

THE INCARNATION OF THE SYMBOLIC: CODIFYING SYMBOLIC REPARATION RIGHTS IN PHILIPPINE LAW*

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ABSTRACT

As a country with more than a century of a colonial past, a distant memory of war injuries, a notorious history of dictatorship, and a continuing story of struggling democratic and republican systems, the Philippines ought to have already grasped the concept of restorative justice as transcending not only in the material sense, but all the more so in political, social, cultural, and moral aspects. With its stories of suffering and resiliency, the Philippines is expected to have already recognized that the concrete goal of symbolic reparation can be achieved only with the recognition of nuanced stakeholder human rights experiences that differ greatly and deeply. Unfortunately, quite the contrary is reflected in its legal system. This Note explores the current application, or the lack thereof, of symbolic reparation in Philippine law. Here, the author assesses the symbolic reparation efforts of the Philippine government in three particular incidents: The burial of Dictator Ferdinand Marcos at the Libingan ng mga Bayani, the removal of the Comfort Woman statue, and the repatriation of the Balangiga Bells, to ascertain the necessity for a codification of symbolic reparation rights for victims and their families'. The Note concludes in the affirmative—that there exists a necessity for the codification of such rights within the gaping hole of symbolic reparation in Philippine law.

“[National healing] can only come through a process that leads to social justice. Justice requires accountability. Justice does not come with just forgetting. Accountability involves the recognition of the place of the perpetrator and the victim.”

—Justice Marvic M.V.F. Leonen¹

* Cite as Jamilah Paola D.C. Laguardia, *The Incarnation of the Symbolic: Codifying Symbolic Reparation Rights in Philippine Law*, 94 PHIL. L.J. 175, [page cited] (2021).

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I. INTRODUCTION

On November 18, 2016, almost five decades since the declaration of Martial Law in the Philippines—which claimed the lives of 892 Filipinos in massacres, 352 in forced disappearances, and 5,040 in arrests and detentions²—the remains of former President Ferdinand Marcos were laid to rest at the Libingan ng mga Bayani (“LNMB”) in Taguig, Metro Manila. After a long-winding battle in the Supreme Court, a 58-page heavily-dissented decision and a 9-5 vote determined that the former dictator was a hero, worthy enough to be interned in the sacred military burial grounds.

On the other side of the globe, another dictator’s remains faced a turnabout. On October 24, 2019, almost nine decades since the Spanish Civil War—which brought an end to thousands of Spaniards both fighting and in hiding—the remains of General Francisco Franco were buried in their family crypt. After a series of conflicting government policies and campaign promises, the Supreme Court of Spain decided that the former Spanish dictator must not be allowed to be buried alongside the 33,000 civilians in the Valley of the Fallen who sacrificed their lives during the Civil War.

Two similar stories of tragic historical experiences under dictatorship, yet two entirely different approaches in honoring the dignity of the fallen and demanding accountability from the disgraced. The Philippines and Spain demonstrated to the world how two completely different countries sifted through their own collective memories to choose that which will be included in the tailoring of their socio-cultural fabric.

PHILIPPINE LAW JOURNAL Vol. 92; Member, Order of the Purple Feather (2016-2017); ACCRALAW-Violeta Calvo Drilon Scholar for Legal Writing (2019).

The author extends her gratitude to Atty. Gerard L. Chan for his invaluable supervision in the writing of this Note.

The author likewise gives her thanks to Ms. Princess Camille Dacillo, Ms. Mary Rose Santos, and Ms. Cristine Marie Villaruel for sharing their comprehensive and incisive, but perpetually constructive and supportive comments in the drafting of this Note. The author similarly conveys her thanks to Engr. Juan Paolo Laguardia and Mr. Jose Mari Laguardia for being constant sources of endearing support and inspiration during the creation of this work.

This Note is dedicated in memory of Mrs. Mary Ann Laguardia—a woman of all things beautiful and good—without whose light and wisdom, the author would not have the spur to complete this work.

¹ *Ocampo v. Enriquez* [hereinafter “*Ocampo*”], G.R. No. 225973, 807 SCRA 223, Nov. 8, 2016 (Leonen, J., *dissenting*).

² ABS-CBN Investigative and Research Group, *BY THE NUMBERS: Human rights violations during Marcos’ rule*, ABS-CBN NEWS (Sept. 21, 2018), at <https://news.abs-cbn.com/focus/09/21/18/by-the-numbers-human-rights-violations-during-marcos-rule>.

The Philippines is no stranger to memorialization measures as a way of reparation for abuses. On its journey towards transitional justice, the Philippines, through the years, has implemented both legal and non-legal measures to address human rights atrocities. But while redress through suits and legal claims is second nature, the Philippines' keenness towards seeking symbolic reparations is uncharacteristically lacking. While monetary claims to answer for the injuries suffered by the victims is a practical solution, claims concerning the recognition of the atrocity, a guarantee of non-repetition, and, above all, an apology and accompanying remorse that may compensate for the cultural and social damages suffered are utterly neglected. For instance, the Comfort Woman statue formerly standing along Roxas Boulevard was recently removed from the site, following the Japanese government's grievance against its construction as reportedly communicated in a conference between Japanese Minister of Internal Affairs and Communication Seiko Noda and President Rodrigo Duterte.

With these stories and experiences of irony, this Note explores the Philippines' measures of recourse through symbolic reparation as a transitional justice tool. Particularly, it wishes to prove that it is high time that the State enact laws recognizing symbolic reparation rights for victims and their families'. The Note assesses two symbolic reparation provisions: Article III, Section 12(4) of the 1987 Constitution and Republic Act No. 10368 or the Human Rights Victims Reparation and Recognition Act of 2013 ("Rep Act. No. 10368"). From this assessment, it then analyzes the existing symbolic reparation regime in the Philippines and its response to three particular cases: *First*, on symbolic reparation repercussions following the burial of former President Marcos in the LNMB; *second*, on symbolic reparation efforts to address the atrocities committed against Filipino comfort women during World War II; and *third*, on symbolic reparation efforts to address the Balangiga Massacre. Finally, with the assessment of the legal instruments and the analysis of the three historical incidents, the Note aims to prove that there is enough impetus for the codification of the victims and their families' symbolic reparation rights.

II. LOOKING THROUGH THE SIGNIFICANCE OF SYMBOLIC REPARATIONS

A. An Established and Working Reparations Regime as a Mandatory Transitional Justice Tool

While literature gives various conceptual definitions for transitional justice, it is more familiarly defined in terms of the means available for

realizing its ends. Transitional justice is more commonly recognized in the form of “investigation and prosecution, reparations, truth-seeking, reconciliation, institutional reforms, vetting, and other measures” pursued to provide redress to the injuries sustained by a particular population following a change in a political regime.³ Some authors also frame the concept by classifying it according to measures which are either “backward-looking” or “forward-looking,” the former including measures seeking to compensate for the wrongdoings committed in the past,⁴ and the latter enumerating schemes ensuring the non-repetition of the wrongs committed.⁵

Brownwyn Anne Leebaw, in her article, *The Irreconcilable Goals of Transitional Justice*, provides a brief historical overview of the origins of transitional justice.⁶ According to her, while the concept emerged as early as restorative efforts in Athens between 411 and 404 BC, its application was only fully accepted following the end of the World War II. Through the Nuremberg Trials and the Allied Control Council Law, the Allied Forces were able to provide reparation to the Holocaust victims. Furthermore, it was during the rise of democratic regimes in Latin America and Eastern Europe that literature on transitional justice manifolded. Truth commissions, purge laws, and public trials emerged, seeking to discover accountability for past atrocities through prosecution, investigation, and conviction.⁷ The article also highlighted the Charter 77 Foundation in 1992, a conference organized to address the question of “whether and how Eastern European leaders might learn from the experience of the Latin American transitions of the previous decade.”⁸ According to Leebaw, the conference opened an avenue for the “development of comparative transitional justice analysis and the expansion of networking.”⁹

One of the more recognized tools of transitional justice is reparation. Reparation, in the context of transitional justice, refers to a “range of measures

³ Kai Ambos, *Assessing the Efficiency of Transitional Justice*, 6 YONSEI L.J. 45, 45 (2015).

⁴ Eric Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 762, 766 (2004). For instance, backward-looking measures of transitional justice include “punishing wrongdoers, compensating victims for their losses, forcing individuals to disgorge property that was wrongfully acquired, and revealing the truth about past events.”

⁵ *Id.* Forward-looking measures include “providing a method for the public to recapture lost traditions and institutions; [...] signaling a commitment to property rights, the market, and democratic institutions; and establishing constitutional precedents that may deter future leaders from repeating the abuses of the old regime.”

⁶ Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95 (2008).

⁷ *Id.* at 98–100.

⁸ *Id.* at 100.

⁹ *Id.*

that aim to rectify the harm caused and to restore the victim to his or her position before the act in question occurred.”¹⁰ While transitional justice was developed largely due to human rights advocates campaigning for the idea that states have roles to play in providing redress to human rights atrocities, the concept of reparation has, for the longest time, already been ingrained in natural law. German jurist Christian Tomuschat writes:

Few would argue that persons suffering a grave breach of their human rights should not have full reparation. This rule would seem to belong to the body of natural justice. The law of torts was already highly developed in ancient times. Roman jurists had no doubt that, in principle, the person responsible for an act causing injury was under a duty to compensate his victim.¹¹

Even before the development of such concept in international law, reparation has always been a part of punitive and restorative justice systems of states, there being a recognition that “[t]he damage caused by an unlawful act is generally deemed to require reparation.”¹² However, with the growth of the concept in the context of international law, the principle that, “states have roles to play in providing redress to human rights atrocities, intertwined with the corresponding duty in ensuring that the same wrongs will not be repeated[.]” became acknowledged. Bernard Graefrath explains:

[T]he principal legal consequences of an international delinquency are reparation of the moral and material wrong done[.] [...] The only rule which is unanimously recognized by theory and practice is that out of an international delinquency arises a right for the wronged State to request from the delinquent State the performance of such acts as are necessary for reparation of the wrong done. What kind of acts these are depends upon the merits of the case. It is obvious that there must be pecuniary reparation for material damage, and at least a formal apology.¹³

Throughout the years, reparation has taken on different forms but may, generally, be categorized into two: Material and symbolic reparation. Material reparation includes financial compensation for physical injuries

¹⁰ Kerry Clamp & Jonathan Doak, *More than Words: Restorative Justice Concepts in Transitional Justice Settings*, 12 INT'L CRIM. L. REV. 339, 351 (2012). (Citations omitted.)

¹¹ Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT'L & COMP. L. 157, 157 (2002). (Citations omitted.)

¹² *Id.* at 158.

¹³ Bernard Graefrath, *Reparation as One Form of International Responsibility*, 185 RECUEIL DES COURS 1, 63 (1984), *citing* L. OPPENHEIM, INTERNATIONAL LAW (8th ed.) (1955).

sustained and for properties damaged; symbolic reparation, on the other hand, includes apology, voluntary work, or any other means by which there can be an expression of remorse and assurance of non-repetition.¹⁴ Both material and symbolic reparations form part of a reparation regime that is perceived as a “process”—an organized response mechanism that addresses the physical, social, cultural, psychological, and moral injuries sustained by a society. Reparations are not desired “outcome[s].”¹⁵ Process-based restorative justice emphasizes the importance of community participation as the people affected are the primary stakeholders who are in the best position to decide what form of reparation will compensate for the injuries sustained by them based on the circumstances nuanced to their suffering.¹⁶

B. Symbolic Reparation as a Segment of a Reparation Regime

Like transitional justice, symbolic reparation is usually defined by the mechanisms employed to operationalize its goals. Fact-finding and truth committee initiatives, official apologies, restorative measures directed towards people prejudiced by victimization, and commemorative efforts like the erection of parks and museums are among the most common manifestations of an active symbolic reparation program.¹⁷ As a segment of transitional justice, symbolic reparation is viewed as an instrument that can fill the emotional, psychological, and moral needs of the victims. According to Swart:

Restorative justice is understood as restoring harms and hurt reflecting a commitment to values such as individual empowerment, responsibility, peace, respect[,] and compassion. Emotional reparation [...] involves social rituals of respect, courtesy, apology, and forgiveness—gestures that can operate

¹⁴ Clamp & Doak, *supra* note 10, at 351.

