ALLUSION TO ALLEGATION: THE SUPREME COURT'S HISTORY-MAKING FUNCTION IN CRYSTALLIZING THE MARCOS ATROCITIES IN PHILIPPINE HISTORY*

*Deanna Clarisse M. Heceta***

ABSTRACT

While a nation's history has long been recognized as pivotal in the development of its legal system, the less often studied paradigm is the role a nation's legal system plays in the crystallization of its history. This Note argues that the Supreme Court of the Philippines, in failing to categorically recognize the human rights violations of the Marcos era, has shirked from the history-making function inherent in courts of law. The author highlights in particular how there has been unequal treatment in the recognition of Marcos as a plunderer on one hand, and as a human rights violator on the other. Because of this, it is ultimately submitted that the Supreme Court has fallen short of its obligation of granting justice to the victims of Martial Law.

"The greatest threat to freedom is the shortness of human memory."
—Chief Justice
Claudio Teehankee[1]

I. INTRODUCTION

What role does a nation's history play in the development of its legal system? Simply put, laws and legal systems necessarily come about as a result of history. In the wider, systematic sense, a nation's classification as either a

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** J.D., University of the Philippines College of Law (2020); A.B. Literature (English), Ateneo de Manila University (2016); Chair, Student Editorial Board, PHILIPPINE LAW JOURNAL Vol. 93.

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[1] Olaguer v. Military Commission No. 34 [hereinafter "*Olaguer*"], G.R. No. 54558, 150 SCRA 144, 178, May 22, 1987 (Teehankee, *C.J.*, *concurring*).

civil or a common law jurisdiction, for example, is largely based on the historical events that preceded the legal system's adoption. The Philippines, for one, is a special case; it has adopted principles from both civil and common law jurisdictions. This is a testament to the historical intricacies of the country's colonization by both the Spanish (who follow the civil law tradition) and the Americans (who have traces of the common law tradition from their own experience of colonization by England).

In the more piecemeal sense, one need only look at the Philippine Constitution to see how profound an effect history has on a nation's legal system. A direct consequence of the Martial Law era and the People Power Revolution that toppled the Marcos dictatorship, the 1987 Constitution introduced provisions that primarily aimed to prevent the abuses that marred Marcos' 20-year long reign. These provisions include the expansion of the power of judicial review,[2] the article on public accountability,[3] and prohibitions on public officers entering into numerous offices.[4]

Statutory laws also come about as a result of the need to either repeal or update older laws, while judicial doctrines[5] are sometimes promulgated to fill in gaps in the current legal system. The recognition of the Battered Woman Syndrome in a judicial doctrine,[6] for example, and the subsequent enactment

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[2] CONST. art. VIII, § 1(2). "Judicial power includes the duty of the court of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

[3] Art. XI, § 1. "Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives."

[4] Art. VII, § 13. "The President, Vice-President, the Members of the Cabinet, and their deputies or assistants shall not, unless otherwise provided in this Constitution, hold any other office or employment during their tenure. They shall not, during said tenure, directly or indirectly, practice any other profession, participate in any business, or be financially interested in any contract with, or in any franchise, or special privilege granted by the Government or any subdivision, agency, or instrumentality thereof, including government-owned or controlled corporations or their subsidiaries. They shall strictly avoid conflict of interest in the conduct of their office.

The spouse and relatives by consanguinity or affinity within the fourth civil degree of the President shall not during his tenure be appointed as members of the Constitutional Commissions, or the Office of the Ombudsman, or as Secretaries, Undersecretaries, chairmen or heads of bureaus or offices, including government-owned or controlled corporations and their subsidiaries."

[5] CIVIL CODE, art. 9. "No judge or court shall decline to render judgment by reason of the silence, obscurity or insufficiency of the laws."

[6] People v. Genosa, G.R. No. 135981, 419 SCRA 537, 542, Jan. 14, 2004.

of the Anti-Violence Against Women and Children Act,[7] were created to remedy a gap in the law which hampered the state's pursuit of its duty to protect the disadvantaged—in this case, women and children. In their totality, these legal developments were essentially born from key moments in Philippine history that: *first*, illustrate and make known to a nation what lacks or is unjust in their legal system; and *second*, give rise to developments in law that aim to cure such gaps or inequities.

The less often asked question, however, but one that is equally pressing in today's socio-political landscape, is this: what role does a nation's legal system play in the crystallization of its history?

This Note argues that the Philippine legal system, through Supreme Court decisions in particular, is a vital mode of capturing, recognizing, and retelling the socio-political nuances of crucial points in Philippine history, specifically, the Marcos regime. It likewise argues that this history-making function of the Supreme Court is a necessary element in the proper dispensation of justice, particularly in the context of resolving cases arising from or relevant to the Marcos atrocities.

For this goal, Part II discusses the theoretical basis of the history-making function of judicial bodies. It draws parallels from the Nuremberg Trials ("Trials") of post-Nazi Germany and argues that the same principles may be applied to municipal courts. Part III gives a brief background of the Martial Law regime under the dictatorship of Ferdinand Marcos, Sr. and analyzes the rising phenomenon of historical revisionism which slowly diminishes the nation's recognition and demands of accountability for the Marcos atrocities. Part IV analyzes cases wherein the Supreme Court ultimately failed to utilize its history-making function in the resolution of controversies before it, which the author argues has led to the failure of courts to properly appreciate and perpetuate an accurate account of Philippine history in its rulings. Part V expounds on the relevance of the history-making function of the Supreme Court by arguing that it is indispensable to the attainment of true justice for the victims of Marcos' human rights violations. Finally, Part VI provides recommendations that may be adopted by the judiciary to put a stop to the pervasive attempts at historical revisionism ongoing today.

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[7] Rep. Act No. 9262 (2004). Anti-Violence Against Women and Their Children Act of 2004.

II. THE JUDICIARY'S HISTORY-MAKING FUNCTION

A. The Entanglement of Law and History

According to Roscoe Pound, history possesses a dynamic role in law and society. More than just being an unmalleable piece of historical fact, a nation's history becomes an important consideration in the development and progression of legal systems toward encapsulating a society's values and standards. Thus:

> Nineteenth-century legal history-writing [...] did not think of a law which had always been the same but of a law which had grown. *It sought stability through establishment of principles of growth, finding the lines along which growth had proceeded and would continue to proceed, and it sought to unify stability and change by a combination of historical authority and philosophical history.* [...] *[Law] was declaratory of principles of progress discovered by human experience of administering justice and of human experience of intercourse in civilized society; and these principles were not principles of natural law revealed by reason, they were realizings of an idea, unfolding in human experience and in the development of institutions—an idea to be demonstrated metaphysically and verified by history.*[8]

Eventually, the general favor accorded to this historical school of thought began to deteriorate as the 19th century came to an end, which Pound attributes to the rise of philosophical attacks towards it. Justice Oliver Wendell Holmes, in particular, criticized certain characteristics of the historical school, such as: (1) its "habitual failure" to consider the need to justify rules of law through the social advantages in which it would result; (2) its "negative attitude" towards the idea that the law must be improved; and (3) its "rooted tendency" to consistently hold a rule as established, suitable, and necessary on the basis of some inflexible authority.[9]

The resultant disfavor propelled numerous members of the historical school to shift to different schools of thought, such as positivism, the economic interpretation of legal history, or historical materialism. Relevant to this discussion, however, was the taking on by Josef Kohler of a "neo-Hegelian philosophical jurisprudence," which advocated for the necessity of "creative activity." This, in turn, involved the adoption of "legal materials shaped by and adapted to the civilizations of the past, to the exigencies of

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[8] ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 9 (1923). (Emphasis supplied.)

[9] *Id.* at 10. (Citations omitted.)

civilization in the present," and the recognition of "a continually changing and moving civilization."[10]

Kohler's dynamic interpretation of the historical school of thought placed newfound emphasis on the status of legal materials as being, at its core, an adoption, development, and crystallization of what has existed in the past, as well as the values of the present. This process, according to Pound, highlights the pragmatic value of legal materials which, on their own, are able to crystallize history:

> Pragmatism sees validity in actions, not in that they realize the idea, but to the extent that they are effective for their purpose and in purposes to the extent that they satisfy a maximum of human demands. [...] The implication is that we need not fear to act. *Historical scepticism* [sic] [...] *teaches action by attacking the dogma of historical fatalism and the doctrine that what does not exist in historical idea is an idle hope. Activist idealism reaches a result directly opposite to the conclusion of the idealism of the past, which regarded the man who acted as a vain disturber of the rational and foreordained order.* The relativisms that are springing up on every hand are, on their practical side, philosophies of action with respect to something desired. [...] *When men are thinking thus a functional attitude in jurisprudence is inevitable.* [...] *It grows out of the need for action to meet the pressure of new demands consequent upon changes in the social order and of new desires both behind and involved in those changes.*[11]

It is for this reason that Professor Dante Gatmaytan argues that law and history are inextricable. According to him, "[c]ourts write history."[12] He states:

> Law constructs a history that it wants to present as authoritative. As Sarat and Kearns put it, in the adjudication of every dispute, "law traffics the slippery terrain of memory, as different versions of past events are presented for authoritative judgment. In the production of judicial opinions, 'law reconstructs its own past, tracing out lines of precedent to their compelling' conclusion."

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[10] *Id.* at 10–11, *citing* JOSEF KOHLER, RECHTSPHILOSOPHIE UND UNIVERSALRECHTSGESCHICHTE (1904).

[11] *Id.* at 11–12. (Emphasis supplied.)

[12] Dante Gatmaytan, *Judicial Historical Revisionism in the Philippines: Judicial Review and the Rehabilitation of Ferdinand Marcos*, 15 U. PA. ASIAN L. REV. 339, 354 (2020).

> "Judicial decisions are thus products of social memory; at the same time, they are one of the many social institutions that produce social memory."[13]

This Note takes off from this theoretical basepoint. Essentially, there is a need to recognize the pragmatic value of legal materials as that which collates and encapsulates a society's past, its present values, and its goals for the future. Prior to this, a historical approach merely meant knowing the basis of a legal material's historical existence but being too paralyzed to improve upon it. This is the "historical fatalism" that Kohler pointed out. Thus, Kohler argued that whatever history a society may have, whether in the legal sphere or otherwise, such should be seen as a starting point to change the future.

