisions.” (David C. Gray, *Devilry, Complicity, and Greed: Transitional Justice and Odious Debt*, 70 SUM LAW & CONTEMP. PROBS. 137, 142 [2007])

<sup>16</sup> Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

<sup>17</sup> Louis Otis and Eric H. Reiter, *Frontline Justice*, 46 VA. J. INT’L L. 677, 689 (2006).

<sup>18</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary-General, Aug. 23, 2004, available at <http://www.un.org/en/ruleoflaw/index.shtml>.

The fundamental issue at the heart of transitional justice discourse is how to treat the country's past and what its effects are on the success of its future.<sup>19</sup> The nature of a political transition is that "there is a past to bear in mind."<sup>20</sup> Transitional justice "aims at establishing or reinforcing the rule of law by dealing with the mess left over from the previous regime."<sup>21</sup> In cases where there is systemic and massive abuse, justice is no longer limited to holding individuals responsible for the abuse under the ordinary processes of criminal law. The endemic violence done inflicts a greater damage to individuals, their families, relatives, and even society as a whole that must be addressed and corrected as well. Incidents of torture, rape, or murder become more abhorrent to the sense of humanity if committed systematically or under the auspices of a government policy. The adjudication of a single individual's, or even a group's, involvement in segmented and delineated human rights violations is not significant enough to mollify the societal rifts rendered by the prior state abuses.<sup>22</sup> Because systemic human rights violations affect the victims and society as a whole, the successor state has, not only a duty to guarantee that the violations do not recur, but also a special responsibility to reform institutions that were either involved in or incapable of preventing the abuses.<sup>23</sup> Instead of focusing solely upon the accountability of individual perpetrators, as in a traditional criminal justice system, transitional justice combines the goals of justice for victims; with the objectives of peace, reconciliation, and social reconstruction.<sup>24</sup>

In most situations, transitional justice consists of a process of rectifying past state abuse in countries shifting from tyrannical regimes to democratic rule.<sup>25</sup> It means something different from the successful accomplishment of a political or economic transition: it means a political and economic transition that is consistent with liberal and democratic commitments.<sup>26</sup> In general, the discipline of transitional justice recognizes that, due to political and historical realities, traditional justice mechanisms may be inadequate during political transitions towards liberal democracy.<sup>27</sup> A transitional justice regimen faces massive struggles in not only bringing justice to divided and disrupted populations but also

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<sup>19</sup> Kristin Bohl, *Breaking the Rules of Transitional Justice*, 24 WIS. INT'L L.J. 557 (2006).

<sup>20</sup> *Id.*

<sup>21</sup> Otis and Reiter, *supra* note 17 at 677.

<sup>22</sup> Gentilucci, *supra* note 5 at 79.

<sup>23</sup> International Center for Transitional Justice, *available at* <http://ictj.org/about/transitional-justice> (last visited May 7, 2011).

<sup>24</sup> Triponel and Pearson, *supra* note 6 at 103.

<sup>25</sup> Bohl, *supra* note 19 at 557.

<sup>26</sup> Posner and Vermeule, *supra* note 9 at 768.

<sup>27</sup> Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations and The Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141, 145 (2007).

contending with and working in the background of the actual political transformation in place.<sup>28</sup>

The Arab world may face these same struggles. Indeed, the complexity of democratic transition in the Arab spring is peculiar owing to the varying standards of living, the incidence of human rights abuse, and the pervasiveness of corruption in the government. The divisions and rifts created by the previous regime are challenges that confront the successor regimes.

“Justice in the post-crisis context is more of a procedural than a substantive issue.”<sup>29</sup> Transitional justice is not a “special” kind of justice, but an approach to achieving justice in times of transition from conflict and/or state repression.<sup>30</sup> Indeed, there is no substantive or fundamental change from ordinary criminal justice, insofar as it aims to impose accountability and correct past misdeeds. The difference lies in the mechanisms and tools used to enforce liability, with a view towards fulfilling other objectives crucial to the success of a transitioning society. In cases of regime changes, the aim of justice is far more complex than reinstituting the values of democracy and the rule of law on a *tabula rasa*; it requires a value-laden choice by community of various options taking into account its preferences and concerns for the future.<sup>31</sup> No plan for transitional justice will be successful without considering the context for which the plan is intended.<sup>32</sup>

Thus, transitional justice has taken on a focused meaning, namely the use of various justice mechanisms – which include among others trials, truth commissions, reparations, apologies, and purges<sup>33</sup> – to deal with the gross atrocities left from the previous regime.<sup>34</sup> These transitional justice mechanisms can provide the foundation of a peaceful society, an instrumental view on two fronts: judicial mechanisms as a tool to create a legal system, and a legal system as a tool to foster peaceful relationships after violence.<sup>35</sup> Restoring the rule of law, strengthening democratic institutions, providing a form of retribution for victims, promoting national peace and unity, and, perhaps most importantly, providing recuperating states with a sense of justice and legal order are but some of the

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<sup>28</sup> Gentilucci, *supra* note 5 at 85.

<sup>29</sup> Otis and Reiter, *supra* note 17 at 691.

<sup>30</sup> International Center for Transitional Justice, *supra* note 23..

<sup>31</sup> Otis and Reiter, *supra* note 17 at 691.

<sup>32</sup> Danielle Tarin, *Prosecuting Saddam and Bungling Transitional Justice in Iraq*, 45 VA. J. INT'L L. 467, 544 (2005).

<sup>33</sup> Posner and Vermeule, *supra* note 9 at 766.

<sup>34</sup> Otis and Reiter, *supra* note 17 at 688.

<sup>35</sup> Jamie Rowen, *Social Reality and Philosophical Ideals in Transitional Justice*, 7 CARDOZO PUB. L. POL'Y & ETHIC J. 93, 97 (2008).

known benefits of transitional justice mechanisms.<sup>36</sup> Thus, they become one of many available strategies that governments undertake to redress violence from the past and to create a community of shared values and norms.<sup>37</sup>

### *B. Tracing the Evolution of Transitional Justice*

Professor Ruti G. Teitel, one of the leading scholars on transitional justice studies, described the three (3) genealogical phases of transitional justice in history during periods of political flux.<sup>38</sup> The aims, modalities and relevant actors, among others, differentiate these three phases.

#### 1. Phase I

Phase I is related to transitions in post-World War II countries, where the “central aim was to delineate between unjust wars and the parameters of justifiable punishment by the international community.”<sup>39</sup> After the atrocities committed during the war came to light, individuals responsible for the devastation and gross human rights abuses were being held accountable for their actions. However, the war resulted in the collapse of the domestic justice system that left a dearth of procedural remedies for extracting criminal liability against responsible officers.<sup>40</sup>

More significantly, the gravity of the atrocities committed – the Jewish concentration camps – so appalled the international community’s sense of humanity that it required a different mode of extracting justice. Hence, the Allied Forces then instituted the Nuremberg Trials to prosecute the leaders of Nazi Germany. Building on the historical “just war” trial tradition at Nuremberg, the victor’s justice was meted out over a defeated enemy in a vanquished country.<sup>41</sup> A trial-type process characterized the Nuremberg proceedings, where both sides presented their respective cases before a tribunal and judgment on the liability of war criminals was thereafter rendered.<sup>42</sup> Similar to the ordinary criminal justice

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<sup>36</sup> Ming Zhu, *Power and Cooperation: Understanding the Road Towards a Truth Commission*, 15 BUFF. HUM. RTS. L. REV. 183 (2009).