¹⁵ *Id.* at 342. “In broad terms, [restorative justice] centres on the idea that justice must involve an effort to address the harm caused by a wrongdoing, and that prosecution and penal sanction through criminal courts is not the only, or the best, means to achieve this. Rather, victims, perpetrators, and the broader community engage in a dialogue in order to identify and address the underlying social and political causes of the offending act.”

¹⁶ *Id.* at 343. Tony Marshall, who advocates for process-based restorative justice, remarked that this type of restorative justice is one “whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”

¹⁷ Ron Dudai, *Closing the Gap: Symbolic Reparations and Armed Groups*, 93 INT’L REV. RED CROSS 783, 788 (2011).

independently of verbal discourse and which depend on the emotional dynamics of the parties involved.¹⁸

Symbolic reparation provides an avenue for states to address the injuries suffered by victims which cannot be financially restituted.¹⁹ Symbolic reparation completes a working and effective reparation program, addressing not only physical injuries but moral, psychological, social, and cultural ones as well. It involves a deeper and more intimate assessment of the injuries sustained by a nation that proceeds from the theory that a state must likewise attend to the symbolic needs of its people to make sense and worth of the sufferings they have weathered, to have “carriers of meanings” that will remind them and the future generations of the adversities they went through in the past, and that such must not be repeated.²⁰ Ron Dudai expounds:

In all its manifestations, reparation has emerged as a key feature of accountability and transitional justice. It was defined as a way to make “elusive ideas of truth, justice[,] and reconciliation into something more concrete” and to ensure that the physical, psychological[,] and social damage in societies emerging from a violent past is acknowledged and addressed.²¹

Both material and symbolic reparation measures are important segments of a truly working and effective reparation regime. Reparation must be utilized in consideration of all other restorative options, such that all of these alternatives may be implemented together. Noteworthy is the idea that “various forms of reparations [are] not to be implemented in isolation of each other but must complement each other.”²² Mia Swart, in her article on the name-changing of streets in Germany and Austria following the end of World War II, highlighted the need to consider and incorporate all restorative alternatives available. She stated that “[s]treet naming in itself can of course not achieve the rehabilitation of victims of human rights violations but should rather be understood as part of a package of restorative measures.”²³

¹⁸ Mia Swart, *Sorry Seems to be the Hardest Word: Apology as a Form of Symbolic Reparation*, 24 S. AFR. J. HUM. RTS. 50, 53 (2008).

¹⁹ Dudai, *supra* note 17, at 787.

²⁰ *Id.* at 788. (Citations omitted.)

²¹ *Id.* at 788–89. (Citations omitted.)

²² Mia Swart, *Name Change as Symbolic Reparation after Transition: The Example of Germany and South Africa*, 9 GERMAN L. J. 105, 108 (2008). (Citations omitted.)

²³ *Id.* at 106.

1. *Renaming of Public Places as a “Denazification” Measure*

One prevalent example of a symbolic reparation measure is the changing of names of public spaces to commemorate and honor the sufferings of the victims. Swart considers the changing of names as a major aspect of transitional justice dedicated to “restoring dignity and public recognition to victims.”²⁴ She notes how “[t]he changing of street names has at least three functions: That of ‘vehicle for commemoration,’ that of constituting a form of symbolic reparation for human rights abuse[,] and the function of constructing a politicised [sic] version of history.”²⁵

Swart cited the “denazification” measures initiated by the American military government then, which had the main vision to rid Germany of anything that will remotely remind the nation of its painful past. One such measure was a directive that declared all objects—from museums, to parks, to monuments, to statues—honoring Nazism and its leaders as illegal. Streets that were originally named after Jewish people but were changed during the previous regime to Hermann Goring Street and Adolf Hitler Platz were restored to their previous Jewish names.²⁶ Swart observed that the same “denazification” program was employed in Austria, where street signs bearing Nazi names were taken down and restored to the names of Habsburg heroes.²⁷

Swart clarified, though, that the changing of names only forms a significant portion of the “package of restorative measures.”²⁸ While material compensation may bring about concrete rehabilitative results, changing of names is a symbolic effort designed to address the moral injuries suffered by the victims.

2. *Passing Memory Laws in Post-Civil War Spain*

Another popular demonstration of symbolic reparation is the enactment of memory laws. Memory laws are significant not only because of the definitive mandate to grant specific forms of reparation to victims and families, but also because their actual passage and existence validates the historical truth of the human rights atrocities suffered by the country. Michael

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 115–16,

²⁷ *Id.* at 117.

²⁸ *Id.*

Humphrey, in *Law, Memory and Amnesty in Spain*, enumerates three elements which characterize a working and effective memory law: “[F]irstly, a statement of official collective memory; secondly, the criteria for inclusion and exclusion in the new social and political order; and thirdly, a political consensus which underpins law’s legitimacy and endurance.”²⁹

According to Humphrey, the first element, for instance, is concretized by memory laws through provisions fostering “commemoration of anniversaries in rituals and cultural productions in the form of books, films, photography, and music.”³⁰ The second element, on the other hand, is observed through the identification of the perpetrators of the atrocity as well as the recognition of the victims, a determination of “whose suffering should be acknowledged.”³¹ Lastly, the third element relies on the legitimacy of the existence of the law itself which affirms the power of the contemporary ruling authorities who overthrew the previously oppressive power.³²

This was exactly how memory laws played a huge role in the transitional justice journey of Spain during the Civil War. The Spanish Civil War emerged out of the National Uprising led by General Francisco Franco’s Nationalist Forces whose vision was to topple the then ruling Republican government. Over a three-year period, a “reign of terror” ruled over Spain, with General Franco’s philosophy that “the *vencedores* (victors) should enjoy their spoils, while the *vencidos* (vanquished) should suffer a cruel repression which included persecution, execution, torture, or exile.”³³ From 1936 to 1939, the victims of the Spanish Civil War experienced numerous summary executions and enforced disappearances. From these years since and until 1975, Spain saw the enactment of laws that penalized anyone who would pledge support to the overthrown Republican government.³⁴

Three memory laws encapsulated Spain’s experience with its pursuit towards reparation and rehabilitation: The Amnesty Law in 1939, the Amnesty Law in 1977, and the Law of Historical Memory in 2007, all of which

²⁹ Michael Humphrey, *Law, Memory and Amnesty in Spain*, 13 MACQUARIE L.J. 25, 27 (2014).

³⁰ *Id.*

³¹ *Id.* at 28.

³² *Id.*

³³ Angela Guarino, *Chasing Ghosts: Pursuing Retroactive Justice for Franco-Era Crimes against Humanity*, 33 B. C. INT’L & COMP. L. REV. 61, 65 (2010). (Citations omitted, translations in the original.)

³⁴ Humphrey, *supra* note 29, at 27. “The overall war casualties are estimated at around 500,000 to 600,000. Around 50,000 were victims of Francoist repression after the end of the Civil War in February 1939 and a further 190,000 prisoners were executed or died in prison.”

were an expression of the ruling political consensus during the relevant period.³⁵ For instance, the Amnesty Law in 1939 was described as an expression of the total defeat of the Republican government and the absolute reign of General Franco's forces. The law, while providing reprieve to political offenses committed during the war, required cooperation with and support for General Franco's rule. The law likewise penalized all who aided the Republic forces during the uprising.³⁶

With General Franco's death in 1975, the Amnesty Law in 1977 saw the conviction of all forces, not limited to those loyal to General Franco, who participated in the Spanish Civil War. The political climate that particularly characterized the law was the *pacto del olvido* or "the pact of forgetting," a consensus on the eradication of anything related to the horrors of the Spanish Civil War.³⁷ However, towards the end of this period, there emerged a wave called the "globalisation of justice" giving light to the "rejection of impunity, confrontation of the past, [prioritization of] accountability[,] and [aiming] towards a broader societal inclusion of past regime victims."³⁸ Through awareness of transitional justice, challenges as to the effectivity of *pacto del olvido* and its strategy of "collective amnesia" arose.³⁹

The third law, which presently characterizes the political climate in Spain, is more victim-centered, rather than being focused on the prosecution and persecution of the perpetrators. Humphrey explained:

At the heart of the Law of Historical Memory 2007 was the new victim, not the defeated, but the victim of human rights abuse informed by a transitional justice culture. This human rights framing reconstituted the dyadic relationship underlying Civil War Memory; however, this time not defined as a relationship between victor and defeated but between perpetrator and victim.⁴⁰

³⁵ *Id.* at 28.

³⁶ *Id.* at 28–31.

³⁷ *Id.* at 32. See also Teresa Godwin Phelps, *Truth Delayed: Accounting for Human Rights Violations in Guatemala and Spain*, 36 HUM. RTS. Q. 820, 835 (2014). "If the Franco era was discussed, it was behind closed doors, and in whispers as [*Los Dos Españas*] (the right and left in Spain) did not agree on who started the conflict or who was the more violent and responsible for the most killings."

³⁸ Humphrey, *supra* note 29, at 34.

³⁹ Peter Burbridge, *Waking the Dead of the Spanish Civil War: Judge Baltasar Garçon and the Spanish Law of Historical Memory*, 9 J. INT'L CRIM. JUST. 753, 757 (2011).

⁴⁰ Humphrey, *supra* note 29, at 35.

The law not only forced into light the massive human rights abuses committed during the Spanish Civil War, but likewise provided a mandate to locate and exhume the remains of thousands of victims of enforced disappearances. Likewise, while not providing for the annulment of judgments, the law pronounces as “illegitimate” the various decisions adjudicated by courts, tribunals, and councils during the Spanish Civil War, such that the individuals who suffered because of these rulings would have the “right to a declaration of reparation and personal recognition.”⁴¹

C. Socio-Cultural and Psychological Effects of Symbolic Reparation

The value of a working and effective reparation regime is understood in the realization that material or financial reparation does not fully restore the loss of dignity suffered by victims of human rights atrocities and violent crimes. For instance, following the end of World War II in Germany, the Final Federation Compensation Law was passed in 1956, the goal of which was to provide reparation for the loss of lives and property. However, the law was solely dedicated to the grant of financial compensation, providing no reprieve to the grief and loss suffered by the victims. Worse, even the implementation of the law created a bad impression among the victims, as testimonies on the horrors they experienced had to pass a strict test of veracity and confirmation to enable them to avail of the reparation program.⁴²

This is where the significance of symbolic reparation in the psychological, social, and cultural healing of the nation’s psyche becomes relevant. More than restoring the victim’s dignity, symbolic reparations are instrumental in attributing liability and acknowledging suffering through the validation of the victims’ narratives. In the words of Brandon Hamber and Richard Wilson:

[Symbolic reparation measures] acknowledge and recognize the individual’s suffering and place it within a new officially sanctioned history of trauma. Symbolic representations of the trauma, particularly if the symbols are personalized, can concretize a traumatic event, and help re-attribute responsibility. The latter stage is important because labelling responsibility can appropriately

⁴¹ Burbridge, *supra* note 39, at 758.