B. The Crystallization of History by International Tribunals

To illustrate the interaction of law and history, take as an example the international community's response after the fall of the Nazi regime in Germany and the resulting denouement of World War II. A revolutionary turning point for the international criminal justice system, the Nuremberg Charter ("Charter") was drafted to lay down the rules and procedures for the trials to be conducted against 22 top-ranking Nazi officials.[14] Necessarily commencing alongside the Trials was the writing of post-war history. Thus:

> While the jurisprudence underlying Nuremberg's Charter was an unstable amalgam of natural law, common law, and traditional positivist reasoning, the Tribunal's main contribution to postwar multilateralism was arguably through its quasi-administrative, fact-finding role—another cherished objective of New Deal-style institutions. *It told the truth about the Nazis, even if it fell short of serving as "the greatest history seminar ever held in the history of the world."*[15]

The legal actors present during the Trials were not oblivious to how history was to be written before their very eyes. It was recognized that every word to be uttered and every action to be taken would inevitably form part and parcel of the post-war narratives that historians, leaders of nations, actors operating within the international legal community, and even future

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[13] *Id.* at 354–55. (Citations omitted.)

[14] Elizabeth Borgwardt, *Re-Examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 401 n.2 (2005), *citing* IAN BURUMA, THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN 144–45 (1994).

[15] *Id.* at 453. (Emphasis supplied, citations omitted.)

generations of civilians would regard as nothing less than fact. Thus, in his opening statement at the Trials, British Chief Prosecutor Sir Hartley Shawcross "confidently expressed a widely held aspiration for what Nuremberg would come to stand for"—that is, "a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth, and future politicians for warning."[16]

What was the relevance, then, of the formation and eventual crystallization of this particular incident of world history? For one, the implications of the judgment to be rendered by the tribunal meant more than mere determinations of the defendants' innocence or guilt. They served as catalysts for change in the international criminal justice system in that "[t]he Nuremberg trial and its Charter were designed to mark 'the reestablishment of the principle that there are just and unjust wars and that unjust wars are illegal[.]'"[17] According to Elizabeth Borgwardt:

> *The Nuremberg tribunal asserted that its Charter was contributing to a broad historical trend affirming the universal value of international moral and legal sanctions*, which had been a growing force in international affairs since at least the end of the First World War, and which had achieved the status of positive law with the promulgation of the 1928 Kellogg-Briand Pact. President Truman expressed his hope that "we have established for all time the proposition that aggressive war is criminal and will be so treated." *The Nuremberg Charter, and the tribunal's judgment based on that Charter, had been conceived by its authors as a means of lifting international justice to a new and higher level.* Shortly after the judgment was announced, Judge Biddle wrote:
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> > [Nuremberg's] judgment has formulated, judicially for the first time, the proposition that aggressive war is criminal and will be so treated [...] [N]ow that it has been so clearly recognized and largely accepted, the time has come to make its scope and incidence more precise [...] I suggest that the time has now come to set about drafting a code of international criminal law.[18]

Particularly, the Charter and the Trials brought to the forefront newfound regard and interest in the protection of human rights. It also created for this legal field a legacy which has grown exponentially in terms of its geographical coverage, its consideration for cultural nuances, and its

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[16] *Id.* at 461. (Citations omitted.)

[17] *Id.* at 423.

[18] *Id.* at 449–50. (Emphasis supplied, citations omitted.)

intersectionality with other fields of legal study. In the field of crimes against international law in particular:

> Human rights legacies of Nuremberg that were immediately apparent included legitimating the idea of individual responsibility for crimes against international law; offering a jurisprudential underpinning for political or philosophical assertions of the dignity of the individual, irrespective of local, domestic laws; and providing an example of the importance of documenting and narrating the specifics of atrocities to create a detailed and enduring record. Even the trial's least successful legacy, its attempt to consolidate the status of aggression as an international crime, shaped the direction of human rights-related legal ideas, away from policing the political context of armed conflict, and more towards the protection of civilians.[19]

The interplay of an international criminal tribunal's roles in both the crystallization of history and the development of legal systems has thus been described as follows:

> *International criminal law makes claims to truth and history on the one hand, but also to justice through the process of the trial, on the other.*
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> The dual function of international criminal trials has been recognised and affirmed by the [International Criminal Tribunal for the Former Yugoslavia] Trial Chamber in its consideration of the issue of guilty pleas, proof[,] and sentencing in *Erdemovic*. This gradual move to a hybrid role is occurring at a time of relative confidence in the international criminal justice movement. *The courts are themselves increasingly assertive, and make claims to a role in the creation of history.* And prominent defendants are challenging the legitimacy of the courts and in doing so offering alternative accounts, though these are often inaccurate and self-serving. Milosevic, whilst not recognising the ICTY's jurisdiction, recognises its historical significance and the opportunity a trial provides him as narrator.
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> *In short, international criminal justice is becoming more than a process of securing the convictions of international criminals. It has a wider resonance, and symbolic function.* As a new international criminal procedure and jurisprudence emerges, it must examine the varied demands made of it, and should not merely be a compromise in comparativism between civil and common law traditions. Its evolution provides an

[19] *Id.* at 457.

> opportunity to re-think underlying rationales and policy concerns, to explore a theory of international criminal justice.[20]

C. The Crystallization of History by Domestic Courts

This does not mean to say that domestic judicial bodies would require the same degree of fanfare that characterized the Trials and other international criminal tribunals in order to play a role in the crystallization of history. It is, in fact, quite the contrary, as the exact same history-making function—albeit less high-profile in nature and surely relevant to a more limited demographic—could still be taken by municipal courts of different jurisdictions.

In the case of *Rice v. Cayetano*,[21] for example, the U.S. Supreme Court allowed the petitioner, Harold F. Rice, a man of European descent, to register as a voter in the elections for the Office of Hawaiian Affairs ("OHA") trustees.[22] At the time Rice attempted to register, however, a state law provided that only native Hawaiians could vote for the trustees of the OHA. In ultimately striking down this voting restriction, the Court in *Rice* held that restricting the OHA electorate to native Hawaiians "embodied a racial classification that effectively 'fenc[ed] out whole classes of [...] citizens from decision-making in critical state affairs.'"[23]

Needless to say, the promulgation of the *Rice* decision sparked outrage within and beyond the native Hawaiian community. The invocation of the 15th Amendment[24] in favor of Rice, a "fifth-generation white descendant of

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[20] Daniel Joyce, *The Historical Function of International Criminal Trials: Re-thinking International Criminal Law,* 73 NORDIC J. INT'L 461, 461–62 (2004). (Emphasis supplied, citations omitted.)

[21] 528 U.S. 495 (2000).

[22] Kathryn Nalani Setsuko Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of Rice v. Cayetano*, 15 ASIAN AM. L. J. 9, 21–22 (2008).

OHA's main purpose was to improve the conditions of "native Hawaiians" and "Hawaiians" as defined by Section 10-2 of the Hawaii Revised Statutes, and to satisfy the State's trust obligation, created by the Admission Act, to use the public land trust for the betterment of "native Hawaiians." OHA, a state agency led by a board of nine trustees, is funded by 20% of the trust proceeds created by Section 5(f) of the Admission Act and by other legislative allocations. Article XII of the State Constitution requires all board members and voters in OHA elections to be Hawaiian, as defined by statute. *Id.* at 14–15.

[23] Ellen Katz, *Race and the Right to Vote after Rice v. Cayetano,* 99 MICH. L. REV. 491, 492 (2000). (Citations omitted.)

[24] The 15th Amendment of the U.S. Constitution prohibits the federal government from imposing upon any citizen voting requirements based on race, color, or previous condition of servitude.

missionary settlers who arrived in the Islands prior to the 1893 overthrow of the monarchy,"[25] and against the indigenous peoples of Hawaii, inexorably left a sour taste in the mouth. It further institutionalized the inequalities already present in the social paradigm of a colonized race which the state law—in restricting voting exclusively to native Hawaiians—aimed to balance out in the first place.

The blatant disregard and downplaying of the native Hawaiian's historical narrative had jarring legal consequences:

> The Court's failure to recognize or address the Hawaiian people's political status amounted to a disingenuous move to decide the case without discussing the real legal issues. *Rice v. Cayetano presented an opportunity for the Court to settle uncertainties concerning Native Hawaiian legal rights.* Referring to the scholarly discussion between Professors Stuart Benjamin and John Van Dyke, the Court acknowledged that "[i]t is a matter of some dispute…whether Congress may treat the native Hawaiians as it does the Indian tribes." However, the Court sidestepped the issue and declared that traversing "that difficult terrain" was unnecessary because OHA's voting scheme "fails for a more basic reason"—that Congress may not authorize a State to create a voting scheme of this sort.[26]

Thus, it has been noted how:

> [T]he U.S. Supreme Court utilized "selective, often euphemistic, historical framing" to justify its invalidation of the Office of Hawaiian Affairs' Hawaiians-only voting structure, portraying Native Hawaiians as savages civilized through American colonization. *In so doing, the Court legitimized an interpretation of history that denied the damage it did as a colonial power, an interpretation irreconcilable with that of the Native Hawaiians.*[27]

It is necessary to point out at this juncture that the Philippine Supreme Court is no stranger to its capacity to shape and mold the nation's historical narrative. Whether or not the exercise of such power has been an inadvertent or active—perhaps politically-driven—display, the efficacy of this storytelling

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[25] Hong, *supra* note 22, at 22. (Citations omitted.)

[26] *Id.* at 31–32. (Emphasis supplied, citations omitted.)

[27] Veronica Louise Jereza, *Burying "National Trauma": Memory Laws and the Memory of the Marcos Regime*, 93 PHIL. L.J. 410, 418-19 (2020), *citing* Sharon Hom & Eric Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1748, 1775–76 (2000). (Emphasis supplied.)

function is undeniable. A perfect illustration of this is the infamous case of *Rubi v. Provincial Board of Mindoro*.[28]

Rubi involved a writ of habeas corpus proceeding for Rubi and other Manguianes of the Province of Mindoro who were illegally deprived of their liberty when forced to reside on a reservation established in Tigbao, Mindoro. In ruling in favor of their segregation, the Court, through Justice George Malcolm, highlighted a resolution enacted by the Provincial Board which established the reservation sites in consideration of: (1) the supposed failure of prior attempts for "the advancement of the non-Christian people of the province;"[29] and (2) how it was believed that the only plausible method for successfully "educating the Manguianes was to oblige them to live in a permanent settlement."[30]

The Solicitor General, following the same line of argumentation, added that their segregation would likewise be beneficial for: (1) the protection of the Manguianes themselves; (2) the protection of the public forests in which they had previously settled; and (3) the "necessity of introducing civilized customs among the Manguianes."[31]

Justice Malcolm continued by writing:

> In so far as the Manguianes themselves are concerned, the purpose of the Government is evident. Here, we have on the Island of Mindoro, the Manguianes, leading a nomadic life, making depredations on their more fortunate neighbors, uneducated in the ways of civilization, and doing nothing for the advancement of the Philippine Islands. What the Government wished to do by bringing them into a reservation was to gather together the children for educational purposes, and to improve the health and morals—was in fine, to begin the process of civilization. This method was termed in Spanish times, "bringing under the bells." The same idea adapted to the existing situation, has been followed with reference to the Manguianes and other peoples of the same class, because it required, if they are to be improved, that they be gathered together. On these few reservations there [sic] live under restraint in some cases, and in other instances voluntarily, a few thousands of the uncivilized people. Segregation really constitutes protection for the Manguianes.