<sup>37</sup> Rowen, *supra* note 35 at 114.

<sup>38</sup> Teitel, *supra* note 16 at 69.

<sup>39</sup> *Id.* at 72.

<sup>40</sup> “First, national justice was displaced by international justice. The administration of the post-World War I model of transitional punitive justice, characterized by failed national trials, was left to Germany. Seen with the hindsight of history, it was clear that the post-World War I national trials did not serve to deter future carnage. In an evident critical response to the past, post-World War II transitional justice began by eschewing national prosecutions, instead seeking international criminal accountability for the Reich’s leadership.” (*Id.*)

<sup>41</sup> Ruti G. Teitel, *supra* note 12, 842.

<sup>42</sup> Teitel, *supra* note 10, 1618-1620.

system, the retributive approach was employed where the main focus was to punish state actors for various war atrocities.

In Phase I, the purpose at that time of transition was to guarantee the rule of law, by holding war criminals individually accountable for past deeds. Significantly, this stage contributed to the universalization of human rights, insofar as it condemned regimes that committed unjustified and unnecessary violence against unarmed populations. The significance of the Nuremberg model is that by defining the rule of law in universalizing terms, it has become the standard by which all transitional justice debates are framed.<sup>43</sup>

## 2. Phase II

Phase II of the transitional justice genealogy is associated with the wave of accelerated democratic transitions<sup>44</sup> and modernization of countries in South and Central America, Eastern Europe and Africa.<sup>45</sup> With the collapse of the Soviet Union and the end of the Cold War, countries in these regions transitioned from repressive authoritarian or military regimes to democratic and majoritarian rule. However, the victims of the previous regimes ordinarily dominated the successor governments. They faced transitional predicaments which required balancing the demands of addressing past transgressions by the deposed military dictators with the primary responsibility of rebuilding their nations under a fledgling democracy and jumpstarting their ruined economies.

Unlike the retributive approach of the Nuremberg Trials, transitional justice in Phase II utilized a restorative model of justice with a view towards assuaging the deeper psychological and social wounds inflicted to the people, in order to move forward as a country. Thus, transitional justice expanded to include questions concerning how to “heal” whole societies, with a restorative focus.<sup>46</sup>

The difference in goals and aims from the previous phase likewise introduced alternative modalities in achieving transitional justice that moved away from the ordinary adversarial type of trial that were “more concededly contextual, limited and provisional.”<sup>47</sup> The truth commission exemplified the alternative strategies employed by transitioning regimes to address concerns other than criminal liability, such as official recording of events, reconciliation, closure, and peace, among others. Truth commissions served as a venue for victims to recount

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<sup>43</sup> Teitel, *supra* note 16 at 71.

<sup>44</sup> Teitel, *supra* note 12 at 839

<sup>45</sup> Teitel, *supra* note 16 at 71.

<sup>46</sup> Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009).

<sup>47</sup> Teitel, *supra* note 16 at 78.



their experiences of violence and to analyze the social conditions that permitted such abuse.

Focus moved away from the trial-type Phase I model of universalizing judgment to rebuilding political identity through the rule of law and premised on local understandings of legitimacy.<sup>48</sup> In sharp contrast to the legal framework of the Nuremberg trials, the methods and procedures of the truth commissions drew inspiration not just from the law, but also from such diverse disciplines as psychology, religion, ethics, and morality in achieving its goals. That these bodies were governed by nationals (not foreigners) who had a deep understanding and appreciation of the history of divisions and pain under the previous regime contributed to the localized approaches used. Hence, the problem of transitional justice was reconceived across moral and psychological lines to redefine national identity.<sup>49</sup> Transitional justice in Phase II presented a balance between the backward-looking aspect of individual accountability and the forward-looking aspect of collective development and progress of the nation.

### 3. Phase III

Phase III is associated with steady-state transitional justice, and with “contemporary conditions of consistent conflict which lay the basis for the generalization and normalization of a law of violence.”<sup>50</sup> Whereas the tools of transitional justice were previously applied to extraordinary transitions in post-conflict situations (such as war or absolute regime change in a state), the same tools have been increasingly used in contemporary political conditions such as war in times of peace, political fragmentation, weak states, small wars and steady conflicts.<sup>51</sup> These changes in conditions are reflected in the new developments in international humanitarian law, which now reach beyond international conflict to intra-state incidents that occur even in peacetime, extending in particular to extreme offenses as crimes against humanity.<sup>52</sup>

At this point, transitional justice moves from the exception to the norm, constituting a new paradigm of the rule of law.<sup>53</sup> The most recognized symbol of transitional jurisprudence is the International Criminal Court, which “provides a legal scheme whereby the international community is enabled to hold a regime’s

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<sup>48</sup> Teitel, *supra* note 16 at 80.

<sup>49</sup> *Id.* at 82.

<sup>50</sup> Teitel, *supra* note 12 at 839.

<sup>51</sup> Teitel, *supra* note 16 at 89-90.

<sup>52</sup> Teitel, *supra* note 12 at 840.

<sup>53</sup> *Id.*

leadership accountable and condemn a systematic persecutory policy, even outside the relevant state.”<sup>54</sup>

For new democracies emerging from authoritarian or repressive regimes, resort to transitional justice mechanisms is a leading rite of modern political passage and draws upon both legal innovations and ritual acts that enable the passage between two orders.<sup>55</sup> The bridge created by transitional justice mechanism hopes to smoothen the fundamental change in society not just to legitimize the new regime over the old one, but also to create the conditions for its future success.

## **PART II. SHIFT OF FOCUS OF TRANSITIONAL JUSTICE MECHANISMS: FROM CIVIL AND POLITICAL RIGHTS TO SOCIAL AND ECONOMIC RIGHTS**

The most fundamental element of transitional justice is establishing respect for and obedience to the rule of law in the new society.<sup>56</sup> When civilian populations are victimized by the instruments of government – envisioned to protect and advance the interests of the people – fostering trust between the people and the government is a foremost measure in re-establishing the rule of law in the developing democracy.<sup>57</sup>

### *A. Violations of Socio-Economic Rights in Transitioning Societies Examined*

Through most of these phases of transitional justice, the focus has mainly been on investigating massive violations of civil and political rights as inimical to the concept of the rule of law. Most of the democratic transitions, both armed and peaceful, have been predicated on the population’s dissatisfaction over state abuse and widespread discrimination. The stories of human rights violations that surfaced in the proceedings of modern transitional justice mechanisms tended to center on physical violence, enforced disappearances, torture or genocide. However, a nascent field of transitional justice studies has raised concern over the narrow view taken on the spectrum of human rights abuses during past regimes, while overlooking the economic and social conditions that are equally crucial in rebuilding a just society.

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<sup>54</sup> Teitel, *supra* note 16 at 90.

<sup>55</sup> Lis J. Laplante and Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia’s Ley De Justicia Y Paz*, 28 MICH. J. INT’L L. 49, 50 (2006), citing Ruti G. Teitel, TRANSITIONAL JUSTICE (2000), at 11-26.