⁴² Yael Danieli, *Healing Aspects of Reparations and Reparative Justice for Victims of Crimes Against Humanity*, in REPARATION FOR VICTIMS OF CRIMES AGAINST HUMANITY 7–21 (Jo-Anne Wemmers ed., 2014). (Citations omitted.)

redirect blame towards perpetrators and relieve the moral ambiguity and guilt survivors often feel.⁴³

Likewise, symbolic reparations are significant in concretizing the stories of the victims, thus validating and granting value to their suffering. For instance, the symbolic reparation measure of collecting testimonies aids in the reintegration of the victims back into the community. Vital-Brasil, in *An Ethical and Aesthetic Challenge: Symbolic Reparation and the Construction of Memory*, explains:

The testimonial narrative was key in giving visibility to the crimes against humanity, exposing what had been hidden and denied by repressors, and contributing to clarifying what happened. This narrative was also key in returning the witnesses' condition of being human and to once again feel part of humanity.⁴⁴

Symbolic reparations do not only serve to address the trauma suffered by the victims individually, but likewise endeavor to effect collective healing for the affected nation. Illustrating it through the process of giving testimonies, Vital-Brasil remarked:

The reparation process does not give back the time that was lost in torture chambers or reinstate the lives of those who were killed or disappeared. It is possible and necessary, however, as a legacy for [the] following generations, *to reclaim the narrative of those whose lives were uprooted by the hand of state violence*. Through the intermediary of testimony, we can experience the struggles of historical moments and understand what this meant for each individual during this period in order to reconstruct the fabric of collective memory.

* * *

Through the testimony, the link between those affected by state violence, individually and collectively, can be reconstructed.⁴⁵

It was likewise observed that symbolic reparation measures are instrumental in creating a collective consciousness and memory not only

⁴³ Brandon Hamber & Richard Wilson, *Symbolic closure through memory, reparation and revenge in post-conflict societies*, 1 J. HUM. RTS. 35, 38 (2010).

⁴⁴ Vera Vital-Brasil, *An Ethical and Aesthetic Challenge: Symbolic Reparation and the Construction of Memory*, 28 TORT. J. 70, 77 (2018).

⁴⁵ *Id.* at 80. (Emphasis supplied.)

among the victims, but for the whole country, of the historical trauma the nation had gone through. Danieli wrote:

There is a need for commemoration both for the victims and for society. Rituals are very important; there is no organised society, religion or culture that does not have rituals of memory. Commemorations can fill the vacuum with creative responses and may help heal the rupture not only internally but also the rupture the victimisation created between the survivors and their societies. This is a mutually reinforcing context of shared memory, shared mourning, a sense that the memory is preserved, that the nation has transformed that memory into a part of its global consciousness and shares the horrible pain. What may be an obligatory one-day-a-year commemorative ritual to some may be experienced by victims as a gesture of sharing and support. This is fundamental to the societal dimension of reparative justice.⁴⁶

III. LOCATING SYMBOLIC REPARATIONS IN PHILIPPINE LAW

With its long history of oppression and experiences with impunity, one would expect that the Philippines has appreciated the value of reparations—particularly that of symbolic reparations—and has devised a mechanism by which relief may be readily available and accessible to victims and their families. Among the most notable symbolic reparation measures adopted by previous administrations were the establishment of the Presidential Commission on Good Government, to recover the illegally amassed wealth by the Marcos family, and the Philippine Truth Commission, to address the massive claims of graft and corruption during the administration of former President Gloria Macapagal Arroyo. However, while these are laudable, there has yet to be a law which definitively and precisely lays down the bundle of rights and privileges available to victims and their families in the context of achieving transitional justice—a law which outlines a set of incentives and sanctions that the State may impose to provide effective remedy.

A. Article III, Section 12(4) of the 1987 Constitution

The fundamental basis of the right to compensation for and rehabilitation of victims like torture and other similar practices is found in

⁴⁶ Danieli, *supra* note 42.

Section 12(4), Article III of the 1987 Constitution: “The law shall provide penal and civil sanctions for violations of this Section as well as *compensation to and rehabilitation of victims of torture or similar practices, and their families.*”⁴⁷

It may be observed that the subject provision appears alongside the rights of a person under custodial investigation likewise enumerated under Section 12 of Article III. Thus, it may be inferred that the right to demand compensation and rehabilitation is exclusively available to those who suffered torture and similar practices while being detained. However, a review of the deliberations of the 1986 Constitutional Commission supports the argument that it may have actually been the intent of the framers to allow the subject provision to cater to a broader and more general class of victims who endured injuries from torture and the like, whether detained or otherwise.

Section 12(4) of Article III traces its origins from Resolution No. 40, introduced by Commissioner Rene Sarmiento, worded as follows:

RESOLUTION TO INCORPORATE IN THE NEW CONSTITUTION A PROVISION REQUIRING THE GOVERNMENT TO COMPENSATE VICTIMS OF TORTURE OR SIMILAR PRACTICES AND THEIR FAMILIES FOR THE PHYSICAL AND PSYCHOLOGICAL INJURIES INFLICTED UPON THEM, WHICH COMPENSATION SHALL LATER BE COLLECTED FROM THOSE GUILTY OF SUCH PRACTICES.⁴⁸

Notably, the proposed provision did not make any specific reference as being applicable only to victims of torture and similar practices while being detained. Nor was the Resolution, at the time of its introduction before the Commission, proposed in reference to the bundle of custodial investigation rights then found in Section 20, Article IV of the 1973 Constitution.

Even the discussion on the proposed provision did not make any mention of the exclusivity of the right to demand compensation and rehabilitation to victims who suffered from torture and the like during detention or custodial investigation, except those who suffered from offenses

⁴⁷ (Emphasis supplied.)

⁴⁸ 1 RECORD CONST. COMM’N 60 (June 5, 1986).

perpetrated by public officers.⁴⁹ During the deliberations over this provision by the 1986 Constitutional Commission, Commissioner Teodulo C. Natividad raised that compensation for and rehabilitation of victims and their families must be observed and upheld “because nobody takes care of these victims, and this is a matter that should be attended to.”⁵⁰ Citing Commissioner Lugum L. Uka, Commissioner Natividad emphasized the significance of the right to the effect that “the victim is the forgotten orphan.”⁵¹

Citing that “in other countries, like the United States, England, New Zealand[,] and others, they have what they call a victim compensation system or law[,],”⁵² Commissioner Natividad stated that:

[T]he concept here is that the victims of violent crimes are compensated in accordance with law. There is a careful graduation of offenses; a limit to the amount that can be paid; a time limit within which the application for compensation is to be made, as well as a provision that any money paid to the victims can be later on recovered from the accused.⁵³

Commissioner Natividad clarified that while the provision clearly pertains to victims of torture and violent crimes, the Constitutional Commission should consider expanding its application to cover innocent individuals who suffered injuries because of their incidental presence in an area where a public officer was performing his or her official duties.⁵⁴ Fr. Joaquin G. Bernas remarked that while the proposal of Commissioner Natividad may be considered by the Commission, it had to be reiterated that the provision focuses on injuries sustained by individuals because of acts committed by public officers and not any damages sustained by just any

⁴⁹ *Id.* at 740 (July 18, 1986). “Mr. Suarez: When the Committee speaks of victims of tortures or similar practices, who would be the offenders or perpetrators of these? Is it limited to government of public officials and not to private individuals?”

Is that the meaning of this provision?

Fr. Bernas: Yes.”

⁵⁰ *Id.* at 701 (July 17, 1986).

⁵¹ *Id.* at 702.

⁵² *Id.* at 701–02.

⁵³ *Id.* at 702.

⁵⁴ *Id.* “The usual scenario here is that of an encounter between the police and the criminal elements with a bystander[—]that is what happens in Mindanao or the Visayas or even in Metro Manila. In the crossfire, somebody gets seriously injured or killed. Who helps the victim pay for his hospitalization or burial? Nobody. But the man is an innocent bystander[—]he has nothing to do with the events.”

person.⁵⁵ While Commissioner Natividad acceded to this and understood the limited application of the provision to cover only those offenses committed by public officers, he certainly had wanted the Commission to consider expanding its scope so that it may be availed of by “hapless victims of violent crimes where the boundary is vague, but, nevertheless, the need is very clear.”⁵⁶ In the end, the Commission reached no particular conclusion as to the scope of the provision, aside from the consensus that it applies to victims of torture and violent crimes due to acts committed by public officers.

Perhaps the part of the deliberations that most clearly supports the argument that the subject provision applies to victims of torture or similar practices, whether committed during detention or not, may be seen in the exchange between Commissioner Natividad and Commissioner Hilario Davide on the powers and functions of the Commission on Human Rights, specifically on its duty to “recommend to Congress effective measures to promote human rights and for compensation to victims, or their families, of violations of human rights.” To wit:

Mr. Natividad: I have the impression that in the Article on Bill of Rights we have already provided for a mandate to Congress to provide for a victim compensation plan or system to victims of violations of human rights.

Mr. Davide: No, Madam President. The provision on the Article on Bill of Rights is limited to victims of tortures and other similar practices.

Mr. Natividad: But these are violations of human rights, Madam President.

Mr. Davide: Yes, these are human rights violations, but the proposal is broader. *The tortures there may be accomplished while a person is under detention.*⁵⁷

From this exchange, it may be inferred that the provision for compensation found under the Bill of Rights is available to victims of torture and other similar practices, *whether under detention or otherwise*. Subsequent exchanges during the deliberations then focused on the difference between the compensation provision found in Article III and in Article XIII, with the

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 3 RECORD CONST. COMM’N 778 (August 27, 1986). (Emphasis supplied.)

distinction being that the former only covers victims of offenses perpetrated by public officers, while the latter provides for victims of all kinds of human rights violations, even those committed by private individuals.⁵⁸

Interestingly, even a subsequent law, Rep. Act No. 10368, made reference to Section 12(4), Article III of the Constitution in its declaratory principles provision, while subsequently stating that the law recognizes as victims not only those who were detained during Martial Law, but all those who suffered human rights violations during the dictatorship of former President Marcos.

SECTION 2. Declaration of Policy. — Section 11 of Article II of the 1987 Constitution of the Republic of the Philippines declares that the State values the dignity of every human person and guarantees full respect for human rights. Pursuant to this declared policy, *Section 12 of Article III of the Constitution prohibits the use of torture, force, violence, threat, intimidation, or any other means which vitiate the free will and mandates the compensation and rehabilitation of victims of torture or similar practices and their families.*

* * *

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.⁵⁹

It is important to note, however, that during the time that the subject provision was presented before the Commission, it was worded as if there must be an implementing law to put it into effect. Consistent with how it presently appears in the 1987 Constitution, the proposed provision deliberated over then was: “Compensation for and rehabilitation of victims of tortures of similar practices, and of their families, *shall be provided by law.*”⁶⁰

⁵⁸ *Id.* at 779–80.

⁵⁹ Rep. Act No. 10368 (2013), § 2. Human Rights Victims Reparations and Recognition Act of 2013. (Emphasis supplied.)

⁶⁰ *Supra* note 48, at 701. (July 17, 1986) (Emphasis supplied.)

The same was confirmed by a review of the deliberations of the 1986 Constitutional Commission:

Mr. Suarez: So if the legislature does not pass a law implementing this, the provision by itself will not enable the victims to obtain compensation. This is again a reminder to the legislature to do something about this.

* * *

Mr. Suarez: And, therefore, this is a demandable or enforceable constitutional right? That is what I am trying to clear up, Mr. Presiding Officer.

Fr. Bernas: *It is demandable in the sense that, if there is a law providing for this compensation and providing for a system of rehabilitation, then the victim can demand compensation and rehabilitation. But, as I say, unless this is implemented by the legislature, by itself it does not accomplish much.*

Mr. Suarez: Thank you for the clarification.⁶¹

Reviewing the deliberations of the 1986 Constitutional Commission, it is apparent that there is a necessity for the enactment of an enabling law to address the particulars of the compensation and rehabilitation system to be provided to the victims and their families—the extent of atrocity to be recognized, the amount of compensation to be granted, and the classification of victims based on the suffering they experienced, among others. Thus, the constitutional provision, in itself, may not be a source of rights and obligations to enforce the right of the victims and their families to symbolic reparation.

B. Republic Act No. 10368

Notwithstanding the absence of an enforceable general right towards reparation in the Constitution, there has been a successful attempt in the previous years to codify into a law the specific rights and privileges available to the victims of Martial Law and their families.