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[28] [Hereinafter "*Rubi*"], 39 Phil. 660 (1919).
[29] *Id.* at 709.
[30] *Id.*
[31] *Id.*

> Theoretically, one may assert that all men are created free and equal. Practically, we know that the axiom is not precisely accurate. The Manguianes, for instance, are not free, as civilized men are free, and they are not the equals of their more fortunate brothers. True, indeed, they are citizens, with many but not all the rights which citizenship implies. And true, indeed, they are Filipinos. But just as surely, the Manguianes are citizens of a low degree of intelligence, and Filipinos who are a drag upon the progress of the State.[32]

As though unsatisfied, the Court did not mince words in its description of the Manguianes, referring to them on several instances throughout the decision as "natives of the Philippine Islands of a low grade of civilization," as a people "very low in culture" who have failed to "[advance] beyond the Negritos in civilization," and as a people who have "shown no desire for community life, and [...] have not progressed sufficiently in civilization to make it practicable to bring them under any form of municipal government."[33]

In this regard, Justice Marvic M.V.F. Leonen, a staunch advocate for indigenous people's rights, points out the historical and cultural impact of the *Rubi* decision. He first notes how legal matters are, quite literally, almost always "contested territory," yet the justice system is set up in such a way that legal matters are never "[n]egotiated with those who are subject to it but rather by the actors that have the appropriate status to be in that forum: i.e[.] the lawyers and the judges."[34] Thus, notwithstanding the possibility of actors—particularly, members of the judiciary—being drastically detached from the contexts of the litigants before them, it is they who are ultimately given the opportunity to determine matters of grave importance to their lives, limbs, and liberties. This is precisely demonstrated in the unfortunate case of Rubi and the Manguianes, in that "the determination of the essence of their identity was [...] judicially constructed and imposed."[35]

Thus, the members of the judiciary need to recognize the value of the decisions they write, and necessarily, the historical narratives contained in them. Not only do these legal documents become determinative of the current issue being faced, they likewise determine the outcomes of future legal battles since any subsequent argument made by future parties would be derived

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[32] *Id.* at 712–13.

[33] *Id.* at 693–94.

[34] Marvic M. V. F. Leonen, *Law at Its Margins: Questions of Identity, Rights of Indigenous Peoples, Ancestral Domains and the Diffusion of Law*, 83 PHIL. L.J. 787, 800 (2007).

[35] *Id.*

precisely from "[t]he values and meanings congealed in legal texts."[36] Justice Leonen writes:

> To recognize that law has meaning-making power, then, is to see that social practices are not logically separable from the laws that shape them and that social practices are unintelligible apart from the legal norms that give rise to them. Therefore, if one were to talk about the relationship between culture and law, it would certainly be right to say that it is always dynamic, interactive, and dialectical—law is both a producer of culture and an object of culture. Put generally, law shapes individual and group identity, social practices, and the meaning of cultural symbols, but all of those things (culture in its myriad manifestations) also shape law by changing what is socially desirable, politically feasible, legally legitimate. As Pierre Bourdieu puts it, "law is the quintessential form of 'active' discourse, able by its own operations to produce effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law."[37]

The restrictions imposed upon Rubi and the other members of the Manguianes were, to an extent, validated by a discussion on the meaning of civil liberty. In this regard, Justice Malcolm wrote how "[c]ivil liberty may be said to mean that measure of freedom which may be enjoyed *in a civilized community*, consistently with the peaceful enjoyment of like freedom in others."[38] Thus, in essence, the Supreme Court held that the civil liberties made issue in the case were only meant to be enjoyed by a civilized community and could not be enjoyed by the Manguianes, as they had yet to be properly civilized.

Similar to how the *Rice* case had been decided on the ironic invocation of the 14th Amendment, the *Rubi* case was decided on an equally ironic invocation of an individual's right to civil liberty. In both cases, fundamental constitutional ideologies were utilized by the U.S. and Philippine Supreme Courts to support what is understood today as clearly unjust results.

III. REVISING THE MARCOS ERA

The Marcos regime was a 20-year-long dictatorship best characterized as an era of widespread human rights violations and rampant government

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[36] *Id.* at 801.

[37] *Id., citing* Naomy Mezey, *Law as Culture, in* CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM 37–42 (2003).

[38] *Rubi*, 39 Phil. 660, 705. (Emphasis in the original.)

corruption. The stronghold of Marcos on the nation was strengthened when the country was placed under Martial Law through Proclamation No. 1081, ultimately allowing him to institutionalize what would be "[t]he greatest dominance of state over society the Philippines has seen."[39] In terms of the human rights violations committed during Marcos' term, the staggering numbers—or at least, those that have been documented—are as follows: 3,257 killed, 35,000 tortured, and 70,000 incarcerated.[40] Meanwhile, in terms of the ill-gotten wealth amassed by the Marcos family, the Philippine Supreme Court had previously ordered the forfeiture of "Swiss deposits which were transferred to and are now deposited in escrow at the Philippine National Bank in the estimated aggregate amount of US$658,175,373.60 as of January 31, 2002, plus interest" in favor of the Republic of the Philippines.[41] This figure has yet to take into account the amounts accumulated by Marcos cronies, the amounts kept in other bank accounts, and the assets that have yet to be seized.

No less than the 1987 Constitution came about as a result of the despot's oppressive rule over the country. Its provisions feature a stronger checks and balance system, an expanded power of judicial review, three independent Constitutional Commissions, and articles on social justice and public accountability. Ultimately, these constitutional innovations were introduced for the purpose of encapsulating the principles and values violated during Marcos' term and are now—supposedly—the object of fervent protection by the nation. As an additional example, Veronica Louise Jereza notes how:

> [T]he word "truth" was added to the Preamble as a "protest against the deception which characterized the Marcos regime." The Bill of Rights was written in such a way as to "more jealously [safeguard] the people's fundamental liberties in the essence of a constitutional democracy;" in particular, persons under custodial investigation were given the right to "competent and independent counsel, preferably of his own choice" as a response to the military's practice of detaining persons and having only lawyers selected by the military defend the detainees. The transitory provisions also extended the president's authority to issue freeze orders and orders of

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[39] Ruby Rosselle Tugade, *Beyond Legal Transformation: Assessing the Impact of Transitional Justice Mechanisms in the Philippines,* 93 PHIL. L.J. 77, 80 (2020), *citing* PATRICIO ABINALES & DONNA AMOROSO, STATE AND SOCIETY IN THE PHILIPPINES 205 (2005).

[40] *Id.* at 81, *citing* Alfred McCoy, *Dark Legacy: Human Rights Under the Marcos Regime, in* MEMORY, TRUTH-TELLING AND THE PURSUIT OF JUSTICE: A CONFERENCE ON THE LEGACIES OF THE MARCOS DICTATORSHIP 131 (2001).

[41] Republic v. Sandiganbayan, G.R. No. 152154, 406 SCRA 190, 274–75, July 15, 2003.

> sequestration for the recovery of "ill-gotten properties amassed by the leaders and supporters of the previous regime to protect the interest of the people."[42]

The 1987 Constitution, therefore, can be said to be a document crystallizing: *first*, the history of the Filipino people in relation to the Marcos regime; and *second*, the aspirational values sought by the nation after its ouster. Ruby Rosselle Tugade notes that:

> The deliberations of the Constitutional Commission of 1986 reflected such aspirational motives. During the inaugural session of the constitutional convention, the [V]ice [P]resident of the commission, former Justice Ambrosio Padilla stated:
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> > The writing of a constitution, truly reflective of the sentiments, ideals[,] and aspirations of our people, is the most important task of this generation. It is a task that will place our nation, long derailed by 14 years of martial misrule, back on the tracks of constitutional democracy, which is the key to political stability and economic recovery.[43]

Numerous human rights movements began and prospered precisely because of collective efforts dedicated to ensuring that, on one hand, the victims of Marcos atrocities be given the justice of which they have long been deprived, and on the other, that the same types of atrocities be incapable of repetition. In pursuit of this, members of the academe, through scores of journal articles written on the topic and other educational platforms; private entities, such as non-government organizations with human right advocacies; and even government entities such as the Commission on Human Rights (CHR), the Presidential Commission on Good Governance (PCGG), and the Human Rights Victims' Compensation Board (HRVCB), have all operated as key actors in ensuring that this dark history be preserved in the collective Filipino consciousness.

In recent years, however, there has been a gradual yet noticeable shift in the depiction of the Marcoses' historical narrative. This shift, undeniably an active effort on the part of the family and their allies, can be dubbed as no less than an opportunistic revision of Philippine history. British academic Duncan McCargo explains:

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[42] Jereza, *supra* note 27, at 425, *citing* JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 2, 113 (2009).

[43] Tugade, *supra* note 39, at 82, *citing* 1 RECORD CONST. COMM'N 7 (June 2, 1986).

> [T]he post-1986 narrative of the Marcos era as a time of rampant corruption and political repression has been increasingly challenged by a set of alternative facts promoted by his supporters, in which Marcos, the most brilliant Filipino of the 20th century, led a heroic struggle to modernize the country's politics, economy[,] and society, only to be ousted by the small clique of elite families that have dominated the nation since independence.[44]

These efforts can largely be attributed to the relationship between President Rodrigo Duterte and the Marcos clan. During his presidential campaign, Duterte famously promised that, "if elected president, he [would] allow the burial of [...] Marcos in the Libingan ng mga Bayani."[45] Duterte's actions certainly played a role in reshaping the Marcos image when he also described the dictator as "a great president and [...] a hero [who] had the idealism [and] the vision for this country," adding that the "[Marcos] dictatorship 'remains to be debated' but [that] his government programs and projects have stood the test of time."[46]

The rehabilitation of the Marcos image was bolstered when the late Senator Miriam Defensor-Santiago, who was not only a known and beloved political icon to the Filipino youth, but also one of the harshest critics of the Philippine political arena, announced that Marcos' son, Ferdinand Marcos, Jr., would be her presidential running mate. When her campaign was marred with public concern over the state of her health, Santiago defended Marcos, Jr. by saying that "if she [were] elected President and something happened to her, 'we [would] want someone young and idealistic to replace her.'"[47] She further added that she would need to choose one who is "excellent, with good academics[,] and with concern," referring once more to Marcos, Jr.[48] Although Marcos, Jr. would eventually lose to then Camarines Sur representative Leni Robredo by just over 263,000 votes, he has since then claimed to have been

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[44] Duncan McCargo, *Rebranding the Marcos legacy,* NIKKEI ASIAN REV., July 4, 2017, *at* https://asia.nikkei.com/Politics/Rebranding-the-Marcos-legacy.