<sup>56</sup> Gentilucci, *supra* note 5 at 87.

<sup>57</sup> *Id.* at 79.

Ruben Carranza of the International Center for Transitional Justice describes the need for including corruption and economic crimes in transitional justice initiatives, which have long been sidelined in favor of confronting the more violent and physical types of abuses.<sup>58</sup> He begins by identifying the invariable intersection of human rights violations and economic crimes during times of authoritarian rule or armed conflict, especially for developing countries. Violations of civil and political rights are intrinsically linked to violations of economic, social, and cultural rights, whether they are causes or consequences of the latter.<sup>59</sup> Human rights abuse is mutually reinforced by corruption,<sup>60</sup> where the economic resources plundered by abusive public officers serve to finance government or military operations, which are the prime perpetrators of violence and abuse. Verily, the funds amassed from corrupt practices have helped sustain the system of abuse.

Common are regimes “that marry programs of abuse with embezzlement of public funds, indulge in profligate spending on military and personality cults in order to preserve personal power, commit massive outlays to perpetrate atrocities, or unlawfully convert public and private property to advance programs of abuse and to line their pockets and those of their cronies.”<sup>61</sup> In fact, in cases of a regime change, the funds accumulated by abusive dictators are used either to facilitate escape to a foreign country or to acquire the best legal defense team against future prosecution. Meanwhile, successor governments are left with onerous debts and depleted coffers, stolen by the previous regime. Coupled with the responsibility of rebuilding the nation, transitioning countries, especially the developing ones, suffer the burden of confronting past abuses with limited resources.

### *B. De-Compartmentalization of Transitional Justice*

In pushing for the inclusion of economic crimes in the agenda of transitioning societies, Carranza argues that “[t]here is no fundamental obstacle to applying the key elements of transitional justice to large-scale corruption.”<sup>62</sup> Indeed, most of the transitional justice initiatives have treated corruption, at best, sparingly, as a tangential issue of human rights abuse, and at worst, as completely outside the scope of its inquiry. This could be indicative of a possible compartmentalization of transitional justice, where human rights violations and corruption or economic crimes are treated separately:

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<sup>58</sup> Ruben Carranza, *Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes*, 2 INT'L J. OF TRANSITIONAL JUSTICE 310 (2008).

<sup>59</sup> Arbour, *supra* note 7 at 1, 8.

<sup>60</sup> “The relationship between a state’s human rights record and the extent of corruption in its government can be as simple as one of mutual reinforcement.” (Carranza, *supra* note 58 at 311.)

<sup>61</sup> David C. Gray, *supra* note 15, 141-142.

<sup>62</sup> Carranza, *supra* note 58 at 314-315.

... In practice however, the predominant approach in the transitional justice field tends to view human rights as narrower than the range of human rights violations that actually occur. The field compartmentalizes the unresolved legacies faced by transitioning societies, particularly in developing countries. It constructs one compartment for human rights violations and another for economic crimes and corruption. Economic crimes thus are treated as if they do not constitute rights violations in themselves. Not only does this compartmentalization oversimplify the relationship between those unredressed legacies but it also does not reflect the reality of the societies that seek to address them.<sup>63</sup>

Such compartmentalization appears to stem from the “dichotomy in human rights discourse,” where civil and political rights are treated differently than socio-economic rights. Since transitional justice is heavily inspired by conventional justice and criminal law, the neglect of economic, social, and cultural rights is merely symptomatic of a deep ambivalence within justice systems about social justice.<sup>64</sup> Although narrowing the scope of investigation to gross violations of human rights serves the practical purpose of focusing attention and maximizing limited resources, compartmentalization of transitional justice may only lead to frustration in establishing the indivisibility of human rights,<sup>65</sup> especially in cases where the link between systemic abuse and corruption is severely glaring. Avoiding the past regimes’ illegal pillaging of public funds used to support their operations can imperil the smooth transition by successor regimes. This could also seriously undermine the legitimacy and power of the latter because of the ineffective and compartmentalized investigation of the past.

Verily, if one of the goals of transitional justice is to rebuild a functioning society and re-establishment of the rule of law<sup>66</sup> from the devastation of past abuses, then economic crimes and corruption must likewise be considered, if full and complete justice is to be rendered. More often than not, conflicts and regime change are fueled by social injustices prevalent in the country – racial discrimination, marginalization, widespread poverty, or social inequality. Transitional justice tools will help clarify the context, causes and effects of systems of injustice and point to the symbiotic nexus between violations of civil and political rights and socio-economic rights.

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<sup>63</sup> Carranza, *supra* note 58 at 314-315.

<sup>64</sup> Arbour, *supra* note 7 at 5.

<sup>65</sup> “It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.” (International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, available at <http://www.unhcr.org/refworld/docid/48abd5730.html> [last visited May 1, 2011])

<sup>66</sup> “The most frequent justification for post-crisis justice interventions is that they will lead to the re-establishment of the ‘rule of law.’” (Otis and Reiter, *supra* note 17 at 704.)

Needless to say, the inclusion of economic crimes and corruption in transitional justice mechanisms leads to a fuller account of the legacy of abuse<sup>67</sup> and provides the financial means to support transitional societies.<sup>68</sup> First, by refusing to gloss over the incidents of large-scale corruption, a more holistic picture of the support structures that permitted the culture of human rights abuse is drawn for the public's benefit and education. Within the context of the retributive model, conventional justice is oftentimes content with extracting criminal liability for acts and concludes its process by meting out the prescribed penalties under the law for the crime committed. In contrast, transitional justice delves into the root causes of the massive injustice, examining their psychological, social, economic, racial, or even religious aspects. Not only does it look back into past abuses, the forward-looking nature of transitional justice aims to provide a blueprint for preventing or eliminating the circumstances that incentivized the conflict in the first place.

One of the major assumptions behind transitional justice movements is that whatever else has to be done about atrocities, the truth about their occurrence must become part of public awareness and public culture far into the future.<sup>69</sup> Unless the conditions that incubated or facilitated the violence and injustice in the previous regime are given the proper attention and fully documented for future reference, the cycle of abuse and discontent will continue to prevail. Tracing the links between abuse and corruption in repressive regimes gives a more comprehensive understanding for successor regimes in their struggle to rebuild their communities.

Second, the investigation of economic crimes may serve to provide the means of financing the painful transition of the society. The recovery of ill-gotten wealth of the past regime is a source of funding that can be tapped by the successor regime, not just in paying reparations for the victims of abuse, but likewise for stimulating economic recovery. Financing reparations through the confiscation of the proceeds of corrupt practices feeds the victim's need for recognition of the abuse committed against them and offers an available source for monetary compensation, without dipping in the successor governments' limited resources. Moreover, the freezing of accounts and asset recovery deprives corrupt and brutal dictators from using this illegally obtained wealth to finance their defense against prosecution or extradition.

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<sup>67</sup> Catranza, *supra* note 58 at 319-321.

<sup>68</sup> *Id.* at 324-326.

<sup>69</sup> Donald W. Shriver, Jr., *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1 (2001).

In transitioning societies where there is a veritable link between abuse and corruption, confronting the economic forces that contributed to the conflict must perforce be considered for the transitional justice mechanism to be effective. Although rooted in ordinary criminal justice, transitional justice can move beyond traditional mechanisms of individual accountability for civil and political rights violations and give proper consideration to economic, social, and cultural rights and their contribution to establishing the rule of law in transitioning democracies.