When one talks about compensation for and rehabilitation of the victims of Martial Law, Rep. Act No. 10368, otherwise known as the “Human Rights Victims Reparation and Recognition Act of 2013,” immediately comes

⁶¹ *Id.* at 710. (Emphasis supplied.)

to mind as the primary basis for reparation. While Rep. Act No. 10368 springs from the recognition that there is a need to provide compensation for and rehabilitation of victims of torture and similar practices, as well as their families under Article III, Section 12(4) of the 1987 Constitution, the law largely focuses on monetary compensation and limits the role that symbolic reparation can play, as seen in provisions mandating the erection of a Memorial/Museum/Library, the publication of a Roll of Human Rights Victims, and the establishment of a Human Rights Violations Victims' Memorial Commission ("HRVVMC"), to wit:

SECTION 26. *Roll of Victims.* — Persons who are HRVVs, regardless of whether they opt to seek reparation or not, shall be given recognition by enshrining their names in a Roll of Human Rights Victims to be prepared by the Board.

A Memorial/Museum/Library shall be established in honor and in memory of the victims of human rights violations whose names shall be inscribed in the Roll. A compendium of their sacrifices shall be prepared and may be readily viewed and accessed in the internet. The Memorial/Museum/Library/Compendium shall have an appropriation of at least [five hundred million pesos ([PHP] 500,000,000.00) from the accrued interest of the [ten-]billion-[peso ([PHP] 10,000,000,000.00) fund.

The Roll may also be displayed in government agencies as may be designated by the HRVV Memorial Commission as created hereunder.

SECTION 27. *Human Rights Violations Victims' Memorial Commission.* — There is hereby created a Commission to be known as the Human Rights Violations Victims' Memorial Commission, hereinafter referred to as the Commission, primarily for the establishment, restoration, preservation and conservation of the Memorial/Museum/Library/Compendium in honor of the HRVVs during the Marcos regime.⁶²

The Implementing Rules and Regulations of Rep. Act No. 10368 likewise adds a provision ensuring the inclusion of events that transpired during Martial Law in history books prescribed in the basic and higher education curricula of Filipino students. It reads:

⁶² Rep. Act No. 10368 (2013), §§ 26–27, ¶ 1.

SECTION 2. *Education and Curriculum Development.* — The lessons learned from Martial Law atrocities and the lives and sacrifices of HRVVs shall be included in the basic and higher education curricula, as well as in continuing adult learning, prioritizing those most prone to commit human rights violations.⁶³

It is important to note that there currently exists a memorial park dedicated to remembering, honoring, and recognizing the sacrifices and suffering endured by Martial Law victims. Bantayog ng mga Bayani, located in Quezon City, is a “landscaped memorial center” where various memorial pieces were erected in remembrance of Martial Law victims: A library, a wall of remembrance where the names of Martial Law heroes and martyrs were inscribed, as well as a museum and an auditorium showcasing the horrors of the Martial Law era.⁶⁴

However, the Bantayog ng mga Bayani, far from being a reparation measure sponsored by the State, was the result of the efforts and ideals of Dr. Ruben Mallari, “a Filipino-American medical doctor, [who] suggested the establishment of a memorial to honor those martyrs who sacrificed their lives for the cause of freedom and justice but failed to witness the dawn of freedom.” Following this initiative is the establishment of the Bantayog ng mga Bayani Memorial Foundation, composed of private Filipino enthusiasts.⁶⁵

Based on this observation, it is clear that there have been no active efforts on the part of the State to promote its positive duty towards establishing and implementing symbolic reparation as part of the holistic and comprehensive effort for compensation and rehabilitation. Recently, however, various news sites reported on the prospective construction of the museum imagined in Rep. Act No. 10368, with the HRVVMC calling for bids for the construction of the building. Dubbed as the “Freedom Memorial Museum,” the structure is to be erected at the University of the Philippines Diliman in 2022, just in time for the commemoration of the 50th year since Martial Law was declared by the former Dictator. The museum is expected to

⁶³ Rep. Act No. 10368 Rules & Regs. (2014), § 2.

⁶⁴ Bantayog ng mga Bayani, *About*, at <http://www.bantayog.org/about/> (last visited Apr. 14, 2020).

⁶⁵ *Id.*

house various features: A “torture gallery,” a theater, a roll of human rights victims, and a plaza, among others.⁶⁶

While this initiative from the State is laudable, one cannot help but wonder why it took the government nine years to construct the museum since the enactment of Rep. Act No. 10368. It thus raises the thought that while codifying the victims and their families’ right to reparation is significant, the enforcement and implementation of those rights, as responsively and efficiently as the State can, are equally crucial.

IV. SURVEYING THREE EXPERIENCES: THREE SYMBOLIC REPARATION RESPONSES

After looking through possible legal sources of symbolic reparation rights, it is then important to assess how the Philippines has responded to the symbolic reparation concerns of the State, bridging the gap between the deficiency of symbolic reparation laws and the demands for an effective symbolic remedy. The assessment will focus on three particular historical incidents: The burial of former President Ferdinand Marcos at the LNMB, the removal of the Comfort Woman statue, and the repatriation of the Balangiga Bells.

A. The Burial of Marcos at LNMB

On November 18, 2016, 10 days after a 9-5 vote in the Supreme Court, the remains of former President Marcos were interred with full military honors at the LNMB.

The case at the Supreme Court was initiated through various petitions filed by different personalities questioning the legality of numerous issuances released by the Executive Department culminating in the decision to allow the burial of the former Dictator at the LNMB.

The decision, penned by then Associate Justice Diosdado Peralta, traced the matter confronting the Court to the campaign promise made by

⁶⁶ Jodesz Gavilan, *Martial Law museum set to open by 2022*, RAPPLER, Sept. 23, 2019, at <https://www.rappler.com/nation/martial-law-museum-set-opening-2022>. See also Krixia Subingsubing, *Martial law museum to rise on UP Diliman campus*, INQUIRER.NET, Sept. 21, 2020, at <https://www.newsinfo.inquirer.net/1337779/martial-law-museum-to-rise-on-up-campus>.

then presidential candidate Mayor Duterte to bury the former Dictator at the LNMB.⁶⁷ Pursuant to the campaign promise, a memorandum was forwarded to then Chief of Staff of the Armed Forces of the Philippines (AFP) General Ricardo R. Visaya from Secretary of National Defense Delfin N. Lorenzana.⁶⁸ Subsequently, several directives were issued by AFP Rear Admiral Ernesto C. Enriquez to the Philippine Army detailing the funeral honors and services that will be conducted during the burial of the former Dictator at the LNMB.⁶⁹

This series of events led to the filing of petitions of certiorari alleging grave abuse of discretion amounting to lack or excess of jurisdiction against the Secretary of National Defense and the AFP Rear Admiral, particularly assailing the validity of the Memorandum and the directives issued. The petitions also questioned the compliance with the issuance and implementation of the memorandum and directive with various provisions of the Constitution and other numerous legislations. Likewise, the petitions inquired as to whether or not there had been a waiver on the part of the Marcos family to bury the former Dictator at the LNMB after an agreement signed with the Philippine government on how the remains of former President Marcos would be interred. The petitions also contested whether or not the former Dictator was qualified to be buried at the LNMB following various historical facts and even laws passed to probe, investigate, and recover the ill-gotten wealth amassed during his administration.⁷⁰

⁶⁷ *Ocampo*, 807 SCRA 223, 253.

⁶⁸ *Id.* at 253–54. “Subject: Interment of the late Former President Ferdinand Marcos at LNMB

Reference: Verbal Order of President Rodrigo Duterte on July 11, 2016.

In compliance to (sic) the verbal order of the President to implement his election campaign promise to have the remains of the late former President Ferdinand E. Marcos be interred at the *Libingan ng mga Bayani*, kindly undertake all the necessary planning and preparations to facilitate the coordination of all agencies concerned specially the provisions for ceremonial and security requirements. Coordinate closely with the Marcos family regarding the date of interment and the transport of the late former President’s remains from Ilocos Norte to the LNMB.

The overall OPR for this activity will [be] the PVAO since the LNMB is under its supervision and administration. PVAO shall designate the focal person for this activity who shall be the overall overseer of the event.

Submit your Implementing Plan to my office as soon as possible.”

⁶⁹ *Id.* at 254–55.

⁷⁰ *Id.* at 255–57.

The Court, however, ruled that President Duterte, pursuant to the Constitution and the Administrative Code of 1987, had the power to dedicate lands of public domain for national military cemetery and military shrine purposes and, consequently, allow the burial of the former Dictator at the LNMB. It declared that the issue involved delved on a question of policy that was within the wisdom of President Duterte to decide. Curiously, while the Court ruled that the issue brought before it fell outside the ambit of judicial review, being a political question, it proceeded to tackle each and every substantive issue raised by the petitioners.⁷¹

In its decision, the Court declared that while the 1987 Constitution was a product of the efforts to restore democracy and republicanism in the country after the Philippines' experience with the Martial Law regime, not all of its provisions were directed, dedicated, or related to Martial Law. As such, the arguments of the petitioners that the interment of the former Dictator at the LNMB was tantamount to a violation of the letter and spirit of the 1987 Constitution which, according to them, was a charter representing "a clear condemnation of Marcos' alleged 'heroism,'" did not hold water.⁷² The Court likewise declared that the burial had not violated Rep. Act No. 10368 since no specific provision existed therein prohibiting the interment.⁷³

The Court further ruled that the burial of the former Dictator at the LNMB did not violate public policy to the end that only the deserving, the "decent and the brave," or the "hero[es]" should be interred at the sacred military grounds.

The Court clarified that:

[T]he descriptive words "sacred and hallowed" refer to the LNMB as a place and not to each and every mortal remains interred therein. Hence, the burial of Marcos at the LNMB does not diminish said cemetery as a revered and respected ground. Neither does it negate the presumed individual or collective "heroism" of the men and

⁷¹ *Id.* at 260.

⁷² *Id.* at 267–69.

⁷³ *Id.* at 275–76. "This Court cannot subscribe to petitioners' logic that the beneficial provisions of R.A. No. 10368 are not exclusive as it includes the prohibition on Marcos' burial at the LNMB. It would be undue to extend the law beyond what it actually contemplates. With its victim-oriented perspective, our legislators could have easily inserted a provision specifically proscribing Marcos' interment at the LNMB as a 'reparation' for the HRVVs, but they did not. As it is, the law is silent and should remain to be so. This Court cannot read into the law what is simply not there. It is irregular, if not unconstitutional, for Us to presume the legislative will by supplying material details into the law. That would be tantamount to judicial legislation."

women buried or will be buried therein. The “nation’s esteem and reverence for her war dead,” as originally contemplated by President Magsaysay in issuing Proclamation No. 86, still stands unaffected. That being said, the interment of Marcos, therefore, does not constitute a violation of the physical, historical, and cultural integrity of the LNMB as a national military shrine.⁷⁴

Interestingly, the Court likewise shed light into President Duterte’s intentions as to the interment:

President Duterte’s determination to have Marcos’ remains interred at the LNMB was inspired by his desire for national healing and reconciliation. Presumption of regularity in the performance of official duty prevails over petitioners’ highly disputed factual allegation that, in the guise of exercising a presidential prerogative, the Chief Executive is actually motivated by *utang na loob* (debt of gratitude) and *bayad utang* (payback) to the Marcoses.⁷⁵

1. The Burial of the Former Dictator and the Role it Plays in the History of Symbolic Reparation Policies in the Philippines

An analysis of the motives behind and implications of the burial of the former Dictator at the LNMB is crucial vis-à-vis the symbolic reparation policies of the State. In his article, *Judicial Historical Revisionism in the Philippines: Judicial Review and the Rehabilitation of Ferdinand Marcos*, Dante Gatmaytan laid down in sharp points the repercussions of the burial not only on the claims of victims of the horrors of Martial Law, but also on the prospects of a more cognizant Supreme Court:

The majority of the Supreme Court seemed oblivious to the plight of those who suffered under Marcos’ martial law regime. The story of activists who challenged the martial law regime remains to be told. These stories were systematically repressed by the State, and if these stories of activism were made public, they can critically engage the official narrative of the nation, particularly the history of the martial law period. The Marcos’ [sic] martial law regime can be labeled as traumatic, because studies have established direct

⁷⁴ *Id.* at 294.