[45] Pia Ranada, *Duterte in Ilocos Norte: I will allow Marcos' burial in Heroes' Cemetery,* RAPPLER, Feb. 19, 2016, *at* https://www.rappler.com/nation/elections/duterte-marcos-burial-libingan-bayani.

[46] *Id.*

[47] Macon Ramos-Araneta, *Miriam: When I'm gone, Bongbong will replace me,* MANILA STANDARD, Feb. 10, 2016, *available at* https://www.manilastandard.net/news/top-stories/198944/ miriam-when-i-m-gone-bongbong-will-replace-me.html.

[48] *Id.*

"cheated of [three] million votes,"[49] which led to the filing of an election case before the Presidential Electoral Tribunal.[50]

Even without Duterte and Santiago's endorsements during the last presidential elections, love was never lacking for the Marcoses in their hometown of Ilocos Norte. In 2013, for example, former First Lady Imelda Marcos and daughter Imee Marcos were reelected into public office as congresswoman and governor of Ilocos Norte, respectively.[51] In 2019, Matthew Marcos Manotoc, grandson of Imelda and son of Imee, was elected as Ilocos Norte's new governor, having previously served as a senior provincial board member.[52]

The family's growing political capital aside, the Marcos regime itself has been "publicly glorified through government action, statements made by prominent politicians, regional literature, and social media."[53] A recent instance of such was the government-sponsored celebration of the Dictator's 100th birthday. In addition to the festivities being hosted in his home province under the guidance and direction of the local government (the top positions of which were occupied mostly by his relatives), President Duterte himself issued a proclamation declaring Marcos' birthday as a regional holiday in Ilocos Norte. As though rubbing salt on the wound, the holiday was declared for purposes of commemorating the life of a "World War II veteran, distinguished legislator, and former president."[54] The celebrations included the hosting of various events by the Marcoses "showcasing the rule of their patriarch, including a Mass and the unveiling of a plaque on Sunday at the family's ancestral home town of Batac."[55] In fact, even prior to this development, the province had already been boasting of three museums

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[49] Cathrine Gonzales & Addie Pobre, *TIMELINE: How the Marcoses made their political comeback,* RAPPLER, Feb. 25, 2017, *at* https://www.rappler.com/newsbreak/iq/timeline-marcos-political-comeback.

[50] Mara Cepeda, *Robredo asks PET to 'immediately' junk Marcos protest,* RAPPLER, Jan. 8, 2020, *at* https://www.rappler.com/nation/robredo-wants-pet-immediately-junk-marcos-protest. *But see* Marcos v. Robredo, P.E.T. Case No. 005, Feb. 16, 2021.

[51] Gonzales & Pobre, *supra* note 49.

[52] Robert Vergara & Xave Gregorio, *Marcoses retain hold on Ilocos Norte,* CNN PHIL., May 14, 2019, *at* https://www.cnnphilippines.com/regional/2019/5/14/Marcos-Ilocos-Norte-2019-elections.html.

[53] Jereza, *supra* note 27, at 431.

[54] Nestor Corrales, *Duterte declares Ferdinand Marcos' birthday a holiday in Ilocos,* INQUIRER.NET, Sept. 7, 2017, *at* https://newsinfo.inquirer.net/928599/news-rodrigo-duterte-holiday-ilocos-norte-birthday-ferdinand-marcos-salvador-medialdea-proclamation-310.

[55] Agence France-Presse, *Duterte: Marcos is a hero to Ilocanos; why debate on that?,* INQUIRER.NET, Sept. 10, 2017, *at* https://newsinfo.inquirer.net/929402/ferdinand-marcos-100th-birth-anniversary-rodrigo-duterte-marcos-family.

"where highly partisan displays celebrate [Marcos'] leadership during a 1960s era of Asian strongmen."[56]

Notably, the high praises sung by Duterte for the Marcos family are believed by critics to be "part of an escalating campaign to rehabilitate the image of Marcos and help the family's remarkable political comeback."[57] Jereza notes how online platforms have likewise been an efficient source of propaganda for the Marcos family, citing in particular a recent report which found that there are about 100 active pro-Marcos pages on Facebook.[58] The use of online platforms is alarming, considering how, in 2020, the Philippines was found to be one of the world's top users of the internet and social media.[59] This statistic has two glaring implications: *first*, that social media serves as the regular Filipino's main access to information; and *second*, that because of the pervasiveness of social media's reach, its influence on different sectors of society, especially the youth, is far from insignificant.

Is equating the Marcoses' return to power with the opening of the floodgates to historical revisionism an imagined fear? Note how in early January of this year, Marcos, Jr. proposed for school textbooks that "portrayed his family in a negative light" to be revised.[60] In response to this, ACT Teachers Partylist representative France Castro said that "'rehabilitating the image of the Marcos family through revision of history books would nullify the sacrifices of people 'who lived and died fighting tyranny and plunder.'"[61] Moreover, it would "[deny] justice to the countless who were tortured, murdered, and disappeared in the name of Marcos and his dictatorship, and the entire Filipino nation whose democracy and economy it trampled."[62]

Notable relatives of Martial Law victims had also spoken out against this move, with Erin Tañada identifying the proposal of Marcos, Jr. as "a clear

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[56] McCargo, *supra* note 44.

[57] Agence France-Presse, *supra* note 55.

[58] Jereza, *supra* note 27, at 432 *citing* Mariejo Ramos, *Troll armies wage 'history war' to push Marcos comeback,* INQUIRER.NET, Dec. 31, 2018, *at* https://newsinfo.inquirer.net/1068051/troll-armies-wage-history-war-to-push-marcos-come back.

[59] Cora Llamas, *We Are Social report: Philippines tops internet and social media use in 2020,* MARKETING INTERACTIVE, Feb. 25, 2020, *at* https://www.marketing-interactive.com/we-are-social-report-philippines-tops-internet-and-social-media-use-in-2020.

[60] Divina Nova Joy Dela Cruz, *Lawmaker slams Marcos 'historical revisionism',* MANILA TIMES, Jan, 12, 2020, *available at* https://www.manilatimes.net/2020/01/12/%20%20%20%20%20news/top-stories/lawmaker-slams-marcos-historical-revisionism/673487/.

[61] *Id.*

[62] *Id.*

move at historical revisionism and another desperate attempt by the Marcoses to erase the memory of the horrors of Martial Law and absolve the sins of their father."[63] Human rights lawyer Chel Diokno likewise "advised Filipinos to be wary of some people who are allegedly abusing the justice system to revise history."[64]

IV. THE SUPREME COURT AND THE MARCOS LEGACY

It may be argued that Supreme Court cases that do, in fact, recognize the Marcos atrocities, are sufficient safeguards against historical revisionism. However, a thorough analysis of these cases would present a crisis of subjectivity, wherein it can be gleaned that the appreciation and perpetuation of Marcos regime narratives have become increasingly dependent on the personal inclinations of justices. Certain cases, as will be discussed, would show that even members of the judiciary are not immune to the growing trend of downgrading the horrors that occurred during the Marcos regime. An antithesis, therefore, to its history-making function, is how the Supreme Court itself has played a hand in the dilution of recognition of the Marcos atrocities.

What is worthy of mentioning at this point is that Philippine case law is replete with decisions that recognize—in no-nonsense, straightforward language, at that—the widespread and systematic corruption which led to the accumulation of ill-gotten wealth for the Marcos family and their cronies. In her dissenting opinion in *Ocampo v. Enriquez*,[65] former Chief Justice Maria Lourdes Sereno outlined several Supreme Court rulings that enunciated this fact.

In *Republic v. Sandiganbayan*,[66] for one, the Court made the categorical declaration that certain Swiss deposit accounts in the name of various foundations actually formed part of the ill-gotten wealth amassed by the Marcoses. The eventual forfeiture amounting to over 650 million dollars, plus interest, was declared by the Court to be clearly disproportionate to the lawful income of the Marcos family.[67] Chief Justice Sereno likewise noted how the

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[63] *Family members of martial law victims reject Bongbong Marcos' call to revise history textbook*, CNN PHIL., Jan. 11, 2020, *at* https://www.cnnphilippines.com/news/2020/1/11/bongbong-marcos-historical-revisionism-.html.

[64] *Id.*

[65] [Hereinafter "*Ocampo*"], G.R. No. 225973, 807 SCRA 223, Nov. 8, 2016 (Sereno, *C.J., dissenting*).

[66] G.R. No. 104768, 407 SCRA 10, July 21, 2003.

[67] *Ocampo*, 807 SCRA at 356 (Sereno, *C.J., dissenting*).

same reasoning was used in the case of *Marcos, Jr. v. Republic*[68] when the Court ordered the forfeiture of Arelma, S.A.'s assets which amounted to over 3 million dollars.[69]

Meanwhile, in the cases of *Republic v. Estate of Hans Menzi*[70] and *Yuchengco v. Sandiganbayan*,[71] the beneficial ownership of shares of the Bulletin Publishing Corporation in the former case and the Philippine Telecommunications Investment Corporation in the latter was scrutinized by the Court.[72] In both cases, the Court concluded that, notwithstanding the shares having been registered in the names of Marcos cronies and nominees, the same actually formed part of the Marcoses' ill-gotten wealth and was therefore subject to forfeiture in favor of the government.[73]

Certain Supreme Court cases have also acknowledged the abuse of office committed by Marcos throughout his regime. In *Tabuena v. Sandiganbayan*,[74] Marcos was found to have unlawfully exercised his authority when he "ordered the general manager of the Manila International Airport Authority to directly remit to the Office of the President the amount owed by the agency to the Philippine National Construction Corporation[.]"[75] In *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto*,[76] Marcos was again found to have unlawfully exercised his authority when he "made a marginal note prohibiting the foreclosure of the mortgaged assets of Mindanao Coconut Oil Mills and waiving the liabilities of the corporation and its owners to the National Investment and Development Corporation[.]"[77] Finally, in *Republic v. Tuvera*,[78] Marcos illegally "granted a Timber License Agreement to a company owned by the son of his longtime aide, in violation of the Forestry Reform Code and Forestry Administrative Order No. 11."[79]

In contrast to these cases, however, much is left to be desired when it comes to the Supreme Court's recognition of the countless human rights violations committed during the Marcos regime. More often than not, any reference made to the rampant murders, illegal detentions, enforced

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[68] G.R. No. 189434, 671 SCRA 280, Apr. 25, 2012.
[69] *Ocampo*, 807 SCRA at 356 (Sereno, *C.J., dissenting*).
[70] G.R. No. 152578, 476 SCRA 20, Nov. 23, 2005.
[71] G.R. No. 149802, 479 SCRA 1, Jan. 20, 2006.
[72] *Ocampo*, 807 SCRA 223, 356 (Sereno, *C.J., dissenting*).
[73] *Id.* (Sereno, *C.J., dissenting*).
[74] G.R. No. 103501, 268 SCRA 332, Feb. 17, 1997.
[75] *Ocampo*, 807 SCRA 223, 357–58 (Sereno, *C.J., dissenting*).
[76] G.R. No. 135715, 648 SCRA 586, April 13, 2011.
[77] *Ocampo*, 807 SCRA 223, 358 (Sereno, *C.J., dissenting*).
[78] [Hereinafter "*Tuvera*"], G.R. No. 148246, 516 SCRA 113, Feb. 16, 2007.
[79] *Ocampo*, 807 SCRA 223, 358 (Sereno, *C.J., dissenting*).

disappearances, or acts of torture are phrased in what could only be described as euphemistic prose. Moreover, such references are usually only ever incorporated into the decisions by way of introductions or epilogues, rather than actual recitations of the case's factual background.