### **PART III. TRANSITIONAL JUSTICE MECHANISMS IN THE PHILIPPINES: INVESTIGATING CORRUPTION IN POST-MARCOS REGIME**

The Philippines' experience of transitional justice is exemplified by the bloodless People Power Revolution, which overthrew the military rule of then President Ferdinand Marcos, and saw the return of democracy in the archipelago. In the 1970s, the ballooning foreign debts that funded the massive infrastructure projects and the rise of communist insurgency in the provinces contributed to the unrest and dissatisfaction with the Marcos administration. President Marcos, who had won an unprecedented second term in 1969, was already constitutionally prohibited from being elected in the following elections,<sup>70</sup> and faced the waning days of his authority. However, when purported elements of the communist movement attempted to assassinate the secretary of defense, President Marcos saw it as an opportunity to extend his hold on power and to keep himself in office.<sup>71</sup> Citing the pervasiveness of lawless elements of the communist insurgency, the entire country was thus placed under martial law with Marcos having full executive and legislative control and supreme authority over the military.<sup>72</sup> The declaration of martial law was aptly encapsulated as having destroyed "in one fell swoop the Philippines' 75 years of stable democratic traditions and established reputation as the showcase of democracy in Asia."<sup>73</sup>

In the years following the declaration of martial law, various human rights abuses were committed, including enforced disappearances, torture and summary executions. The leaders of the opposition and suspected communist insurgents

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<sup>70</sup> "No person shall serve as President for more than eight consecutive years." (CONST. [1935], art. VII, § 5)

<sup>71</sup> "Marcos was elected President of the Philippines in 1965 and was re-elected in 1969. The Philippine Constitution of 1935, still in effect in 1972, was similar to the United States Constitution, in that it limited election of the President to two four-year terms. Thus, MARCOS would have had to leave the office of the Presidency by the end of 1973, but he did not. **On September 21, 1972 MARCOS imposed martial law on all of the Philippines through Proclamation 1081, which suspended the Constitution, in order to keep himself in office.**" (*In Re: Estate of Marcos Human Rights Litigation*, 910 F.Supp.1460, 1462 [1995]; emphasis supplied)

<sup>72</sup> Proc. No. 1081 (1972).

<sup>73</sup> *Dizon v. Eduardo*, G. R. No. 59118, 158 SCRA 470, Mar. 3, 1988.

were rounded up and detained in camps, where they were physically and mentally tortured.<sup>74</sup> President Marcos, his family, relatives and cronies were accused of taking over several businesses, awarding government contracts to favored corporations, and amassing millions of pesos of embezzled and misappropriated public funds for their own personal benefit.

On 25 February 1987, Marcos' authoritarian regime came to an end with the People Power revolution, which ousted the dictator and installed as President, Corazon Aquino. After more than 14 years of living under the shadow of an oppressive regime, the country came to breathe again with the promise of democratic rule. Unlike most of the violent transitions of countries under the Phase II genealogy of transitional justice, the transfer of power was peacefully done without much bloodshed. Nevertheless, the brutality and viciousness of the abuses during the Marcos regime, which culminated with the assassination of President Aquino's husband (Sen. Benigno "Ninoy" Aquino, Jr.) was not something that could easily be forgotten, much less forgiven. However, similar to transitioning societies, the vindication of injustice had to be balanced with the task of re-building the stalled economy that had been ravaged by cronyism and saddled with onerous foreign loan obligations.

*A. Creation of the Philippine Commission  
on Good Government (PCGG)*

One of the first official acts of President Aquino was the creation of the Philippine Commission on Good Government (PCGG), a transitional justice mechanism, with the task of assisting her on specific matters concerning the previous Marcos regime, namely:<sup>75</sup>

- a. The recovery of all ill-gotten wealth accumulated by former President Marcos, his immediate family, relatives, subordinates and close associates, whether located in the Philippines or abroad, including the takeover or sequestration of all business enterprises and entities owned or controlled by them, during his administration, directly or through nominees, by taking undue advantage of their public office and/or using their powers, authority, influence, connections or relationship;
- b. The investigation of such cases of graft and corruption as the President may assign; and
- c. The adoption of safeguards to ensure that the above practices shall not be repeated in any manner under the new government, and the institution of adequate measures to prevent the occurrence of corruption.

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<sup>74</sup> *In Re: Estate of Marcos Human Rights Litigation*, 910 F.Supp.1460, 1463 (1995).

<sup>75</sup> Exec. Order No. 1, § 2 (1986).

On the strength alone of its legal mandate, the PCGG had the necessary elements as an effective transitional justice mechanism to investigate corruption in the Marcos regime. First, PCGG's singular task was the recovery of ill-gotten wealth amassed by then President Marcos and his cronies. The subject matter of investigation was thus specifically limited and focused to the issue of corruption, without suffering from the criticism of being a distraction on the equally important inquiry into civil and political human rights abuses, which was delegated to a separate investigative body.<sup>76</sup> Not only were the economic crimes and corruption of the Marcos dictatorship included within the scope of a transitional justice mechanism (as Carranza had advocated), the PCGG gave the concern exclusive and special treatment. The creation of the PCGG can be considered as a significant development in promoting the indivisibility of human rights, insofar as it recognized the twin injustices committed – the first, against the corporal bodies of individual victims in violation of civil and political rights; and the second, against the national economy by the plunder of public funds by Marcos and his cronies in violation of economic and social rights.

Second, its inquiry into corruption in the martial law regime included the study of possible safeguards or mechanisms to prevent the same corruption in the new government. The PCGG's mandate was not limited to recovery but also reviewing the root causes and circumstances that facilitated the corruption and cronyism in the Marcos regime. Thus, the PCGG had a forward-looking function in reviewing the context of corruption and proposing mechanism to protect the new democratic institutions from being vulnerable to the same corrupting influence.

Third, proceeds from recovery of the Marcos ill-gotten wealth and sale of confiscated assets were earmarked to fund the agrarian reform program, which sought to give land to the landless. The rise of the communist insurgency – one of the cited reasons for the declaration of martial law – was fueled by the widespread inequity in the provinces where the poor majority of farmers and tenants were beholden and reliant on the landed gentry for their daily needs. Thus, President Aquino enacted the comprehensive agrarian reform program to expropriate agricultural lands and distribute them to the farmers, and used the ill-gotten wealth recovered and sold by the PCGG as one of the sources of the program's

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<sup>76</sup> After the PCGG, President Aquino later on created the Presidential Committee on Human Rights with the primary function of investigating complaints or cases of unexplained or forced disappearances, extra-judicial killings (salvaging), massacres, torture, hamletting, food blockades and other violations of human rights, past or present, committed by officers or agents of the national government or persons acting in their place or stead or under their orders, express or implied. (Exec. Order No. 8, § 4[a] [1986]) With the creation of the independent Commission on Human Rights (CONSTITUTION, Article XIII, Sec. 17), the Presidential Committee on Human Rights was later on abolished. (Exec. Order No. 163, § 4 [1987])



funding.<sup>77</sup> Designating the proceeds of the recovered assets to economic progress of the country was aimed at stimulating growth and thus, easing the process of democratic transition.