⁷⁵ *Id.* at 299. (Emphases supplied.)

correlations between practices of the regime and the victims who manifest signs of posttraumatic stress disorder.⁷⁶

Gatmaytan stated that the decision of the Court in *Ocampo v. Enriquez* is “an act of historical revisionism”⁷⁷ as the case is “not only a legal document [but] presents a version of history that historians cannot erase.”⁷⁸

The Philippine Supreme Court’s approach in [*Ocampo*]—which is to separate law and history—displays either naiveté or an insidious attempt to honor a dictator.

* * *

The impact of [*Ocampo*] is doubly significant because the Marcos regime’s atrocities are documented. Expunging Marcos’ records by clearing the path to his interment deprives his victims of human rights abuses “to recover their self-respect as holders of human rights.”⁷⁹

What is worse, however, is that in hindsight, the burial plays an insidious role in the resurgence of the power of the Marcos family in Philippine politics. Because of the successful senatorial bid of the former Dictator’s daughter, the almost fruitful candidacy for a vice presidential post by his son, the renewed calls for the revision of the negative portrayal of Marcos’ administration in school textbooks, and a notable court dismissal of a case filed against the former first family for the recovery of their ill-gotten wealth, Gatmaytan noted that “some critics cite *Ocampo* as the trigger of [the Marcos historical revision] project.”⁸⁰ In this light, the Supreme Court, through *Ocampo*, “is not being regarded as an independent branch of government; rather it is regarded as an agent in the rehabilitation of Ferdinand Marcos.”⁸¹

⁷⁶ Dante Gatmaytan, *Judicial Historical Revisionism in the Philippines: Judicial Review and the Rehabilitation of Ferdinand Marcos*, 15 U. PA. ASIAN L. REV. 339, 369 (2020). (Citations omitted.)

⁷⁷ *Id.* at 341.

⁷⁸ *Id.* at 340.

⁷⁹ *Id.* at 367–68. (Citations omitted.)

⁸⁰ *Id.* at 379.

⁸¹ *Id.* at 379–80.

2. Marcos' Burial and its Betrayal of the State's Duty to Establish a Symbolic Reparations Regime

With the burial of the late Dictator at the LNMB, not only were the sacred grounds of the military cemetery defiled, but the memorialization efforts of the victims and their families became all for naught. Former Chief Justice Maria Lourdes Sereno encapsulated the implications of the former Dictator's burial in her dissenting opinion:

Instead of commemorating victims, however, the memorial proposes to honor Marcos, the recognized perpetrator of countless human rights violations during the Martial Law regime. The establishment of this memorial would accomplish the exact opposite of what is intended by symbolic reparation, and would consequently violate the obligations of the Philippines under international human rights law.

For reasons previously discussed, the burial of Marcos would be more than a simple matter of the interment of his remains, because it would involve his victims' right to symbolic reparations. Undoubtedly, to honor the very perpetrator of human rights atrocities would be the direct opposite of the duty of the state to respect, promote, and fulfill human rights.⁸²

With the burial of the former Dictator at the LNMB, the State lost sight of the concept that symbolic reparation is a process-based scheme that prioritizes the feelings of the stakeholders in the affected community, which in this case are the victims of Martial Law and their families. There have been strong and massive mobilizations leading to and following the burial of the former Dictator, organized not only by stakeholders but even the general public. It is not hard to see that the State, relying on a 9-5 voted and heavily-dissented decision of the Supreme Court, barely considered the stakeholders' sentiments in proceeding with the burial.

The State failed to live up to its positive duty to compensate for the injuries sustained by human rights violations victims and to rehabilitate the marred spirit of democracy and republicanism during Martial Law, the very vision by which the 1987 Philippine Constitution itself was founded upon.

A review of the deliberations of the 1986 Constitutional Commission sheds light on how the Commissioners took careful examination and

⁸² *Ocampo*, 807 SCRA 223, 402 (Sereno, C.J., dissenting).

consideration of every constitutional provision in light of overcoming, validating, and correcting the harrowing experiences during Martial Law.

On the opposition against the maintenance of foreign military facilities and bases in the Philippines, Commissioner Sarmiento stated the following:

Madam President, after having deposed a much-hated dictator th[r]ough people's power, after our traumatic experience with a tyrant, we are now in the process of redefining and reshaping the course of our lives. Part of this process of redefining our future is the writing of a new constitution which, hopefully, will bring about a new era of peace, freedom and independence in our land. It behooves all of us, Members of this Commission, that we consider the lessons we have acquired from the dark years of martial law and use these as guidelines for defining the [c]onstitution we want.⁸³

On the same issue, Commissioner Jose Nolleto shared with the rest of the Commission:

The Marcos regime has wrought great havoc to our country. It has intensified insurgency and is guilty of rampant violations of human rights and injustice that is [sic] has committed. It has brought about economic turmoil. It has institutionalized widespread graft and corruption in all levels of government and it has bled the National Treasury, resulting in great financial hemorrhage of our country.⁸⁴

On expressing his support towards a presidential system of government, Commissioner Ambrosio Padilla declared that:

During the many years of martial law, Mr. Marcos was the Chief Executive (Prime Minister or Premier) in the parliamentary system as originally initiated in the 1973 Constitution. Thereafter, he advocated the return to the presidential system with stress or emphasis on a "strong" President for our developing country. We all know that even under the 1935 Constitution, the Chief Executive was already a strong President. But Mr. Marcos, under the martial law regime, arrogated unto himself more powers and we were the sorry victims of that accepted principle that "power tends to corrupt, and absolute power corrupts absolutely."⁸⁵

⁸³ 4 RECORD CONST. COMM'N 621 (Sept. 13, 1986).

⁸⁴ *Id.* at 583 (Sept. 12, 1986).

⁸⁵ *Supra* note 48, at 51 (June 4, 1986).

The closing remarks message of the 1986 Constitutional Commission President Cecilia Muñoz-Palma, however, presents a holistic culmination of the efforts of the Commissioners to draft a Constitution, which not only corrected the lapses and weaknesses of the previous charters but also strengthened the protection against any future aggrandizement of power by a cunning executive—a vision to depart from the lasting mark of dishonorable governance left by Martial Law:

The fires of patriotism which erupted in the Philippine Revolution of 1896 and produced the Magna Carta of Malolos, the intense desire and clamor for independence from foreign rule which inspired the eminent nationalists who framed the 1935 Constitution for the Philippine Commonwealth and which eventually became the Constitution of the Philippine Republic, the bitter experiences of the nation under a Constitution imposed upon the people under the aegis of martial rule — all these forces played a part in the framing of the new Charter of 1986 in this year of Our Lord.

A beautiful irony which cannot be overlooked is the fact that this new Constitution was discussed, debated, and finally written within the walls of this hall which saw the emergence of what was called by its author a “constitutional authoritarianism,” but which, in effect, was a dictatorship, pure and simple. This hall was the seat of a combined executive and legislative power skillfully placed in the hands of one man for more than a decade. However, the miracle of prayer and of a people’s faith and determined struggle to break the shackles of dictatorship toppled down the structure of despotism and converted this hall into hallowed grounds where the seeds of a newly found freedom have been sown and have borne fruit.

* * *

For the first time, the Charter contains an all-embracing expanded Bill of Rights which constitutes the cornerstone of the structure of government. Traditional rights and freedoms which are hallmarks of our democratic way of life are reaffirmed. The right to life, liberty and property, due process, equal protection of the laws, freedom of religion, speech, the press, peaceful assembly, among others, are reasserted and guaranteed. The Marcos provision that search warrants or warrants of arrest may be issued not only by a judge but by any responsible officer authorized by law is discarded. Never again will the Filipino people be victims of the much-

condemned presidential detention action or PDA or presidential commitment orders, the PCOs, which desecrate the rights to life and liberty, for under the new provision a search warrant or warrant of arrest may be issued only by a judge. Mention must be made of some new features in the Bill of Rights, such as: the privilege of the writ of habeas corpus can be suspended only in cases of invasion or rebellion, and the right to bail is not impaired during such suspension, thereby discarding jurisprudence laid down by the Supreme Court under the Marcos dispensation that the suspension of the privilege of the writ carried with it the suspension of the right to bail. The death penalty is abolished, and physical, psychological or degrading punishment against prisoners or detainees, substandard and subhuman conditions in penitentiaries are condemned.

* * *

The executive power is vested in the President of the Philippines elected by the people for a six-year term with no reelection for the duration of his/her life. While traditional powers inherent in the office of the President are granted, nonetheless for the first time, there are specific provisions which curtail the extent of such powers. Most significant is the power of the Chief Executive to suspend the privilege of the writ of habeas corpus or proclaim martial law.

The flagrant abuse of that power of the Commander-in-Chief by Mr. Marcos caused the imposition of martial law for more than eight years and the suspension of the privilege of the writ even after the lifting of martial law in 1981. The new Constitution now provides that those powers can be exercised only in two cases, invasion or rebellion when public safety demands it, only for a period not exceeding 60 days, and reserving to Congress the power to revoke such suspension or proclamation of martial law which congressional action may not be revoked by the President. More importantly, the action of the President is made subject to judicial review, thereby again discarding jurisprudence which render the executive action a political question and beyond the jurisdiction of the courts to adjudicate.

For the first time, there is a provision that the state of martial law does not suspend the operation of the Constitution nor abolish

civil courts or legislative assemblies, or vest jurisdiction to military tribunals over civilians, or suspend the privilege of the writ.⁸⁶

Clearly, the burial was the State's definitive betrayal of the spirit on which the 1987 Constitution was founded.

One cannot help but compare the fate of the remains of the former Dictator with the remains of General Franco in Spain. With the socialist government in power, the exhumation of Franco's remains, despite heavy opposition from the decedent's family and supporters from the far-right, was completed. For four-and-a-half decades, the remains of the late General laid in the Valley of the Fallen in Madrid, a mausoleum where at least 33,000 civilians who died during the reign of Franco in Spain, were buried.⁸⁷

Criticizing the burial of General Franco in the Valley of the Fallen, Special Rapporteur to the United Nations Pablo de Greiff laid down the historical and political implications of the act on the victims of the Spanish Civil War:

As it stands at present, the site does not offer any form of information or sign that explains the predominance of Francoist and fascist symbolism and the exaltation of the "winning" side in the Civil War. Nothing explains the ambiguous character or the belated idea of giving the place a sense of "reconciliation". There is no account of the fact that it was built with the forced labour of thousands of political prisoners under inhuman conditions. Nor does it offer any information about the bodies of the almost 34,000 persons who are buried there, or about the fact that many of the remains were transferred there without the consent and/or the knowledge of their families. There is no explanation of who José Antonio Primo de Rivera was, nor of why he was buried in the centre of the Basilica, or why General Francisco Franco was buried there without having been a Civil War victim.

⁸⁶ Cecillia Muñoz-Palma, *Closing remarks of the President of the Constitutional Commission at the final session, Oct. 15, 1986*, OFFICIAL GAZETTE, available at <https://www.officialgazette.gov.ph/1986/10/15/closing-remarks-of-the-president-of-the-constitutional-commission-at-the-final-session-october-15-1986/> (last visited Jan. 8, 2021).

⁸⁷ Raphael Minder, *Franco's Remains Are Exhumed and Reburied After Bitter Battle*, N.Y. TIMES, Oct. 24, 2019, available at <https://www.nytimes.com/2019/10/24/world/europe/franco-exhumed.html>.