In the case of *Marcos v. Manglapus*,[80] for example, the *ponencia* problematized the return of the deceased Dictator's remains as an issue that would have a "profound effect on the political, economic[,] and other aspects of national life."[81] The Court then rationalized this premise by describing the Marcos regime, as well Marcos' eventual ouster, as "the case of a dictator forced out of office and into exile after causing [20] years of political, economic[,] and social havoc in the country."[82] Finally, when speaking of the civil and political strife that would possibly come about as a result of their return, the Court made no mention of the possible turmoil it may cause the survivors or the families of victims of Marcos atrocities. Instead, the Court only referenced: (1) "[t]he failed Manila Hotel coup in 1986 led by political leaders of Mr. Marcos;" (2) "the takeover of television station Channel 7 by rebel troops led by Col. Canlas with the support of 'Marcos loyalists';" and (3) "the unsuccessful plot of the Marcos spouses to surreptitiously return from Hawaii with mercenaries aboard an aircraft chartered by a Lebanese arms dealer" as being what "awakened the nation to the capacity of the Marcoses to stir trouble even from afar and to the fanaticism and blind loyalty of their followers in the country."[83]

In *Tuvera*, the Marcos regime was collectively and vaguely referenced as being a source of "national trauma."[84] Yet even in this case, the national trauma caused by Marcos was actually only considered in the context of the kleptocracy that characterized his regime. In other words, rather than acknowledging the countless human rights violations that occurred just as pervasively and systematically during Marcos' rule, only the economic damage was accorded judicial recognition:

> The imposition of exemplary damages is a means by which the State, through its judicial arm, can send the clear and unequivocal signal best expressed in the pithy but immutable phrase, "never again." It is severely unfortunate that the Republic did not exert its best efforts in the full recovery of the actual damages caused by the illegal grant of the Twin Peaks TLA. To the best of our ability, through the

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[80] [Hereinafter "*Manglapus*"], G.R. No. 88211, 177 SCRA 668, Sept. 15, 1989.
[81] *Id.* at 681.
[82] *Id.* at 682.
[83] *Id.* at 681.
[84] *Tuvera*, 516 SCRA 113, 153.

> appropriate vehicle of exemplary damages, the Court will try to fill in that deficiency. For if there is a lesson that should be learned from *the national trauma of the rule of Marcos*, *it is that kleptocracy cannot pay*. As those dark years fade into the backburner of the collective memory, and a new generation emerges without proximate knowledge of how bad it was then, it is useful that the Court serves a reminder here and now.[85]

Meanwhile, in *Heirs of Licaros v. Sandiganbayan*,[86] the Marcos regime and all its horrors were referred to as a "dark chapter in our history."[87] This is problematic because, much like the previous cases, the decision once again employed language that is equivocal at best and evasive at worst. The Court once again demonstrated its unequal treatment in recognizing through categorical language the amassing of ill-gotten wealth by the Marcos family and their cronies, yet only ever alluding to the systematic violation of human rights:

> After nearly [20] years, the commitment to exorcise the specter of the bygone dictatorship, a resolve that was forged on the streets of EDSA in 1986, may have sadly been lost to memory. Those who are tasked to undo past wrongs and transgressions are exhorted to tenaciously and steadfastly keep the resolve alive, so that our people could at last put a closure to this *dark chapter in our history*, avoid the same thorny path, and move forward in the quest for our nation's destiny.[88]

Finally, the Supreme Court in 2016, in one of its most controversial decisions relating to the Marcos legacy, took a sharp turn toward the direction of historical revisionism. In the case of *Ocampo*, the Supreme Court, voting 9–5,[89] allowed the burial of Marcos at the Libingan ng mga Bayani ("LNMB"). The purpose of this Note is not to re-examine the reasoning behind the Court's ruling. It will not argue whether or not the Court erred, in allowing the burial. Rather, this Note endeavors to examine once more the language employed by the Court and the grave injustice it had perpetuated against Marcos' victims by whitewashing his crimes as mere allegations. For instance, in ruling on Marcos' eligibility for burial at the LNMB, the Court wrote:

> Petitioners did not dispute that Marcos was a former President and Commander-in-Chief, a legislator, a Secretary of National Defense,

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[85] *Id.* (Emphasis supplied.)
[86] G.R. No. 157438, 440 SCRA 483, Oct. 18, 2004.
[87] *Id.* at 498.
[88] *Id.* at 497–98 (Emphasis supplied.)
[89] *Ocampo*, 807 SCRA 223, 324–25.

> a military personnel, a veteran, and a Medal of Valor awardee. *For his* ***alleged*** *human rights abuses and corrupt practices*, we may disregard Marcos as a President and Commander-in-Chief, but we cannot deny him the right to be acknowledged based on the other positions he held or the awards he received. *In this sense, We agree with the proposition that Marcos should be viewed and judged in his totality as a person.* ***While he was not all good, he was not pure evil either. Certainly, just a human who erred like us.***[90]

Allusion to allegation: this is the Marcos narrative that the Supreme Court, whether actively or passively—but in either case, directly—helped crystallize as part of Philippine history. Needless to say, this is a far cry from the collective outrage that not only sparked the People Power Revolution of 1986, but also gave rise to the values that the constitutional commissioners considered and injected into what would eventually become the 1987 Constitution.

While there are cases that exemplify instances of the Court's ability to categorically recognize Marcos' human rights violations, these instances, more often than not, come about in the form of dissenting or separate opinions. As a consequence, the writings of these justices, as well-intentioned as they may be, fail to hold much legal bearing when weighed against the history-making function of the Court.

Justice Abraham Sarmiento's dissenting opinion in *Manglapus*, for example, although disagreeing with the majority's decision that forbidding the return of the Marcoses was within the executive's power, did not mince words in his characterization of the Marcos atrocities. This is understandable, considering that in the said dissenting opinion, due recognition was given to the Justice himself as well as to his late son as actual victims of the systematic and government-sponsored persecution of political dissenters:

> The undersigned would be lacking in candor to conceal his dislike, to say the least, for Marcos. ***Because of Marcos, the writer of this dissent lost a son.*** *His son's only "offense" was that he openly and unabatedly criticized the dictator, his associates, and his military machinery. He would pay dearly for it; he was arrested and detained, without judicial warrant or decision, for seven months and seven days. He was held incommunicado a greater part of the time, in the military stockade of Camp Crame.* In his last week in detention, he was, grudgingly, hospitalized (prison hospital) and confined for chronic asthma. The deplorable conditions of his imprisonment exacerbated his delicate health beyond cure. He died,

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[90] *Id.* at 313. (Peralta, *J.*) (Emphasis supplied.)

on November 11, 1977, a martyr on the altar of the martial law apparatus.

The undersigned also counts himself as one of the victims of Marcos' ruthless apparatchiki. *On August 14, 1979, he was, along with former President Diosdado Macapagal, and Congressmen Rogaciano Mercado and Manuel Concordia, charged, "ASSOed," and placed under house arrest, for "inciting to sedition" and "rumor mongering," in the midst of the distribution of Ang Demokrasya Sa Pilipinas (Democracy in the Philippines), a book extremely critical of martial rule, published by him and former Congressman Concordia, authored by President Macapagal and translated into Tagalog by Congressman Rogaciano Mercado.* In addition, they were also all accused of libel in more than two dozens of criminal complaints filed by the several military officers named in the "condemned" book as having violated the human rights of dissenters, and for other crimes, in the office of the Provincial Fiscal of Rizal. *It had to take the events at "EDSA" to set them free from house arrest and these political offenses.* I am for Marcos' return not because I have a score to settle with him. ***Ditto's death or my arrest are scores that can not*** [sic] ***be settled.***[91]

In the case of *Olaguer v. Military Commission No. 34*, Chief Justice Claudio Teehankee employed the same manner and method of writing in his separate concurring opinion. Not only did he use categorical language in recognizing the human rights violations committed by Marcos, he also provided ample recognition of the actual individuals who suffered under the Marcos regime:

> Thus, persons held under Presidential Commitment or Detention Orders were detained indefinitely without charges, yet had no recourse to the courts. Even if they were acquitted in court, the military would not release them until and unless the then President lifted the preventive detention order. It was a long and horrible nightmare when our people's rights, freedoms[,] and liberties were sacrificed at the altar of "national security" even though it involved nothing more than the President-dictator's perpetuation in office and the security of his relatives and some officials in high positions and their protection from public accountability of their acts of venality and deception in government, many of which were of public knowledge.
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> * * *
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> The treacherous assassination on August 21, 1983 of the martyred *Benigno S. Aquino, Jr.*, within minutes of his arrival at the

[91] *Manglapus,* 177 SCRA 668, 727–28. (Emphasis supplied.)