Other factors contributed to the high expectations placed on the PCGG. The designation of respected leaders of known probity and critical of martial law to head the commission enhanced its legitimacy. Verily, public perception of the commissioners' resolve was crucial in garnering both moral support and critical information to trace and recover the stolen public funds. Moreover, the PCGG and its members were also privileged with immunity from suit in the discharge of their functions,<sup>78</sup> which the Philippine Supreme Court affirmed in no uncertain terms:

Having been charged with the herculean task of bailing the country out of the financial bankruptcy and morass of the previous regime and returning to the people what is rightfully theirs, the Commission [PCGG] could ill-afford to be impeded or restrained in the performance of its functions by writs or injunctions emanating from tribunals co-equal to it and inferior to this Court. Public policy dictates that the Commission be not embroiled in and swamped by legal suits before inferior courts all over the land, since the loss of time and energy required to defend against such suits would defeat the very purpose of its creation.<sup>79</sup>

*B. Assessing the Performance of the PCGG*

Almost 25 years from its creation, the PCGG's task is far from over. The high expectations heaped on the PCGG have not resulted in fulfilling its role of providing "reconciliation and healing" from the dark chapter of corruption in the Marcos regime.

To begin with, the PCGG has not determined to a definitive amount the scope of plunder and pillage committed during the Marcos regime. Basic in the efforts to recover the Marcos assets is first determining the exact figure of the ill-gotten wealth. At the time Marcos fled the country, it was only estimated that his total wealth figured somewhere between USD\$5-15 Billion. Without a definite figure or framework for tracing the wealth, the country will continue to grapple in

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<sup>77</sup> The receipts from assets recovered and from sales of ill-gotten wealth recovered through the PCGG was designated as one of the additional sources of funding for the Agrarian Reform Fund of the Comprehensive Agrarian Reform Program. (Rep. Act No. 6657, § 63 [1988].) However, the amounts appropriated as compensation to victims of human rights violations under the applicable law were deducted. (Rep. Act No. 9700, § 21 [2009].)

<sup>78</sup> "No civil action shall lie against the Commission or any member thereof for anything done or omitted in the discharge of the task contemplated by this order." (Exec. Order No. 1, § 4[a])

<sup>79</sup> *Presidential Commission on Good Government v. Emmanuel Peña*, G. R. No. 7763, Apr. 12, 1988.

the dark trying to unearth where these funds and assets have been hidden. That Marcos and his cronies had funneled and laundered the money abroad only makes recovery all the more complicated and challenging, as they have to contend with foreign banking and criminal laws.

The chances of identifying the other Marcos assets around the world grew exponentially dim with the passage of time. Documentary records become brittle and unreadable with age, or worse, are mysteriously misplaced or lost. The demise of President Marcos on 28 September 1989, more than two years after the peaceful transition of power, buried as well the opportunity to confront him about his assets. Verily, locating witnesses and securing their testimony has become a daunting task due to the distrust of the delayed system of prosecution accumulated over the years. With each day that goes by that assets are not identified and recovered, the country inches closer to having claims prescribed under various statutes of limitations. Although the United Nations Convention Against Corruption (UNCAC) advocates longer prescriptive periods for recovery claims of assets arising from corruption<sup>80</sup> and the constitutional bar against the prescription of the state's claim against unlawfully acquired property,<sup>81</sup> the country can ill-afford to continuously prolong its search for the stolen and missing public funds and waste away the opportunity for a quick and speedy asset recovery. What is worse is that these same ill-gotten assets have been utilized in funding the legal defense of suspected corrupt officials in cases filed by the PCGG in the Sandiganbayan, which is the criminal court specifically tasked to hear civil cases of asset recovery. Meanwhile, the PCGG is made to operate on a budget of PhP89,841,000 under the present national appropriations, which is barely 1% of the funds allocated for the entire Department of Justice.<sup>82</sup>

Exacerbating the PCGG's mediocre performance in asset recovery is the PCGG's apparent indifference to its equally important forward-looking function as a transitional justice mechanism – the institution of corruption prevention measures. The PCGG's past efforts have emphasized on identifying and recovering ill-gotten wealth, without due regard to reviewing the conditions and circumstances that allowed such plunder in the first place. In fact, the PCGG's subdued execution of its forward-looking function was eclipsed by the creation of

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<sup>80</sup> "Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice." (UNCAC, art. 29)

<sup>81</sup> The right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches, or estoppel. (CONST. art. XI, § 15)

<sup>82</sup> Under the 2011 General Appropriations Act, PhP7,152,031,000 of the budget was allocated to the Department of Justice. (*available at* <http://www.dbm.gov.ph> last accessed on May 1, 2011)

the Presidential Commission against Graft and Corruption,<sup>83</sup> and the supervening Presidential Anti-Graft Commission,<sup>84</sup> which had almost similar functions of identifying corruption safeguards.<sup>85</sup> That these presidential commissions were primarily tasked to investigate and hear administrative complaints of other instances of graft and corruption in government is likewise a tacit rebuke against PCGG's neglect of its second and third mandate.

Given the PCGG's record of recovery, it is estimated that it may take the commission seventy-five years before the government can completely recover the stolen public funds, assuming that the value of the ill-gotten wealth is pegged at a conservative USD\$10 Billion. The figures are not meant to belittle the PCGG's efforts but only to emphasize the pressing need for more decisive action. The lack of a definite time line under the enabling law may have lulled the PCGG into complacency as the years progressed and with cases continuing to languish in courts. In fact, there have been legislative proposals to abolish the PCGG and transfer its function of litigating the cases of recovery, asset management, and instituting safeguards against corruption to other government agencies.<sup>86</sup> Even the present PCGG has recognized that its success lies in the orderly winding down of its business in terms of recovery of the ill-gotten wealth, as there can be no greater prize than for the PCGG's work to be rendered *functus officio*.<sup>87</sup>

What is disheartening is that allegations of excesses and misuse of funds in the PCGG itself have recently surfaced. In a recent Preliminary Report submitted to the Philippine Truth Commission (PTC),<sup>88</sup> the PCGG pointed to

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<sup>83</sup> On 11 January 1994, then President Fidel V. Ramos created the Presidential Commission Against Graft and Corruption to coordinate efforts toward the eradication of opportunities favorable to the commission of graft and corruption. (Exec. Order No. 151, § 4)

<sup>84</sup> On 16 April 2001, the Presidential Anti-Graft Commission was created by then President Gloria Macapagal-Arroyo, which replaced the Presidential Commission Against Graft and Corruption, with the power to conduct studies, on its own or in cooperation with other government agencies or non-governmental organizations, on new measures to prevent and minimize the opportunities for graft and corruption at all levels of the bureaucracy. (Exec. Order No. 12, § 10)

<sup>85</sup> On 15 November 2010, the Presidential Anti-Graft Commission was abolished and its investigative, adjudicatory and recommendatory functions were transferred to the Office of the Deputy Executive Secretary for Legal Affairs. (Exec. Order No. 13, § 2)

<sup>86</sup> During the Fourteenth Congress, then Sen. Aquilino Q. Pimentel, Jr., filed Senate Bill No. 292 to abolish the PCGG and transfer the functions of investigating and prosecuting pending civil and criminal cases to the Office of the Special Prosecutor of the Office of the Ombudsman and the management and disposition of recovered or sequestered assets and properties to the Department of Finance through its Privatization Office. However, the Bill never reached second reading, and no similar bill has been filed in the present Fifteenth Congress. (available at <http://www.senate.gov.ph> last accessed on May 1, 2011)

<sup>87</sup> PCGG, *An Introduction to the Conclusion: 100 Day Report and Plan of Action (01 October 2010 – 08 January 2011)*, available at <http://www.pcgg.gov.ph> (last visited May 1, 2011).