The site can be put to good use and “reinterpreted”, with suitable techniques and pedagogy, in favour of the promotion of truth and memory, and given an educational and preventive purpose. It can hardly be construed as a place devoted to peace and reconciliation, so long as silence is maintained about the facts relevant to the context and origin of the site, and especially while the flower-covered tomb of the dictator remains in the centre of the monument.⁸⁸

The same was observed by former Chief Justice Sereno in her dissenting opinion. Citing the report of De Greiff, the former Chief Justice highlighted that there is a need to “recontextualize” the meaning that the Valley of the Fallen began to hold in Spain because of General Franco’s burial at the same plot, i.e. the exaltation of Francoism. Proceeding from this, the Chief Justice wrote in her dissenting opinion:

The necessity for the reinterpretation and ‘recontextualization’ of the *Valle de los Caídos* highlights the fact that far from being an ordinary burial plot, the final resting place of a dictator and perpetrator of human rights violations is a symbol and a source of meaning. The meaning it conveys, particularly to the victims of atrocities, cannot be underestimated.⁸⁹

B. The Removal of the Comfort Woman Statue

On April 27, 2018, the seven-foot bronze statue of a weeping woman erected along Roxas Boulevard as a historical marker to memorialize the suffering and sacrifices of Filipino comfort women was removed by the Department of Public Works and Highways (DPWH). When inquired about the reasoning behind the removal, the DPWH explained that it was necessary for the implementation of a drainage improvement project along the area.⁹⁰ Interestingly, the removal was made days after the Japanese embassy aired its disappointment over the erection of the statue, lamenting the attempt to break its perceived strong ties between Japan and the Philippines. It was reported that Japanese Internal Affairs and Communications Minister Seiko Noda

⁸⁸ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Mission to Spain*, ¶¶ 32–33, (July 22, 2014).

⁸⁹ *Ocampo*, 807 SCRA 223, 402, 404 (Sereno, C.J., dissenting).

⁹⁰ Alexis Romero, *Duterte backs removal of comfort woman statue*, PHIL. STAR, Apr. 30, 2018, available at <https://www.philstar.com/nation/2018/04/30/1810658/duterte-backs-removal-comfort-woman-statue>.

expressed this sentiment to President Duterte himself during a courtesy call on January 9, 2018.⁹¹

Following the incident, President Duterte expressed approval of the removal, explaining that Japan, throughout the years, had already paid enough for its war atrocities, which included the implementation of the horrid comfort women system in countries like Korea and the Philippines.

The Japanese has [sic] paid dearly for that. *Iy[o]ng reparation started many years ago. Humag na lang natin insultuhin [...] It is not the policy of the government to antagonize other nations[.]*

* * *

*Masakit kasi na ulit-ulitin and you start to imagine how they were treated badly[.]*⁹²

President Duterte, however, recognized that the statue was a manifestation of the people's freedom of expression; thus, he advised that the statue be placed elsewhere, instead of standing along Roxas Boulevard where the Japanese Embassy may be found.⁹³

A review of the country's reparation efforts to address the injuries suffered by the victims of the Comfort Women system leads to the observation that such have largely consisted of material reparations. Among the famous reparation efforts then was the Asian Women's Fund (AWF) which, interestingly, was initiated by Japan. Larry Niksch, in *Japanese Military's Comfort Women*, described and enumerated the financial reparations under the AWF:

The Asian Women's Fund announced three programs for former comfort women who applied for assistance: (1) an atonement fund that paid two million yen (approximately \$20,000) to each former comfort woman; (2) medical and welfare support programs for former comfort women, paying 2.5-3 million yen (\$25,000-\$30,000)

⁹¹ Kyodo News, *Japan voices regret to Duterte over 'comfort women' statue*, ABS-CBN NEWS, Jan. 10, 2018, at <https://news.abs-cbn.com/news/01/10/18/japan-voices-regret-to-duterte-over-comfort-women-statue>.

⁹² *Let's not insult Japan: Duterte backs removal of 'comfort woman' statue*, ABS-CBN NEWS, Apr. 29, 2018, at <https://news.abs-cbn.com/news/04/29/18/lets-not-insult-japan-duterte-backs-removal-of-comfort-woman-statue>. (Emphases supplied.)

⁹³ *Id.*

for each former comfort woman; and (3) a letter of apology from the Japanese Prime Minister to each recipient woman.

The atonement fund issued payments directly to former comfort women from 1996 through 2002, when it ceased operations. During that time, it paid 565 million yen (approximately \$5.7 million) to 285 former comfort women. The medical and support programs continued beyond 2002 in some countries. As of March 2006, the Asian Women's Fund provided 700 million yen (approximately \$7 million) for these programs in South Korea, Taiwan, and the Philippines; 380 million yen (approximately \$3.8 million) in Indonesia; and 242 million yen (approximately \$2.4 million) in the Netherlands.⁹⁴

Pursuant to this, a Memorandum of Understanding was signed between AWF and the Philippines “for medical and welfare support programs for former comfort women,” to be implemented by the Department of Social Welfare and Development (DSWD).⁹⁵

Aside from this, however, there were no records of active pursuits towards symbolic reparation on the part of the Philippines. In the controversial⁹⁶ case of *Vinuya v. Executive Secretary*,⁹⁷ where the Supreme Court had the opportunity to revisit the horrors of the Comfort Women system and to retrace the struggle of the victims for reparations, the Court even emphasized that the representation of the claims of Filipino comfort women against Japan is discretionary on the Philippine government. The Court ultimately decided that the determination of whether or not to espouse the Malaya Lola's claim was a political question because it sought to inquire into

⁹⁴ Larry Niksch, *Japanese Military's Comfort Women*, ¶¶11–12, Apr. 10, 2006, available at <https://www.awf.or.jp/pdf/h0076.pdf>. (Citations omitted.)

⁹⁵ *Id.* at ¶19. (Citations omitted.)

⁹⁶ In 2010, petitioners Isabelita C. Vinuya et al filed a supplemental motion for reconsideration against the ruling of the Supreme Court in *Vinuya v. Executive Secretary*, penned by Former Associate Justice Mariano Del Castillo. The petitioners accused Justice Del Castillo of “manifest intellectual theft and outright plagiarism”, alleging that the former Justice “cop[ie]d without acknowledgment” from the academic works of three notable authors. See *In re* Del Castillo, A.M. No. 10-7-17-SC, 632 SCRA 607, Oct. 12, 2010.

In addition, the dissenting opinion of then Associate Justice Maria Lourdes Sereno, included names of other authors whose works were likewise allegedly plagiarized in the case of *Vinuya*.

However, in a *per curiam* Decision, the Court dismissed the charges of plagiarism, twisting of cited materials, and gross neglect against Justice Del Castillo.

⁹⁷ G.R. No. 162230, 619 SCRA 533, Apr. 28, 2010.

the exercise of a power that exclusively belonged to the Executive Department.⁹⁸

The Court added:

[T]he Executive Department has determined that taking up petitioners' cause would be inimical to our country's foreign policy interests, and could disrupt our relations with Japan, thereby creating serious implications for stability in this region. For us to overturn the Executive Department's determination would mean an assessment of the foreign policy judgments by a coordinate political branch to which authority to make that judgment has been constitutionally committed.⁹⁹

*1. The Removal of the Comfort Women Statue
and the Role it Plays in the History of Symbolic
Reparation Policies in the Philippines*

Assessing the status of comfort women markers vis-à-vis the symbolic reparation policies of the State is significant when one realizes that the weaponization of sexual slavery in armed conflicts persists today. Citing various accounts of sexual violence against women during the Guatemalan civil war from 1960 to 1996, Kelly D. Askin in her article, *Comfort Women – Shifting Shame and Stigma from Victims to Victimiziers*, observed that:

Although sex crimes have always been rampant during wartime, some of the forms these crimes take and the reasons for their commission are changing. Spontaneous, random, or isolated acts of rape and other gross mistreatment of women and girls have always occurred and continue to occur during wartime. And while troops have on countless occasions lost all discipline, order, and decency, and committed rape and other crimes without restraint, contemporary wars are evincing a more deliberate, strategic approach to the perpetration of sex crimes. Increasingly, these crimes form part of a systematic plan or policy that rewards, encourages, or actually orders sexual violence as part of a coordinated effort to terrorize, demoralize, subjugate, and ultimately destroy the opposition group.¹⁰⁰

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Kelly Askin, *Comfort Women - Shifting Shame and Stigma from Victims to Victimiziers*, 1 INT'L CRIM. L. REV. 5, 9 (2001). (Citations omitted.)

With the increasing height of armed conflicts in the rural parts of the Philippines, “[w]omen who decide to stay in their villages are easy prey to rape and other forms of sexual abuse.”¹⁰¹ Now more than ever, therefore, the discussion on the historical, cultural, and social repercussions of violence against women, whether during peace or wartime, must be opened once more, with the narrative of comfort women victims in the Philippines heaping with warnings. Sancho further expounds on this:

Violence against women is an expression of power and domination over women within the family and in the community. The use of violence to maintain the subservience of women and peoples stands as a major obstacle to the achievement of peace and to overcoming all violence. Violence represents one of the greatest threats to world peace. Women are most often the direct victims of the violence of war and other crisis situations. The effect of militarization and the resultant war culture penetrates the [day-to-day] experiences of women and manifests itself in various forms of violence in women’s lives.¹⁰²

*2. The Comfort Women Statue’s Removal
as a Betrayal of the State’s Duty to
Establish a Symbolic Reparations Regime*

It should not come as a surprise that the statue of a weeping comfort woman erected through the efforts of the Tulay Foundation, a non-profit organization, was removed with backing from the Executive Department’s highest official after it earned the ire of the Japanese embassy. The removal pushed through even if the erection of the statue was approved and supported by the National Historical Commission of the Philippines.

Similar to the plight of stakeholders in the burial of the former Dictator at the LNMB, there was also a clear disregard for the insights and feelings of the victims and their families with the removal of the statue. Calls for the return of the statue were made by various organizations, led by women’s group Gabriela, as well as Kaisa Para sa Kaunlaran, represented by Teresita Ang See, an organization affiliated with Tulay Foundation. They lamented what they perceived as subservience of the Philippine government

¹⁰¹ Nelia Sancho, *The Filipino Comfort Women Issue and Its Relevance to Contemporary Situations*, in INTERNATIONAL SYMPOSIUM ON FILIPINO COMFORT WOMEN: PAPERS AND PROCEEDINGS 47 (Ida Mae Fernandez, ed., 1994).

¹⁰² *Id.* at 46.

to the Japanese¹⁰³—ironically the same fate suffered by the Philippines during World War II. The Gabriela Party List even called for a legislative inquiry on the removal of the statue, remarking that the removal “blackens the memory of abused comfort women who died without even getting a formal apology from the Japanese government for the historical injustice which they suffered[.]”¹⁰⁴

A comparison of the Philippines’ experience with the erection of Comfort Woman statues in South Korea and in Taiwan proves that the former does not have a concrete grasp of the significance of symbolic reparation. In South Korea, the “Statue of Peace” was erected in 2011, following the 1000th day of weekly Wednesday Civic Rallies conducted to force the Japanese government to acknowledge its war crimes concerning the comfort women system. Unlike in the Philippines where the statue was erected in a place relatively close to the Japanese embassy, the Statue of Peace was established directly in front of the embassy. Despite calls for the demolition, the South Korean government and the Korean Council for Women Drafted for Military Sexual Slavery by Japan stood firm with its decision to erect the statue. Over the years, various museums dedicated to the remembrance of comfort women were also established in numerous provinces across South Korea.¹⁰⁵

Adding to this memorial marker, the South Korean government recently announced the celebration of a “Comfort Women Day” every August 14th, to commemorate the first South Korean comfort woman testimony made by Kim Hak-sun. South Korean President Moon Jae-in, in a report, described the comfort women system as a “crime against humanity[.]” He “pledged [that] the South Korean government will respect the women as the main parties of the issue, and pursue commemorative projects to restore their honor and dignity[.]”¹⁰⁶

¹⁰³ Xiao Chua, *Day of collective shame: When the comfort woman statue was removed*, GMA NEWS ONLINE, Jan. 1, 2019, at <https://www.gmanetwork.com/news/opinion/content/680016/day-of-collective-shame-when-the-comfort-woman-statue-was-removed/story/>.