Manila International Airport, although ringed with 2,000 soldiers, shocked and outraged the conscience of the nation. *After three years of exile following almost eight years of detention since martial law, Aquino, although facing the military commission's predetermined death sentence, supra, yet refused proper travel documents, was returning home "to strive for genuine national reconciliation founded on justice."* The late *Senator Jose W. Diokno* who passed away this year *was among the first victims of the martial law coup d'etat to be locked up with Senator Aquino.* In March, 1973, all of their personal effects, including their eyeglasses were ominously returned to their homes. Their wives' visitation privileges were suspended and they lost all contact for over a month. It turned out that Aquino had smuggled out of his cell a written statement critical of the martial law regime. *In swift retribution, both of them were flown out blindfolded to the army camp at Fort Laur in Nueva Ecija and kept in solitary confinement in dark boarded cells with hardly any ventilation. When their persons were produced before the Court on habeas corpus proceedings, they were a pitiable sight having lost about 30 to 40 lbs. in weight. Senator Diokno was to be released in September[ ] 1974 after almost two years of detention. No charges of any kind were ever filed against him. His only fault was that he was a possible rival for the presidency.*

Horacio Morales, Jr., 1977 [Ten Outstanding Young Men (TOYM)] awardee for government service and then executive vice-president of the Development Academy of the Philippines, was among the hard-working government functionaries who had been radicalized and gave up their government positions. Morales went underground on the night he was supposed to receive his TOYM award, declaring that *"(F)or almost ten years, I have been an official in the reactionary government, serviced the Marcos dictatorship and all that it stands for, serving a ruling system that has brought so much suffering and misery to the broad masses of the Filipino people. (I) refuse to take any more part of this. I have had enough of this regime's tyranny and treachery, greed and brutality, exploitation and oppression of the people,"* and "(I)n rejecting my position and part in the reactionary government, I am glad to be finally free of being a servant of foreign and local vested interest. I am happy to be fighting side by side with the people." *He was apprehended in 1982 and was charged with the capital crime of subversion, until he was freed in March, 1986 after President Corazon C. Aquino's assumption of office, together with other political prisoners and detainees and prisoners of conscience in fulfillment of her campaign pledge.*

Countless others forfeited their lives[,] and stand as witnesses to the tyranny and repression of the past regime. Driven by their dreams to free our motherland from poverty, oppression, iniquity and injustice, many of our youthful leaders were to make the supreme sacrifice. To mention a few: U.P. Collegian editor *Abraham Sarmiento, Jr.*, worthy son of an illustrious member of the Court

> pricked the conscience of many as he asked on the front page of the college paper: *Sino ang kikibo kung hindi tayo kikibo? Sino ang kikilos kung hindi tayo kikilos? Kung hindi ngayon, kailan pa?* He was locked up in the military camp and released only when he was near death from a severe attack of asthma, to which he succumbed. Another TOYM awardee, *Edgar Jopson*, an outstanding honor student at the Ateneo University [sic], instinctively pinpointed the gut issue in 1971—he pressed for a "non-partisan Constitutional Convention;" and demanded that the then president-soon-to-turn dictator "put down in writing" that he was not going to manipulate the Constitution to remove his disqualification to run for a third term or perpetuate himself in office and was called down as "son of a grocer." When[,] as he feared, martial law was declared, Jopson went underground to continue the struggle and was to be waylaid and killed at the age of 34 by 21 military troops as the reported head of the rebel movement in Mindanao. Another activist honor student leader, *Emmanuel Yap*, son of another eminent member of the Court, was to disappear on Valentine's Day in 1976 at the young age of 24, reportedly picked up by military agents in front of Channel 7 in Quezon City, and never to be seen again.
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> One of our most promising young leaders, *Evelio B. Javier*, 43, unarmed, governor of the province of Antique at 28, a Harvard-trained lawyer, *was mercilessly gunned down with impunity in broad daylight at 10 a.m. in front of the provincial capitol building by six mad-dog killers who riddled his body with 24 bullets fired from M-16 armalite rifles (the standard heavy automatic weapon of our military).* He was just taking a breather and stretching his legs from the tedious but tense proceedings of the canvassing of the returns of the presidential snap election in the capitol building. This was to be the last straw and the bloodless EDSA revolt was soon to unfold.[92]

In Justice Leonen's dissenting opinion in *Ocampo*, the Marcos rule was described as "a regime that caused untold sufferings for millions of Filipinos" in that "[g]ross violations of human rights were suffered by thousands."[93] He likewise noted how Marcos' "[w]idespread 'acts of torture, summary execution, disappearance, arbitrary detention, and numerous other atrocities'" have been judicially recognized in other jurisdictions, particularly citing the case of *In re Estate of Marcos Human Rights Litigation*.[94] In that case, the U.S. District Court of Hawaii outrightly recognized the massive atrocities

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[92] *Olaguer*, 150 SCRA 144, 174–78 (Teehankee, C.J., *concurring*). (Emphasis supplied, citations omitted.)

[93] *Ocampo*, 807 SCRA 223, 491.

[94] *Id.* at 591, *citing In re* Estate of Marcos Human Rights Litigation, 910 F. Supp. 1460 (1995).

committed by Marcos, with particular attention to the methods of torture employed by numerous state actors against political enemies, *viz.*:

> Proclamation 1081 not only declared martial law, but also set the stage for what plaintiffs alleged, and the jury found, to be acts of torture, summary execution, disappearance, arbitrary detention, and numerous other atrocities for which the jury found MARCOS personally responsible.
>
> * * *
>
> The arrest orders were means for detention of each of the representatives of the plaintiff class as well as each of the individual plaintiffs. During those detentions the plaintiffs experienced human rights violations including, but not limited to the following:
>
> 1. Beatings while blindfolded by punching, kicking[,] and hitting with the butts of rifles;
> 2. The 'telephone' where a detainee's ears were clapped simultaneously, producing a ringing sound in the head;
> 3. Insertion of bullets between the fingers of a detainee and squeezing the hand;
> 4. The 'wet submarine', where a detainee's head was submerged in a toilet bowl full of excrement;
> 5. The 'water cure' where a cloth was placed over the detainee's mouth and nose, and water poured over it producing a drowning sensation;
> 6. The 'dry submarine', where a plastic bag was placed over the detainee's head producing suffocation;
> 7. Use of a detainee's hands for putting out lighted cigarettes;
> 8. Use of flat-irons on the soles of a detainee's feet;
> 9. Forcing a detainee while wet and naked to sit before an air conditioner often while sitting on a block of ice;
> 10. Injection of a clear substance into the body of a detainee believed to be truth serum;
> 11. Stripping, sexually molesting[,] and raping female detainees; one male plaintiff testified he was threatened with rape;
> 12. Electric shock where one electrode is attached to the genitals of males or the breast of females and another electrode to some other part of the body, usually a finger, and electrical energy produced from a military field telephone is sent through the body;
> 13. Russian roulette; and
> 14. Solitary confinement while handcuffed or tied to a bed.

> All these forms of torture were used during 'tactical interrogation', attempting to elicit information from detainees concerning opposition to the MARCOS government. The more the detainees resisted, whether purposefully or out of lack of knowledge, the more serious the torture used.[95]

To this day, there is no domestic equivalent to the *In re Estate of Marcos* case. No Supreme Court ruling has taken the pains to categorically establish the utilization of these torture methods by Marcos and his allies in subduing the political and civil unrest caused by his tyranny. Unfortunately, because *In re Estate of Marcos* is a foreign case and therefore not binding as judicial decision, Justice Leonen's dissent falls short of anchoring the pronouncements made therein as being judicially recognized or legally binding in the Philippine jurisdiction.

A notable exception to this trend, however, is found in the strongly worded *ponencia* of Justice Dante Tiñga in the case of *Mijares v. Ranada.*[96] Although incorporated into the decision as a prelude to the actual recitation of facts, this case is one that presents the capacity of the Supreme Court to take hold of its history-making function and contribute to the crystallization of a historically accurate narration of the Marcos regime:

> Our martial law experience bore strange unwanted fruits, and we have yet to finish weeding out its bitter crop. While the restoration of freedom and the fundamental structures and processes of democracy have been much lauded, according to a significant number, the changes, however, have not sufficiently healed the colossal damage wrought under the oppressive conditions of the martial law period. *The cries of justice for the tortured, the murdered, and the desaparecidos arouse outrage and sympathy in the hearts of the fair-minded, yet the dispensation of the appropriate relief due them cannot be extended through the same caprice or whim that characterized the ill-wind of martial rule. The damage done was not merely personal but institutional, and the proper rebuke to the iniquitous past has to involve the award of reparations due within the confines of the restored rule of law.*
>
> ***The petitioners in this case are prominent victims of human rights violations who, deprived of the opportunity to directly confront the man who once held absolute rule over this country,***

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[95] *Id.* at 519–21. (Citations omitted.)

[96] G.R. No. 139325, 455 SCRA 397, Apr. 12, 2005.

> ***have chosen to do battle instead with the earthly representative, his estate.***[97]

To reiterate, by analyzing jurisprudence relating to the Marcos regime, this Note does not attempt to go into the legal questions involved in the cited cases. Rather, this Note aims to illustrate the inconsistent appreciation and perpetuation of the Marcos regime as a historical occurrence. As earlier mentioned, the crisis of subjectivity arises precisely because most, if not all, Supreme Court cases fail to recount the Marcos human rights violations as an undebatable fact. Surely, if every decision written about the Marcos atrocities were to employ categorical language in acknowledging his human rights violations, even if not as impassioned as the *Mijares* decision, then the pervasive issue of historical revisionism would not be the social and political conundrum it is today.

V. THE SUPREME COURT AS THE LAST BASTION FOR JUSTICE

The history-making function of the Supreme Court plays a role in the attainment of justice for the victims of Marcos atrocities. Until there is a categorical pronouncement recognizing not only the occurrence of Marcos' human rights violations, but also how brutal and inhumane such violations were, the victims—who to this day are owed much in terms of reparations, symbolic and otherwise—will remain deprived of the justice that has been due to them and their families for decades. Until the Supreme Court crystallizes the realities of the Marcos regime, the floodgates to historical revisionism can and will remain open, and the horrors suffered by countless Filipinos will be left vulnerable to being denigrated to mere political fiction and propaganda.

Whitewashing this period of Philippine history has additional implications. It perpetuates a culture of impunity of incomprehensible magnitude, which allows individuals in power today the comfort of knowing that justice need not be served. It has been 35 years since the ouster of Marcos, yet little has been done to accord his victims true justice. To make matters worse, this nation is currently being witness to the Marcos family's revived political momentum—an insult to the collective memory of the People Power Revolution. Needless to say, action on the part of the Supreme Court, as the last bastion of justice, is imperative, most especially since it becomes more difficult to crystallize history through first-hand accounts as time passes.

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[97] *Id.* at 399–400. (Emphasis supplied, citations omitted.)

While the executive and legislative departments—prior to this administration, at least—have done significant work in terms of creating mechanisms[98] for transitional justice,[99] these mechanisms are nevertheless put at risk every day under the current administration. Lest it be forgotten, this administration has, on numerous occasions, displayed their resolve in contributing to the rehabilitation of the Marcos legacy, with his burial at the LNMB being—quite literally—the final nail in the coffin. Judicial action is therefore needed now more than ever, especially since the institutional mechanisms outside of the judiciary are slowly being eradicated.