<sup>88</sup> On 30 July 2010, newly elected President, Benigno "Nonoy" Aquino III, son of the late President Corazon Aquino, created the Philippine Truth Commission (PTC) which was tasked to primarily seek and find the truth on, and, investigate reports of graft and corruption, committed by public officers and employees, their co-principals, accomplices and accessories from the private sector, if any, during the

cash advances by previous commissioners using public funds that have not been accounted for<sup>89</sup> as well as excessive and irregularly disbursed travelling expenses.<sup>90</sup> The irony of having an anti-corruption body being accused of the very evil it seeks to prevent is not lost to the public. It is not hard to fathom the effects of these accusations to the commission's drive towards transparency and good governance. The opportunity for corruption of recovered assets could have been minimized had the PCGG's term been limited to a few years after the transition.

This is not to say that the PCGG is without its successes. The PCGG initiated twenty batches of civil cases for forfeiture, reconveyance, reversion and accounting against Marcos and his close associates, which are still pending with the Sandiganbayan. The government's claims in these cases, which include shares of stocks and real properties, amount to a total amount of PhP174,746,588.<sup>91</sup> In 2003, the Philippine Supreme Court in a landmark decision forfeited Swiss deposits that were transferred to and are deposited in escrow at the Philippine National Bank in the estimated aggregate amount of US\$658,175,373.60 in favor of the Republic of the Philippines.<sup>92</sup> In its accomplishment report ending December 2009, the Department of Justice, which has administrative supervision over the PCGG,<sup>93</sup> reported that from 1987 to 2009 a total of PhP85,559,839,049.04 have been remitted to the agrarian reform program by the PCGG.<sup>94</sup> As of 17 January 2011, PCGG had likewise recovered through several compromise agreements PhP18,692,980,816 worth of real properties, shares of

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previous administration. (Executive Order No. 1) However, the Philippine Supreme Court declared the PTC unconstitutional for having singled out the administration of the former President Gloria Macapagal-Arroyo in violation of the equal protection, but without first recognizing the President's prerogative to create the PTC under his duty to faithfully execute the laws. (*Biraogo v. Philippine Truth Commission*, G. R. No. 192935 & 193036, Dec. 7, 2010) The government, through the Office of the Solicitor General, has moved for the reconsideration of the decision of the Supreme Court.

<sup>89</sup> The PCGG reported that former PCGG Chairman Camilo Sabio has unliquidated cash advances amounting to PhP2,158,692.99, which it claims to have been funded by government appropriations and donations by the Philippine Development Alternatives Foundation to PCGG, representing the accrued interest on the principal amount donated to the Republic. (PCGG Preliminary Report for the Truth Commission [Annex "E" of PCGG's "An Introduction to the Conclusion: 100 Day Report and Plan of Action (01 October 2010 – 08 January 2011)"] (*available at* <http://www.pcgg.gov.ph> last accessed on May 1, 2011))

<sup>90</sup> Between 31 January 2004 to 30 September 2010, USD\$3,964,102.97 was disbursed by the PCGG for travel expenses. (PCGG Preliminary Report for the Truth Commission [Annex "E" of PCGG's "An Introduction to the Conclusion: 100 Day Report and Plan of Action (01 October 2010 – 08 January 2011)"] (*available at* <http://www.pcgg.gov.ph> last accessed on May 1, 2011))

<sup>91</sup> PCGG Legal Department Case Docket Report. (Annex "D" of PCGG's "An Introduction to the Conclusion: 100 Day Report and Plan of Action (Oct. 1, 2010 – Jan. 8, 2011)"] (*available at* <http://www.pcgg.gov.ph> last visited on May 1, 2011))

<sup>92</sup> *Republic v. Sandiganbayan*, G. R. No. 152154, Jul. 15, 2003.

<sup>93</sup> Exec. Order No. 643 (2007).

<sup>94</sup> Department of Justice Accomplishment Report 2009. (*available at* <http://www.doj.gov.ph> last accessed on May 1, 2011)

stocks, equipment and jewelry.<sup>95</sup> Although commendable, there is much room for improving on its performance.

The verdict on whether the PCGG had satisfactorily delivered on its mandate remains uncertain. With each passing year, the PCGG faces new challenges without complete resolution of its previous problems. A review of its objectives and goals is plainly clear and necessary, considering the lapse of time from the country's re-birth in the democratic revolution of 1987. Like any transitional justice mechanism that offers provisional relief, the PCGG must begin to conclude its business of recovering the public resources stolen in the Marcos regime, and contribute to the efforts to move the country forward by closing that part of our history.

*C. The Transitional Justice Experiment:  
Lessons Learned from the PCGG*

The Philippines' experiment on transitional justice mechanisms has yielded invaluable lessons for other countries, especially in the rising new democracies in the Arab world, to consider in investigating economic crimes and corruption in previous regimes. First, the transitional justice mechanisms for corruption and asset recovery are provisional in character and its function must be time-bound. Bodies tasked to investigate and recover stolen public assets are mere interim solutions in transitioning democratic societies where the regular agencies tasked to perform them have not yet been organized. In cases of radical change of regime, the promptness of the response is crucial in confiscating public assets and preventing deposed dictators or other public officers from carting away to foreign countries.<sup>96</sup> The possibility of complete recovery of assets increases with the speed that ill-gotten wealth is identified and sequestered. Imposing a deadline on its work will compel the body to use its resources efficiently and give a measure of its success. Transitional justice mechanisms for economic crimes simply bridge the yawning gap under regime changes through the initiation of preliminary protective steps, and should not be considered as something that possesses a boundless mandate. The urgency of a deadline will push the transitional body to be more proactive and creative in their approaches to recover assets, and minimize the possibility of complacency.

Second, close coordination and cooperation between other agencies must be guaranteed to speed up the process of recovery. Similar to other transitional justice approaches, asset recovery requires a multi-disciplinary solution that

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<sup>95</sup> PCGG, *supra* note 87.