¹⁰⁴ *Gabriela seeks House probe on removal ‘comfort woman statue*, ABS-CBN NEWS, May 10, 2018, at <https://news.abs-cbn.com/news/05/10/18/gabriela-seeks-house-probe-on-removal-of-comfort-woman-statue>.

¹⁰⁵ Hyun Kyung Lee & Shu-Mei Huang, *The contested gazes of ‘Comfort Women’ statues in Korea and Taiwan*, CAMBRIDGE HERITAGE RESEARCH CTR., available at <https://www.heritage.arch.cam.ac.uk/publications/spotlight-on/comfort-women>. (last visited on Apr. 14, 2020).

¹⁰⁶ Joyce Lee & Yimou Lee, *South Korea marks first ‘comfort women’ day, joined by protestors in Taiwan*, REUTERS, Aug. 14, 2018, at <https://www.reuters.com/article/us-asia->

Meanwhile, in Taiwan, the first Comfort Woman statue was erected in 2018, through the efforts of Tainan Association for Comfort Women's Rights, a non-profit organization. The unveiling was reportedly impliedly supported by the Nationalist Party, the Koumintang, as its location near the party's office was approved by the latter. The Japanese embassy has since called for the removal of the statue, to no avail.¹⁰⁷ It is interesting to note that the statue was not the first memorial marker established in remembrance of Taiwanese comfort women. In December 2016, "Ama Museum" was unveiled in Taiwan, dedicated to honoring the lives and stories of women forced into Japanese sex slavery during World War II.¹⁰⁸

C. The Repatriation of the Balangiga Bells

On December 11, 2018, 117 years from the day when the Bells were taken from the town of Balangiga by the American colonial forces to commemorate its successful retribution against the insurrection of the locals, the Balangiga Bells returned ashore to the Philippine islands.¹⁰⁹ After years of appeals and negotiations by the Philippine government and various private organizations, the U.S. Government finally acceded to consider the repatriation of the Bells taken as war booty, following the request made by President Duterte in his State of the Nation Address in 2017.¹¹⁰

To recall, the Bells were instrumental in signaling the surprise civilian attack by the townspeople of Balangiga against the American colonial forces then stationed in Samar in 1901. As retribution against the insurrection which claimed the lives and injured many members of the foreign troop, the American forces hatched what would later be known in history as the infamous "Balangiga Massacre" which razed the little town in Samar and left it in a "howling wilderness[.]"¹¹¹ Shortly after the carnage, the Bells were taken by the foreign troops before they returned to the U.S. Before the Bells'

comfortwomen/south-korea-marks-first-comfort-women-day-joined-by-protestors-in-taiwan-idUSKBN1KZ07O.

¹⁰⁷ Lee & Huang, *supra* note 105.

¹⁰⁸ Elaine Hou & Lee Yu-cheng, *Taiwan's first 'comfort women' museum opens after decade of effort*, FOCUS TAIWAN, Dec. 10, 2016, at <https://focustaiwan.tw/society/201612100009>.

¹⁰⁹ Juan Go, *How the Filipinos in Balangiga avenged the Chinese in Peking*, ABS-CBN NEWS, Nov. 25, 2018, at <https://news.abs-cbn.com/ancx/culture/spotlight/11/25/18/how-the-philipinos-in-balangiga-avenged-the-chinese-in-pekings>.

¹¹⁰ Michael Charleston "Xiao" Chua, *The Bells of Balangiga: From war trophy to goodwill symbol*, ANCX, Nov. 17, 2018, at <https://news.abs-cbn.com/ancx/culture/spotlight/11/17/18/the-bells-of-balangiga-from-war-trophy-to-goodwill-symbol>.

¹¹¹ Go, *supra* note 109.

repatriation to the Philippines, two of them were displayed in the state of Wyoming, while the other was brought and displayed in one of the U.S. air bases in South Korea.¹¹²

One hundred and seventeen years since the atrocities perpetrated by the Americans in the little municipality of Balangiga, Samar, the Bells, which symbolized the brief but nonetheless successful insurrection of the townspeople, finally found their way back to their hometown. Throughout the decades since their seizure by the American forces, there have been numerous attempts, both domestically and internationally, to repatriate these important cultural artifacts back to the Philippines. Most notable among these efforts was when former U.S. President Bill Clinton promised the return of the Bells to then President Fidel V. Ramos, in the face of dissent not only from the members of the U.S. Air Force, but also from the officials and residents of the state of Wyoming, where the Balangiga Bells were displayed as military heritage.¹¹³ Despite the hopeful promise of then U.S. President Clinton, the return was for naught when then Wyoming Senator Craig Thomas filed a bill entitled “A Veterans Memorial Physical Integrity Act of 1998” which expressly “prohibit[ed] the return of veterans’ memorial objects such as war booty without exemption[.]”¹¹⁴ The bill was filed in the U.S. Congress shortly before President Ramos went to the U.S. for the repatriation of the Bells.¹¹⁵

Other efforts for the repatriation of the Bells mostly came from the initiatives of the residents of Balangiga and numerous non-profit organizations, such as the Balangiga Research Group¹¹⁶ and the East Coast Group.¹¹⁷

¹¹² Chua, *supra* note 110.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* The Balangiga Research Group was focused on the publication of academic and scholarly resources on the history of the Balangiga Massacre while actively campaigning for the return of the bells to the Philippines. Its members consisted of Rolando Borinaga, a historian from Leyte; Bob Couttie, a British filmmaker; and Jean Wall, daughter of a former American soldier alleged to be the first attacked in the Balangiga Massacre.

¹¹⁷ *Id.* The East Coast Group “sponsored two trips of Bishop Leonardo Medroso of the Diocese of Borongan to the United States. [...] Aside from launching an internet signature campaign with an open letter to President Bush, the US Congress and the Helsinki Commission, he also brought in his second trip a petition signed by hundreds of his parishioners to return the bells and was turned over to the secretariat of the US Congress. Although he never met a congressman, a House Resolution was led in the US Congress by California Rep. Bob Filner on 13 June 2005, which, ‘Urg[ed] the President to authorize the

But on December 11, 2018, the Bells finally landed back on Philippine soil. Their successful repatriation was initiated, this time around, by President Duterte in his State of the Nation Address in 2017, where he remarked:

Those bells are reminders of the gallantry and heroism of our forebear[er]s who resisted the American colonizers and sacrificed their lives in the process[.] [...] Give us back those Balangiga Bells. They are ours. They belong to the Philippines. They are part of our national heritage. *Isauli naman ninyo. Masakit [?]yon sa amin.*¹¹⁸

However, credit must also be given to numerous American war veteran organizations that started the campaign for the return of the Bells to the Philippines. Their efforts paved the way for the enactment of the “US National Defense Authorization Act for Fiscal Year 2018,” which contained a provision on the “Modification of Prohibition of Transfer of Veterans Memorial Objects to Foreign Governments without Specific Authorization in Law.”¹¹⁹

*1. The Repatriation of the Balangiga Bells
and the Role it Plays in the History of Symbolic
Reparation Policies in the Philippines*

The repatriation of the Bells represents a major milestone vis-à-vis the symbolic reparation policies of the State. More than just getting back properties that rightfully belong to the country, the return of the Bells also ignited interest in the exploration of the Philippines’ historical and cultural development throughout the years. With their return, a piece of the country’s identity was revived, sparking hope for renewed policies toward self-determination, especially during these times when certain foreign policy issues test the nation’s allegiance with its allies or its constituents. Kathleen Tantuico notes:

Humans tend to attach cultural and historical value to certain objects. This has been a recurring practice for distinct populations since time immemorial. With the emergence of an international community, such objects have been regarded as identity of states.

transfer of ownership of one of the bells taken from the town of Balangiga on the island of Samar, Philippines, which are currently displayed at F.E. Warren Air Force Base, to the people of the Philippines.”

¹¹⁸ *Id.* (Emphasis in the original.)

¹¹⁹ *Id.*

The value attached to such objects is crucial to nation-building that there is a necessity to codify the means to ensure their protection.

* * *

In material culture, cultural heritage is defined as a way by which human life is manifested through a representation of a particular view of life. Cultural heritage provides a “tangible link” to the past. It is also considered to describe objects inherited from past generations that relate to a society’s cultural development. Cultural development includes movable objects such as archaeological resources and works of art, and immovable objects such as buildings, monuments[,] and sites. Aside from objects and tangible property, cultural heritage also includes an intangible aspect, such as language, music, drama, oral traditions, and other rituals.¹²⁰

*2. The Return of the Bells and the State’s
Performance of its Duty to Establish a Symbolic
Reparation Regime*

Clearly, the Philippines has been successful in the observance of its positive duty towards symbolic reparation in this case. The repatriation of the Balangiga Bells in the country symbolized the reparation for the atrocities committed by the American forces in the town of Balangiga, Samar 117 years ago. The repatriation bears great significance not only for the town of Balangiga which was the cradle for the few successful insurrections during the Philippine-American War, but also for numerous researchers, historians, and philanthropists who dedicated their prime years in negotiating for the return of the Bells. The return of the Bells manifests the State’s assertion over its right to self-determination and its efforts towards decolonization. The implications of the return in boosting the country’s dedication to upholding cultural heritage will resonate through the coming generations, as Tantuico discussed:

Cultural heritage is manifested through tangible objects, including artifacts that may be unique to certain states and civilizations. The removal of cultural property from source countries turns them into mere commodities by their current possessors. Without being in the right context, the purpose for which cultural property is even considered as such, over ordinary property, cannot be fully realized.

¹²⁰ Kathleen Felise Constance D. Tantuico, *The Return of Unregistered Movable Cultural Property of the Colonial Philippines: Perspectives in International Law*, 91 PHIL. L.J. 861, 876–77 (2018). (Citations omitted.)

For former colonies like the Philippines, the development of national identity can be achieved successfully through the association with a study of cultural objects created by their indigenous populations.¹²¹

With the return of the Bells, the Department of National Defense remarked that it signaled the “time to heal the wounds of the past, move on, and look to the future.”¹²²

V. FILLING THE GAPING HOLE OF A SYMBOLIC REPARATION REGIME IN PHILIPPINE LAW AND ITS LEGAL OVERTONES

One of the most common mistakes when it comes to reparation is the perception that any damage or injury, no matter how big or small, may be sufficiently compensated in monetary terms. Because of this limited view, many states often enclose their reparation schemes within the bounds of monetary compensation grants, such that when the damages suffered have been ameliorated, the policy of rehabilitation stops, and hopes for policies towards symbolic reparation are not pursued. Proceeding as well from this perception is the belief that this kind of restorative response is the ultimate rehabilitation mechanism, despite numerous available alternatives. However, as has been discussed earlier, the benefits of symbolic reparation go beyond political repercussions and transcend the psyche, morality, and even culture of a society.

The Philippines, as a country with more than a century of experience under colonial rule, a significant memory of war injuries, a notorious history of dictatorship, and a continuing story of struggling democratic and republican institutions, must grasp the concept of restorative justice as transcending not only the material aspects of humanity, but the political, social, cultural, and moral standards of citizenship. The Philippines must recognize that symbolic reparation is a concrete goal that may be achieved only when it acknowledges that its stakeholders experience human rights atrocities differently and deeply.

The present state of symbolic reparations in Philippine law and the State’s symbolic reparation experiences on three preceding historical

¹²¹ *Id.* at 885–86. (Citations omitted.)