At one point during the current administration, the PCGG faced a massive threat to its existence. In May 2018, the House of Representatives, voting 162–10, approved House Bill No. 7376, the purpose of which was to abolish the PCGG and, instead, augment its functions to the Office of the Solicitor General (OSG).[100] Although the version agreed upon by the bicameral conference committee did not adopt this proposal, and instead approved only those amendments meant to strengthen the OSG,[101] this incident exposed the capacity of political will to threaten these mechanisms for transitional justice. The PCGG, created by then President Corazon Aquino, was mandated to recover the ill-gotten wealth amassed by Marcos, his immediate family, relatives, and close associates. Though plagued with numerous internal issues,[102] the PCGG stood as one of the essential agencies which institutionalized the Marcos atrocities; its abolishment can only bring about dangerous opportunities for those seeking to rehabilitate the Marcos image.

Meanwhile, the HRVCB, established under Republic Act No. 10368 ("R.A. No. 10368"), has been criticized in its role as the agency tasked to

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[98] Tugade, *supra* note 39, at 78.

[99] *Id.* at 79. "The United Nations has defined transitional justice as the "full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation." These processes and mechanisms include both judicial and non-judicial mechanisms such as individual prosecutions, reparations, truth-seeking, institutional reforms, and/or vetting and dismissals. Transitional justice mechanisms apply to societies recovering from armed conflict or repressive regimes that tend to produce dire consequences to the rule of law and to human rights as they happened."

[100] Mara Cepeda, *House OKs bill abolishing agency hunting Marcos ill-gotten wealth*, RAPPLER, May 15, 2018, *at* https://www.rappler.com/nation/202587-house-approves-bill-abolition-pcgg-transfer-powers-solicitor-general.

[101] Camille Elemia, *Senate version wins: PCGG will not be abolished*, RAPPLER, Jan. 21, 2019, *at* https://www.rappler.com/nation/221531-senate-version-wins-pcgg-will-not-be-abolished.

[102] Tugade, *supra* note 39, at 86–87.

"recognize and/or provide reparation to [...] victims and/or their families for the deaths, injuries, sufferings, deprivations[,] and damages they suffered under the Marcos regime."[103] Tugade notes in particular how a "lacuna is present in the law" in that: *first*, it lacks provisions on community reparations; and *second*, it fails to establish an independent truth commission to function as a fact-finding body on the specific atrocities of the Marcos regime.[104] The first is problematic in that "[i]ndividualized reparations are sometimes insufficient to recognize and address the harm caused to the community and its collective[,]"[105] while the second is problematic in that it has left to courts the power to determine the truths of the Marcos era—a power that has been wielded inconsistently throughout a plethora of decisions.

Moreover, the statutory lifespan of the HRVCB has limited its capacity to effectively perform its functions under the law. Under R.A. No. 10368, the HRVCB was given only two years from the promulgation of the law's implementing rules and regulations to complete its tasks, after which it would be rendered *functus officio*.[106] It was thus originally set to expire on May 12, 2014. Republic Act No. 10766 eventually amended the original law and granted the HRVCB an additional two years to operate,[107] thereby extending the HRVCB's deadline to May 12, 2018. Despite this, the extension still seemed to be insufficient for the HRVCB to fully perform the tasks the law set it out to do. By May 11, 2018, only 11,103 claimants out of more than 75,000 had been approved and duly recognized by the HRVCB.[108]

All of this, in addition to political resistance by the current administration, has hampered the HRVCB's overall efficacy in granting justice to Marcos' victims. Even if President Duterte himself signed a joint resolution approved by Congress to release funds for the victims, he then, only days after, went on public record to question the existence of the

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[103] Rep. Act No. 10368 (2013), § 2, ¶ 3.

[104] Tugade, *supra* note 39, at 95.

[105] *Id.*

[106] Rep. Act No. 10368 (2013), § 29. "*Work Period; Sunset Clause.*—The Board shall complete its work within two (2) years from the effectivity of the IRR promulgated by it. After such period, it shall become *functus officio*."

[107] Rep. Act No. 10766 (2016), § 1: "Section 29 of Republic Act No. 10368 is hereby amended to read as follows:

'SEC. 29. *Work Period; Sunset Clause.*—The Board shall complete its work within four (4) years from May 12, 2014. After such period, it shall become *functus officio*.'"

[108] Nestor Corrales, *Duterte extends compensation period for martial law victims,* INQUIRER.NET., Feb. 28, 2019, *at* https://newsinfo.inquirer.net/1090874/duterte-extends-compensation-period-for-martial-law-victims.

Marcoses' ill-gotten wealth.[109] Moreover, the rising tension between the CHR and the Duterte administration, which developed as the latter's response to the former's heavy criticism over the anti-illegal drugs campaign, has inevitably led to political retaliation. In 2017, the House of Representatives approved a measly PHP 1,000 budget for the CHR, an evident display of mockery and vindictiveness which was subsequently denounced by CHR Chairperson Jose Luis Martin Gascon.[110] Thus, Tugade notes that "with the contradiction between government action and pronouncements with respect to the legacy of Martial Law and the right of the victims to an effective remedy, a singular, solid commitment to redress and reconciliation remains elusive for the most part."[111]

Then there is also the CHR to consider. In a series of cases decided not long after the ratification of the 1987 Constitution, the CHR was effectively reduced to what the framers feared: a mere paper tiger.[112] *Cariño v. Commission on Human Rights*,[113] for example, was the doctrinal case which defined the powers of the CHR. In this case, which involved the question of whether public school teachers had the right to peacefully assemble, the CHR was held to have no quasi-judicial powers and was limited to being an investigative body for making findings of fact. Meanwhile, in *Simon v. Commission on Human Rights*,[114] which involved a local government demolishing certain roadside stores, the CHR was held to have no power to issue cease and desist orders.

On the problematic limitation of the CHR's powers, Tugade notes how:

> These two decisions, taken together, produce an interpretation that limits the powers of the CHR and virtually transformed it into what the framers of the 1987 Constitution feared was a "paper tiger" after all. While the Court's zealousness on defining the mandate of the CHR referenced the aims of the framers of the constitution, the

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[109] Alexis Romero, *Duterte claims Marcos ill-gotten wealth 'still unproven'*, PHIL. STAR, Feb. 28, 2019, *available at* https://www.philstar.com/headlines/2019/02/28/1897433/duterte-claims-marcos-ill-gotten-wealth-still-unproven.

[110] Vince Nonato, *House gives CHR P1,000 budget, slashes drug rehab funds by 75%*, INQUIRER.NET, Sept. 13, 2017, *at* https://newsinfo.inquirer.net/930239/house-gives-chr-p1000-budget-slashes-drug-rehab-funds-by-75.

[111] Tugade, *supra* note 39, at 95.

[112] *Id.* at 92.

[113] G.R. No. 96681, 204 SCRA 483, Dec. 2, 1991.

[114] G.R. No. 100150, 229 SCRA 117, Dec. 15, 2004.

> decisions have effectively narrowed down the limited ability of the CHR to protect abusive acts of the State.[115]

With the erosion of the institutions meant to promote transitional justice, all the more should the Court, with its status as an independent and co-equal branch of government, be steadfast in its duty to promote and uphold the rights of victims of the Marcos regime. Today, however, the country is left with questionable pronouncements in cases like *Ocampo*, which reduce to mere allegations the actual atrocities of that era. In the same case, the Court actively denied its capacity to crystallize history when it left it up to history and to the people of the Philippines to adjudge the Marcos family:

> There are certain things that are better left for history—not this Court—to adjudge. The Court could only do so much in accordance with the clearly established rules and principles. Beyond that, it is ultimately for the people themselves, as the sovereign, to decide, a task that may require the better perspective that the passage of time provides. In the meantime, the country must move on and let this issue rest.[116]

This statement, in passing on to the people the burden of institutionalizing the nation's recognition of Marcos' human rights violations, illustrates the failure of the Supreme Court to act in pursuance of its history-making function. It demonstrates callous passiveness at best and ignorance at worst. The statement failed to consider that recourse from the judiciary has become increasingly necessary, precisely because of how the determination and perpetuation of Marcos era narratives has ultimately been left to the politically powerful.

VI. RECOMMENDATIONS

The inconsistent treatment of the Marcos regime by the Supreme Court has caused a fragmentation of the Filipino collective memory. This has led not only to persistent attempts at historical revisionism by the Marcoses and their allies, but also to the perpetuation of a culture of impunity. This, in turn, leaves open the possibility of repetition—the complete antithesis of the legal landscape that the 1987 Constitution envisioned to achieve. The Supreme Court must therefore put a stop to this growing trend of rehabilitating the Marcos image by taking hold of its constitutional role as the

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[115] Tugade, *supra* note 39, at 92.

[116] *Ocampo*, 807 SCRA 223, 324 (Peralta, *J.*).

final arbiter of legal controversies and recognize, with finality, the occurrence and the magnitude of the human rights violations during the Marcos regime.

A. Judicial Notice

One way the Court may do this is by taking judicial notice of Marcos' human rights violations. This function is grounded on Rule 129, Section 1 of the Rules of Court, which *mandates* a court to take judicial notice of: (1) the history of the Philippines; and (2) official acts of the legislative department of the Philippines.[117] Judicial notice has been defined as "the cognizance of certain facts that judges may properly take and act on without proof because these facts are already known to them" or "the assumption by a court of a fact without need of further traditional evidentiary support."[118] It is based on the "convenience and expediency in securing and introducing evidence on matters which are not ordinarily capable of dispute and are not *bona fide* disputed."[119]

1. Judicial Notice of Philippine History

Given this framework, the Supreme Court is mandated to take judicial notice of the commission of human rights violations by Marcos through state agents. Under Republic Act No. 10086 ("R.A. No. 10086"), the National Historical Commission of the Philippines (NHCP) was established as "the primary government agency responsible for history" with the authority "to determine all factual matters relating to official Philippine history."[120]

Section 5 of R.A. No. 10086 provides the NHCP's functions, which include the power to:

> (a) [C]onduct and support all kinds of research relating to Philippine national and local history;
> (b) [D]evelop educational materials in various media, implement historical educational activities for the popularization of Philippine history, and disseminate information regarding Philippine historical events, dates, places[,] and personages;
> (c) [U]ndertake and prescribe the manner of restoration, conservation[,] and protection of the country's historical movable and immovable objects;

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[117] RULES OF COURT, Rule 129, § 1.
[118] Juan v. Juan, G.R. No. 221732, 837 SCRA 613, 627, Aug. 23, 2017.
[119] *Id.*
[120] Rep. Act No. 10086 (2010), § 5.