<sup>96</sup> Ousted President Marcos and his family fled to Hawaii and brought with them boxes of freshly minted pesos and crates of jewelry, artworks, gold and real estate deeds.

involves elements of police investigation, forensic accounting, aggressive diplomacy and litigation. With globalization, asset recovery requires more cooperation with foreign countries and banking institutions, especially in cases where funds and assets have been purposely kept abroad to elude detection and confiscation. Mutual legal assistance treaties are tools in coordinating efforts to break open accounts and sequester funds intended to be beyond the reach of the successor governments. In fact, the UNCAC provides the guidelines for taking evidence and tracing proceeds of corrupt acts.<sup>97</sup>

Third, members of the transitional justice mechanisms must be of known probity and integrity. Surveys conducted in countries setting up transitional justice mechanisms, demonstrate that “the legitimacy of a tribunal may be intimately connected with public perceptions of its work.”<sup>98</sup> Legitimacy is a prime concern for transitioning societies, considering the need for normalization. The public will be more accepting of the findings and work of a transitional justice mechanism that responds to their needs and is perceived to be committed to the serious backward-looking and forward-looking aspects of their work. If an institution is viewed as legitimate, actors will defer to its decisions even when they disagree with the substance of these decisions, and regardless of the threat of sanctions.<sup>99</sup> Legitimacy can be achieved by ensuring early and comprehensive public participation in the creation of a transitional justice system, with an eye towards including all perspectives of the past. Only through meaningful public participation and ownership of the various transitional justice mechanisms available will the goal of reconciliation be truly felt.<sup>100</sup>

#### *D. The Philippine Truth Commission of 2010: PCGG Redux?*

Almost a quarter of a century after President Corazon Aquino created the PCGG, her only son, Benigno “Noynoy” Aquino III, won in the first automated presidential election in the Philippines on a platform of good governance and anti-corruption. Following in the footsteps of his mother, one of the very first acts of the younger President Aquino was to create the Philippine Truth Commission (PTC), which was tasked to investigate allegations of graft and corruption in the previous administration.<sup>101</sup> In order to deliver on its promise of good governance

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<sup>97</sup> UNCAC, art. 46.

<sup>98</sup> Triponel and Pearson, *supra* note 6 at 108, *citing* Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts 18 (2008), <http://www.unrol.org/files/HybridCourts.pdf> [hereinafter Hybrid Courts]

<sup>99</sup> Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Approach*, 32 MICH. J. INT'L L. 1 (2010).

<sup>100</sup> Triponel and Pearson, *supra* note 6 at 144.

<sup>101</sup> “There is hereby created the Philippine Truth Commission, ... which shall primarily seek and find the truth on, and toward this end, investigate reports of graft and corruption of such scale and magnitude that shock and offend the moral and ethical sensibilities of the people, committed by public officers and

and achieve legitimacy in the eyes of the public, the new administration felt the need to initiate meaningful steps towards extracting a degree of accountability for the allegations of massive corruption and economic abuses that hounded the previous administration. Both mother and son succeeded from a previous regime awash with allegations of large-scale corruption and misuse of public funds reaching even the highest levels of the executive branch. Yet, the difference in their approaches gives a peek into the evolution of transitional justice mechanisms in the Philippines, specifically for investigating economic crimes and corruption.

The creation of the PTC under the incumbent President's executive power and duty to enforce the laws is an indication of the development of Phase III transitional justice in the Philippines, where the approaches have moved from the periphery to the center of legal options available in investigating and prosecuting the intemperance of the previous regime. Similar to the PCGG, the PTC, as a transitional justice mechanism has both backward-looking and forward-looking aspects. Its primary goal of probing the previous regime was purposely restricted to accusations of large-scale corruption in the past, and excluded gross human rights violations such as extra-judicial killings.<sup>102</sup> Apart from its investigative responsibilities, the PTC's other function was "to recommend the appropriate action or measure to be taken to ensure that the full measure of justice," and submit its findings and recommendations to the President, Congress and the Ombudsman. Thus, the PTC's mandate perforce included a review of the causes of large-scale corruption and designing recommendations for executive and legislative measures to prevent them in the future. Although institutions with broad mandates in fighting corruption continued to exist and function, the President chose to exercise executive prerogative and resorted to the most celebrated mode of transitional justice – the truth commission.

What makes the circumstances of the creation of the PTC markedly distinct from the post-EDSA revolution PCGG is that the younger Aquino came into power not through a conflict-ridden or revolutionary process, but through the regular electoral exercise prescribed under the Constitution. Unlike his mother who ascended to the Presidency on the heels of Marcos' ouster, presidential power

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employees, their co-principals, accomplices and accessories from the private sector, if any, during the previous administration; and thereafter recommend the appropriate action or measure to be taken thereon to ensure that the full measure of justice shall be served without fear or favor." (Exec. Order No. 1, § 1 [2010])

<sup>102</sup> During the administration of President Arroyo, there was a spate of media, militant and activist killings, which compelled her to create independent commission to investigate the same and thereafter recommend policies to eradicate the root causes of the extrajudicial killings and break the cycle of violence. (Administrative Order No. 157 dated 21 August 2006 and Administrative Order No. 173 dated 23 March 2007) Shortly before the start of the campaign for the 2010 Presidential Elections, the worst election-related violence occurred in Maguindanao, where the members of the media and supporters of Esmel Mangudadatu, including his wife, were massacred on their way to file Mangudadatu's certificate of candidacy for governor against Andal Ampatuan, Jr., son of then incumbent governor Andal Ampatuan, Sr.

was peacefully turned over by former President Gloria Macapagal-Arroyo to her successor after the latter's overwhelming victory in the polls. There may have been a change of political leaders, but the democratic system of government persisted with agencies responsible for anti-corruption measures such as the Ombudsman, the courts and even the PCGG continuing to perform their mandates. With these institutions intact, was the availment of a transitional justice mechanism superfluous and a mere redundancy? The answer lies in a deeper appreciation of the context in which transitional justice approaches become most effective in shifting regimes.

The aim of transitional justice is to correct the unfairness or abuse committed in a previous regime, where the conditions disallowed the complete or effective redress of the injury sustained. In Phase I, the viciousness of war and armed conflict produced massive injustice against unarmed civilians that could not be immediately addressed, as courts were not functioning at all. In Phase II, victims could not turn to the authoritarian regime for relief, since the state had either been the perpetrator of the injustice itself or had implicitly sanctioned the abuse. In both stages, those who suffered abuse were prevented, either by violence, force, intimidation, or official indifference from demanding satisfaction for their injuries. Similar to the two earlier phases, Phase III describes a situation where although some degree of justice can be achieved, the system remains inadequate in providing full and complete redress. This is exemplified by the exercise of jurisdiction by the International Criminal Court, in cases where there has been a failure of the state party to the Rome Statute to investigate or prosecute serious crimes against the international community.<sup>103</sup> Thus, Phase III transitional justice approaches builds on the first two phases insofar as it concerns itself not just with the availability of options for justice, but effective redress for the injustice committed. Otherwise stated, even if ordinary courts and agencies are open to offer succor to most abuses, transitional justice mechanisms may still be resorted to in cases where complete and effective justice cannot be rendered.

In the case of the allegations of corruption against the previous administration, the regular judicial and legal remedies were rendered ineffective which justified resort to the extraordinary transitional justice mechanism of a truth commission. The PTC's focus on massive corruption during the administration of the former President was intricately linked to the frustration of efforts to investigate and prosecute these allegations. During her nine-year term (the longest serving post-EDSA President after Marcos), President Arroyo was rocked with accusations of corruption arising from the fertilizer fund scam<sup>104</sup> and the failed

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<sup>103</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, arts. 19 & 20.