¹²² Rambo Talabong, *Balangiga Bells back in the Philippines*, RAPPLER, Dec. 11, 2018, at <https://www.rappler.com/nation/218657-balangiga-bells-return-philippines-december-11-2018>.

incidents—namely, the burial of former President Marcos at the LNMB, the removal of the Comfort Woman statue, and the repatriation of the Balangiga Bells—demonstrate the need for the realization and enforcement of the right of victims and their families to symbolic reparation. While a general law that captures the nuances of the injuries suffered for every violent crime experienced is not plausible, there is comfort in knowing that the people can assert a right to a holistic remedy that will recognize and remember their sacrifices and will protect them against future abuses. However, having reviewed the status of the symbolic reparation regime in the Philippines, a large, gaping hole was revealed—the source of which repercussions such as the stakeholders’ inability to assert their right to an effective remedy was magnified.

Readily observable from the historical incidents examined is the fact that the lack of any legal remedy for reparation subjects the right to symbolic reparation to the mercy of the sitting political power. If the interests of the victims and their families for symbolic reparation align with the interests advanced by the ruling political power, then the chances for the successful invocation of the remedy increases, and vice versa. This was clearly seen in the removal of the Comfort Woman statue, indicating that the erection of the symbolic reparation measure along Roxas Boulevard near the Japanese Embassy ran against the prevailing sentiments of President Duterte who even remarked that Japan had already paid enough through its past reparation efforts. The burial of former President Marcos at the LNMB manifests this much so, as the burial was done at the behest of President Duterte’s desire to fulfill a campaign promise.

This situation places the victims and their families’ symbolic reparation rights at the discretion of the ruling political power, one that depends on political will rather than on the right’s inherent legitimacy and value. The willingness of the State to provide reparation and to protect against future oppression is conditioned on the prevailing motives of the sitting political heads. Thus, any initiative to assert the rights of the victims and their families are prompted not by a set of incentives and sanctions that may come from the right’s enforcement or violation, but by the current political agenda prioritized by the State.

Quite apparent as well from the three preceding historical events is the fact that none of the measures adopted are process-based, or in a manner whereby all the stakeholders affected and to be affected are constantly consulted on what measures will restore their losses. This was clearly demonstrated in the case of the removal of the Comfort Women statue, where

despite the victims' strong opposition against the act, the statue was ultimately removed. Similarly, the burial of the former Dictator at the LNMB was clearly done without consultation with the Martial Law victims.

Because of the disregard of the primary stakeholders affected, the victims and their families are left with no choice but to accept reparation the government thinks they deserve, even though their expectation for a more comprehensive form of rehabilitation is not met. With no chance for a legal remedy to penalize the violation of their right to an effective reparation, they are forced to settle with whatever small ounce of symbolic reparation the State offers, without hopes of demanding a better and more fitting form of rehabilitation.

While there are some laws which attempted to establish symbolic reparation, the same failed to demonstrate a mechanism of enforcement that may be copied by future stakeholders to assert their right to an effective remedy. Even though laws like Rep. Act No. 10368 explicitly provided for memorialization measures through the provision of museums and libraries, the policy has yet to come to fruition, revealing the lack of any initiative to enforce the rights codified. The constitutional provision found in Article III, Section 12(4) could have been a significant and strong source of rights were it not for its need to be executory. The deliberations of the 1986 Constitutional Commission provide a good reference for a policy towards a more holistic form of effective remedy, which can include the observance of symbolic reparations, but the implementation of the provision does not come easy when the Commissioners themselves believe that it requires an implementing law to be enforceable.

Clearly, these repercussions may be remedied with the codification into law of the victims and their families' right to symbolic reparation. Through a law, the right becomes easily enforceable and judicially demandable, notwithstanding the contrary policies or sentiments of the ruling political heads. In addition, besides outlining the rights of the victims and their families and the corresponding duties of the State, the law may likewise provide a system for enforcement and implementation that will assure that the process-based aspect of restorative justice is reflected in the reparation regime, such that the conditions and views of all stakeholders are considered and valued.

The other significant effect of the process of codification lies in its theoretical implications. Having these rights of reparation enforceable and

demandable in law encourages eventual changes in the norms and values of society, while legitimizing the victims' versions of historical truth.

Codifying symbolic reparation rights might assist in altering the people's perception of and establishing values in transitional justice, thereby empowering the law to promote social consciousness for the victims' right to reparation and the State's correlative duty to provide for and protect the same. A codified law on such right can be used as a "device of organized social action directed toward achieving social change."¹²³ As Dror said:

Law plays an important indirect role in regard to social change by shaping various social institutions, which in turn have a direct impact on society. Thus, a law setting up a compulsory educational system has a very important indirect role in regard to social change, by enabling operation of educational institutions which play a direct role in social change.

* * *

To a considerable extent, law exerts an indirect influence on general social change by influencing the possibilities of change in the various social institutions. For example, the existence of a patent law protecting the rights of investors encourages inventions and further change in the technological institutions, which in turn may bring about basic general social change. The absence of freedom to associate and disseminate ideas can prevent, or at least delay, the spread of new social ideas, and thus exert a very important basic influence on the processes of social change in society.¹²⁴

Apart from serving as a valuable tool for change, the codification of symbolic reparation rights will likewise be a reflection of the events that shaped society, history, and truth. As shared by Stina Loytomaki:

The law is an important instrument in struggles for recognition of different victims of past injustices because law formalises and legitimises particular narratives of victimhood. The law turns private memories into public narratives. Court decisions and memory laws impose a normative judgment on the past, appearing to bring moral clarity to the disoriented world. The law helps to establish 'facts' in an authoritative way, and acts as a means by which a difficult past is rationalised and mastered. The law imposes meaning on information, often clarified only within the axis of what

¹²³ Yehezkel Dror, *Law and Social Change*, 33 TUL. L. REV. 787, 796 (1958-1959).

¹²⁴ *Id.* at 797. (Citations omitted)

is legal and illegal, but taken by the public to be equitable with moral right and wrong. As such, the law serves the interests of groups that claim a legacy of oppression and embrace a political agenda which forces them to present their particular interpretation in universal, absolute terms.¹²⁵

Codifying the victims and their families' symbolic reparation rights not only presents a platform of recognition, but that of legitimization as well—the same platform that validates and affirms their experiences with oppression and impunity. It establishes a version of the events that occurred from their perspective—one that supports their claim for reparations and addresses their concerns for rehabilitation. At the same time, it acknowledges that the historical event affects other major political actors, not only the victors and the vanquished, but more importantly, the victims and their families.

VI. PROSPECTS TOWARDS CODIFYING SYMBOLIC REPARATION RIGHTS THROUGH INTERNATIONAL LEGAL INSTRUMENTS

The foundation for symbolic reparation rights may be sourced from existing international legal instruments that recognizes the significance of an “effective remedy.” Article 2 of the International Covenant on Civil and Political Rights (ICCPR) lays down the duty of states to assure the grant of effective remedies to the victims of human rights atrocities:

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;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

¹²⁵ Stina Loytomaki, *Law and Memory: The Politics of Victimhood*, 21 GRIFFITH L. REV. 1, 18 (2012).

(c) To ensure that the competent authorities shall enforce such remedies when granted.¹²⁶

While the ICCPR establishes helpful policies that recognize a person's right to an effective remedy, it was only in 2005 when clear guidelines on how this "effective remedy" may be achieved were drawn. Known as the "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") through Theo van Boven's report in 1993, revised twice in 1996 and 1997, these UN Guidelines provided a definitive set of concrete measures on how a State may enforce the right of the people to effective remedy under existing international human rights law.¹²⁷

The UN Guidelines offer a fresh and holistic approach on reparation as it proceeds from an understanding that victims' perspectives must be involved and reflected at every process of rehabilitation:

[T]he perspective of the victim is often overlooked. It appears that many authorities consider this perspective a complication, an inconvenience and a marginal phenomenon. Therefore, it cannot be stressed enough that more systematic attention has to be given, at national and international levels, to the implementation of the right to reparation for victims of gross violations of human rights.¹²⁸

The UN Guidelines recognizes not only the physical and economic injuries sustained by those affected, but also the mental and emotional suffering of victims.¹²⁹ Following this, it obliges states to attend to the

¹²⁶ International Covenant on Civil and Political Rights, 2, Dec. 16, 1966, 999 UNTS 171.

¹²⁷ Ellen Desmet, *The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: A landmark or Window - dressing? An analysis with special attention to the situation of indigenous peoples*, 24 S. AFR. J. HUM. RTS. 71, 74 (2008).

¹²⁸ UN Sub-Commission on the Promotion and Protection of Human Rights, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report submitted by Mr. Theo van Boven, Special Rapporteur*, at 53, ¶ 133, UN Doc E/CN.4/Sub.2/1993/8 (July 2, 1993).

¹²⁹ 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, 5 ISIL Y. B. INT'L HUMAN. & REFUGEE L. 333, 337 (2005). "For purposes of this document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial

psychological needs of the victims.¹³⁰ It also adopts a “forward-looking” approach, which mandates states to ensure 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.”¹³¹

To ensure the people’s right to memorialization, the following measures are provided:

Satisfaction should include, where applicable, any or all of the following:

- (a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) 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;

impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”

¹³⁰ *Id.* at 339–40. To wit:

Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

* * *

(e) Costs required [] for legal or expert assistance, medicine, medical services, and psychological and social services.

21. Rehabilitation should include medical and psychological care as well as legal and social services.

¹³¹ *Id.* at 337.

- (e) Public apology, including acknowledgment of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) 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.¹³²

Mechanisms to ensure non-repetition, on the other hand, may be found in the following provision:

Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law.¹³³

While the UN Guidelines is admittedly only a subsidiary source of international law under Article 38 of the Statute of the International Court of Justice, it nevertheless “identif[ies] mechanisms, modalities, procedures[,] and

¹³² *Id.* at 340.

¹³³ *Id.* at 340–41.

methods for the implementation of existing legal obligations under international human rights law and international humanitarian law,²¹³⁴ and thus may be adopted by states in the course of establishing their own reparation regime.

CONCLUSION

With centuries of experience under colonization, years of sacrifices made during the war, and the continuous fight for an honest government, one cannot be blamed for hoping that the Philippines has learned to value the significance of building a collective memory of true history and forging a resistance against any repetition of the hurtful past. The resilience of the people and the endurance of the government should have prepared the State to face and resist any challenges against its dignity and stability. However, the Philippines refuses to learn from the mistakes of its forebearers. The law stands vulnerable at the provocation of its previous enemies, with no anchor for sanctions that the victims and their families may cling onto.

This Note has shown that there is a gaping hole in the appreciation of the significance of symbolic reparation in Philippine law. The Note has likewise shown that this gaping hole blurs the right to symbolic reparation of victims and their families. The recent experiences of the country with the burial of former Dictator Ferdinand Marcos at the LNMB, the removal of the Comfort Women statue, and the repatriation of the Balangiga Bells manifest how the initiative for remedy rests on political powerplay rather than on a codified set of rights and sanctions in ensuring that reparations have been served. Furthermore, the Note observed that the most effective remedy that the State believes it can give to the victims is one riddled without consultation with the respective stakeholders, with many of the determining factors dependent on the existing interests, resources, and political capital of the sitting figures of power.

Not all hopes are lost for the Philippines in its struggle towards appreciating and codifying symbolic reparation rights. International law abounds not only with policies, but also concrete guidelines and measures on how a state may work towards enforcing the victims and their families' symbolic reparation rights. Even a comparative analysis with the measures

¹³⁴ *Id.* at 334.

taken by other countries that experienced the same violent crimes may be emulated.

In a world that sources culture from the collective consciousness of the people and that engraves marks of dignity through a collective memory of guilt and moral ascendancy, symbolic reparation rights cannot be disregarded. While past injuries and damages may not be fully restored, states must at least do everything in its capacity to rehabilitate the victims' loss of hope and morality. Failing to protect itself against the atrocity, in the first instance, may deserve sympathy. But falling into the traps warned against by history, for a second time, is just plain folly.

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