<sup>104</sup> The fertilizer fund scam involved the diversion of public funds amounting to approximately PhP728 million, which were supposed to be used for the purchase of fertilizers for farmers. (Senate Blue Ribbon



broadband deal with Chinese company NBN-ZTE.<sup>105</sup> Despite the flurry of documents and testimony, a full investigation and effective prosecution of these cases never came into fruition before the next presidential election in May 2010. Although the opposition resorted to the constitutionally sanctioned remedy of impeachment, their attempts were largely thwarted by the dominance of administration allies in Congress, which dismissed the complaints for lacking either in form or in substance.

Verily, proper redress of corruption could not be achieved during the incumbency of President Arroyo not because of the absence of legal remedies; but because the institutions responsible for hearing such redress had been weakened or captured – unwilling to investigate or prosecute the allegations of massive corruption. Owing to the ineffective attempts to enforce accountability in the past regime, the present administration's present resort to a truth commission becomes justified. Having democratically and successfully wrestled control from the previous administration, the successor regime of President Aquino enjoyed the freedom to investigate the allegations of corruption, which was one of the centerpiece platforms of his campaign. The PTC as a transitional justice mechanism is intricately involved in ferreting out the truth about the previous regime's involvement in corruption.<sup>106</sup> Verily, the application of transitional justice mechanisms have moved beyond traditional post-conflict societies transitioning into democracies; they have extended their use as mainstream tools for investigating corruption in non-conflict transitions of democratic power, where there has been ineffective or state capture of institutions responsible for investigating graft and corruption.

Building from the experience of the PCGG, the structure of the PTC had been improved to maximize its effectiveness. At the outset, the PTC was given a period of two years to conduct its investigative work and submit a final report with its findings and recommendations. Moreover, other government agencies were instructed to give their full cooperation to the PTC's investigation. There was likewise institutional respect for the expertise of coordinate agencies since the PTC was not overburdened with too much responsibility, such as prosecuting criminal cases or managing sequestered assets. The PTC's mandate was concededly limited to fact-finding and investigation – an initial step to criminal prosecution and

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Committee Report No. 254 dated 26 February 2009; available at [http://www.senate.gov.ph/lis/committee\\_rpt.aspx?congress=14&q=254](http://www.senate.gov.ph/lis/committee_rpt.aspx?congress=14&q=254) last visited May 3, 2011)

<sup>105</sup> The broadband controversy deals with the anomalous contract US\$329-million National Broadband Network contract with Chinese telecommunications firm, ZTE Corp., which was brokered by government officials who allegedly received bribes to facilitate the deal. (Senate Committee on Accountability of Public Officers and Investigations Report No. 743 dated Nov. 11, 2009; available at [http://www.senate.gov.ph/lis/committee\\_rpt.aspx?congress=14&q=743](http://www.senate.gov.ph/lis/committee_rpt.aspx?congress=14&q=743) last visited May 3, 2011)

<sup>106</sup> Carranza, *supra* note 58 at 319.

legislation of anti-corruption measures. The delineation of the PTC's preliminary investigative responsibilities duly recognized the expertise of the Ombudsman, Congress and the courts. The PTC was not meant to be a superfluity to the existing good governance institutions, but a provisional and complementary measure to commence the investigation of the past administration and to facilitate the process of norm standardization of transparency and accountability in the new regime.

President Aquino's PTC, however has been heavily criticized for being a partisan tool of a victorious political party against the defeated opponent. The Philippine Supreme Court had in fact struck down the PTC as being unconstitutional for having violated the equal protection clause since it limited the scope of inquiry into the previous administration alone.<sup>107</sup> Whether the PTC will be able to resurrect from the stinging defeat and comply with the Supreme Court's guidelines for its creation remains to be seen. Nevertheless, a transitional justice approach to investigating corruption in non-conflict regime changes has become a viable option for successor regimes that must face the past in order to move forward into the future. The creation of truth commissions tasked to investigate economic crimes and large scale corruption has moved from the periphery to the center of national consciousness and had undoubtedly added to the panoply of available solutions in times where mainstream justice systems are lacking or ineffective to answer the immediate concerns in transitioning societies.

### CONCLUSION

The Arab spring may usher in a new phase in the genealogy of transitional justice. Where the need to address the excesses of the past regime in the country is great, the more transitional justice approaches become relevant to the success of its shift to democratic governance. Transitioning societies will face difficult questions and challenges ahead, especially in confronting corruption in the preceding regime. The Philippines' own resort to transitional justice systems offers a good point of comparison for countries hoping to reconstruct norms of good governance especially in societies that have been plagued by massive corruption. Using international law as a standard, values of transparency and accountability are re-introduced into transitioning societies that may have been acclimatized to abuse. By shedding light into practices and systems of abuse, people may find closure and peace in a dark chapter in their history. Willful amnesia stymies the development of civic virtues indispensable to a democracy and perpetuates the culture of

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<sup>107</sup> *Biraogo v. Philippine Truth Commission*, G. R. No. 192935 & 193036, Dec. 7, 2010.

corruption and privilege that facilitated the past violations.<sup>108</sup> Transitional justice mechanisms serve the aims of successor regimes to disavow the corrupt and abusive norms of the predecessors and to build a new legal order.

There is no one-size-fits-all formula in settling for a transitional justice system. The character of the previous abusive regime influences both “the paths open for a transition country” and “the tasks that need to be addressed in order to reach democratic consolidation.”<sup>109</sup> The process of selecting a method of investigating the past must be drawn from the transitioning countries’ own experience, taking into account several factors, including political, economic, cultural, and practical restraints. Although it can draw inspiration from the successes and failures of transitional justice mechanisms in the other countries, each of them must look into its own unique situation, cautious and cognizant of its history and social condition, especially the causes of its transition. Any plan for transitional justice must be based on the specific context that these mechanisms will serve.<sup>110</sup> In choosing among the various transitional justice tools to assist in the process of turnover, successor regimes should be clear that they offer only that – assistance in creating the conditions for future reconciliation – and not a magic bullet that will immediately erase complex and long-standing societal dysfunctions.<sup>111</sup> They are but means to an end of ensuring that the conditions are ripe for democracy to thrive. The succeeding government must tread carefully in using the moral capital and political will that they have earned in the transition, in order to fulfill the people’s liberal aspiration coming into the new regime.

One of the Philippines’ lasting legacies to the world is the bloodless transition to democracy in EDSA, whose seeds have flourished in the Arab spring. The country will do well to reinforce that legacy of peaceful democratic revolution by improving on its performance and reputation in combating corruption and in recovering ill-gotten wealth. The country’s success in investigating and prosecuting massive corruption and economic crimes in the past will help strengthen the rule of law by allowing the ensuing administrations to demonstrate the fundamental qualities that will constitute the kind of democracy that it wishes to espouse.<sup>112</sup>

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<sup>108</sup> Joan Fitz Patrick, *Nothing But the Truth? Transitional Regimes Confront the Past Impunity and Human Rights In International Law and Practice* (Naomi Rhot-Arriaza, Ed), 16 MICH. J. INT’L L. 713 (1995).

<sup>109</sup> Lisa J. Laplante and Kelly Phenicie, *Mediating Post-Conflict Dialogue: The Media’s Role in Transitional Justice Processes*, 93 MARQ. L. REV. 251, 283 (2009).

<sup>110</sup> Tarin, *supra* note 32 at 467, 510.

<sup>111</sup> Ramji-Nogales, *supra* note 107.

<sup>112</sup> Bohl, *supra* note 19 at 583.