> (d) [M]anage, maintain[,] and administer national shrines, monuments, historical sites, edifices[,] and landmarks of significant historico-cultural value; and
> (e) [A]ctively engage in the settlement or resolution of controversies or issues relative to historical personages, places, dates[,] and events.[121]

Moreover, the NHCP Board is given the power to "discuss and resolve, with finality, issues or conflicts on Philippine History."[122]

In line with this, Justice Leonen's dissent in *Ocampo* cited the NHCP study entitled *Why Ferdinand Marcos Should Not be Buried at the Libingan ng mga Bayani*.[123] He noted how the study was based on "declassified documents in the Philippine Archives Collection of the United States National Archives/National Archives and Records Administration and the websites of pertinent [U.S.] government agencies and some officially sanctioned biographies of Ferdinand E. Marcos."[124] In effect, Justice Leonen took judicial notice of the facts—as well as the basis for the same—propounded by the NHCP, and ultimately used this as part of the legal reasoning behind his opinion:

> With regard to Mr. Marcos' war medals, we have established that Mr. Marcos did not receive, as the wartime history of the Ang Mga Maharlika and Marcos' authorized biographies claim, the Distinguished Service Cross, the Silver Medal, and the Order of the Purple Heart. In the hierarchy of primary sources, official biographies and memoirs do not rank at the top and are never taken at face value because of their self serving [sic] orientation, as it is abundantly palpable in Mr. Marcos' sanctioned biographies. In a leader's earnestness to project himself to present and succeeding generations as strong and heroic, personally authorized accounts tend to suffer from a shortage of facts and a bounty of embellishment.
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> With respect to Mr. Marcos' guerilla unit, the Ang Mga Maharlika was never recognized during the war and neither was Mr. Marcos' leadership of it. Note that other guerilla units in northern Luzon were recognized, such as:

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[121] § 5.

[122] § 7(h).

[123] Nat'l Hist Comm'n of the Phil. (NHCP), *Why Ferdinand Marcos Should Not be Buried at the Libingan ng mga Bayani,* July 12, 2016 *available at* https://drive.google.com/file/d/0B9c6mrxI4zoYS2I0UWFENEp6TkU/view.

[124] *Ocampo*, 807 SCRA 223, 536 (Leonen, *J.*, *dissenting*).

> 103rd Regiment, East Central Luzon [...]
> Pangasinan Anti-Crime Service, Pangasinan Military Area, LGAF
> 100th Bn/100th Inf. Regiment LGAF
> Southern Pangasinan Guerilla Forces (Gonzalo C. Mendoza Commander).
>
> Furthermore, grave doubts expressed in the military records about Mr. Marcos' actions and character as a soldier do not provide sound, unassailable basis for the recognition of a soldier who deserves to be buried at the LNMB.
>
> On these grounds, coupled with Mr. Marcos' lies about his medals, the NATIONAL HISTORICAL COMMISSION OF THE PHILIPPINES opposes the plan to bury Mr. Marcos at the Libingan ng mga Bayani.[125]

However, as can be gleaned from the text, the report only covers the Marcos legacy in terms of his military record for purposes of disqualifying his burial at the LNMB. Should the NHCP come out with an official report documenting the Marcos human rights violations and, by doing so, declare the same as being a part of Filipino history, the author submits that it should be incumbent upon the Supreme Court to take judicial notice of the same.

2. Judicial Notice of the Official Acts of the Legislative Departments

Pending the enactment of such a report by the NHCP, however, the Court may still find basis to take judicial notice of Marcos' human rights violations. Rule 129, Section 1 of the Rules of Court also provides that courts must take judicial notice of official acts of the legislative department of the Philippines. That said, the Court should take judicial notice of the relevant laws enacted by Congress that have categorically recognized the commission by Marcos of numerous human rights violations.

Relevant to this is R.A. No. 10368. Through the enactment of this law, the state has ultimately recognized the following as factual in nature:

> (a) "[T]he 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

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[125] NHCP, *supra* note 123, at 24.

> Ferdinand E. Marcos covering the period from September 21, 1972 to February 25, 1986"; and
> (b) "[The State's] moral and legal obligation to recognize and/or provide reparation to said victims and/or their families for the deaths, injuries, sufferings, deprivations[,] and damages they suffered under the Marcos regime."[126]

The same law defines *human rights violation* as "any act or omission committed during the period from September 21, 1972 to February 25, 1986 by persons acting in an official capacity and/or agents of the State;" a *human rights violation victim* as "a person whose human rights were violated by persons acting in an official capacity and/or agents of the State as defined herein;" and *persons acting in an official capacity and/or agents of the state* as:

> (1) Any member of the former Philippine Constabulary (PC), the former Integrated National Police (INP), the Armed Forces of the Philippines (AFP)[,] and the Civilian Home Defense Force (CHDF) from September 21, 1972 to February 25, 1986 as well as any civilian agent attached thereto; and any member of a paramilitary group even if one is not organically part of the PC, the INP, the AFP[,] or the CHDF so long as it is shown that the group was organized, funded, supplied with equipment, facilities[,] and/or resources, and/or indoctrinated, controlled[,] and/or supervised by any person acting in an official capacity and/or agent of the State as herein defined;
> (2) Any member of the civil service, including persons who held elective or appointive public office at any time from September 21, 1972 to February 25, 1986;
> (3) Persons referred to in Section 2(a) of Executive Order No. 1, creating the Presidential Commission on Good Government (PCGG), issued on February 28, 1986 and related laws by then President Corazon C. Aquino in the exercise of her legislative powers under the Freedom Constitution, including former President Ferdinand E. Marcos, spouse Imelda R. Marcos, their immediate relatives by consanguinity or affinity, as well as their close relatives, associates, cronies[,] and subordinates; and
> (4) Any person or group/s of persons acting with the authorization, support[,] or acquiescence of the State during the Marcos regime.[127]

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[126] Rep. Act No. 10368 (2013), § 2, ¶ 3.
[127] § 3 (d)(1)–(4).

Since the legislative department has recognized Marcos' human rights violations—through the most solemn form of its official acts at that, i.e. through the enactment of legislation—it should not be within the Court's discretion to discount the object and context of such legislative acts as mere allegations. For one branch of the government to say that a period of Philippine history did, in fact, occur, and for another to invalidate the same as an unresolved accusation, is not only a mockery of the Filipino's collective memory which serves as the very foundation of the country's own constitution; it also exposes the hand that the Court has been playing in perpetuating a culture of impunity.

Ultimately, the taking of judicial notice by the Court of Marcos' human rights violations, either as a part of Philippine history or as official acts of the legislative, remedies the crisis of subjectivity being faced by the judiciary today. In remedying this, the opportunities for historical revisionism are significantly hindered. Regardless of personal inclinations, Marcos' commission of human rights violations becomes a fact that the justices of the Supreme Court are mandated to recognize. This would not only contribute to the unification of the currently fragmented collective memory of the nation, but it would likewise provide the victims of the Marcos era consistent recognition. Such is a necessary step in order for these victims to attain true justice and holistic healing.

B. Historians as Expert Witnesses

Another recommendation is the presentation of historians as expert witnesses. Looking back at the post-World War II experience and the subsequent prosecution of the Nazis, "historians [became] increasingly involved in court battles, judicial reviews, and publicly or privately commissioned investigations of legally-related issues as expert witnesses and advisers."[128] Writing as one such expert, Richard Evans notes that his role as a historian was to essentially "advise on the historical context" of the litigation at hand.[129] According to Evans, in addition to aiding the panel in reaching a legal conclusion based on such historical evidence, it also helped claimants establish the presence of a strong moral case.

Expounding further on the pivotal role historians played in the resolution of cases, Evan notes how, in such instances, historians would perform a role similar to that of a pathologist or a ballistics expert in the

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[128] Richard Evans, *History, Memory and the Law: The Historian as Expert Witness,* 41 HIST. & THEORY 326, 328 (2002).

[129] *Id.* at 329.

prosecution of a murder case.[130] By providing their expertise, they would illustrate accurate historical contextualization that would aid in the dispensation of justice by providing facts to the court, much like how "an informed conclusion about the angle and shape of a wound may establish the kind of weapon which caused it, the way in which the blow was inflicted, and even some of the physical attributes of the murderer."[131]

More than establishing for them a legal claim against the estate of the deceased despot, applying this principle to the victims of the Marcos regime crystallizes the narrative of the horrors they suffered under Marcos' rule. Such crystallization, under the framework of transitional justice, is indispensable in attaining accountability, justice, and reconciliation.[132] Thus, by utilizing historians as expert witnesses in resolving future cases involving the Marcos regime, the Supreme Court would be given the opportunity to take hold of its history-making function and lay to rest a part of Philippine history that has long been exposed to the threat of revisionism. As the years pass, the need for the crystallization and recognition of this period becomes increasingly urgent, considering that the number of individuals with personal knowledge of these human rights violations and who maintain the capacity to testify grows less and less as a necessary consequence of age and death.

Noting once more the existence of an agency such as the NHCP, as well as the years of scholarship developed and nurtured as a consequence of this tumultuous period in Philippine history, this task is one that is not out of reach. Even if the Court were disinclined to take judicial notice of Marcos' human rights violations, the presentation of a historical expert, either from members of the NHCP, or even academicians who specialize on the matter, would no doubt display their qualifications, skills, and resources to establish, through unequivocal evidence, the occurrence of these atrocities during the Marcos regime.

VII. CONCLUSION

It is conceded that there is no positive obligation on the part of the Supreme Court, or any court for that matter, to create history. It is argued, however, that the history-making function of the Supreme Court is a necessary incident to its status as the highest court of the land tasked to be

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[130] *Id.*

[131] *Id.*

[132] Report of the Secretary General, The rule of law and transitional justice in conflict and post-conflict societies, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004).

the final arbiter of controversies. Concomitant to the power of establishing doctrines and judicial precedents, its statements concerning the socio-political history of the country, especially of those from times long passed but remain unresolved, become important factors in shaping the nation's consciousness and in dispensing justice.

The incorporation of existing history into legal materials such as court decisions, and in the reverse, the crystallization of history *through* legal materials, is valuable to a nation's collective memory. As can be seen from this dynamic, law and history interact in a "give-and-take" sense. On the one hand, there is the need to know and understand the past for purposes of resolving issues of the present. This is precisely why courts, on numerous occasions, have considered the intention of legislators when resolving controversies that involve the application of certain laws. On the other hand, it is likewise paramount to recognize that legal materials that capture historical accounts are necessary components of historical records. Just like how it is necessary for a Supreme Court decision to accurately recount the facts surrounding an ordinary litigant, all the more should a decision accurately recount the atrocities of the Marcos era in order to resolve issues of national importance.

As a final note, another reason why it is necessary for legal materials to properly encapsulate history is because these legal materials will inevitably dictate the manner in which future controversies are to be resolved. After all, the reason that Marcos atrocities are still doubted to such extent as they have been is the lack of categorical recognition of their occurrence. After 35 years of standing by as this culture of impunity is perpetuated, it is high time that this historical incident be given judicial recognition. It is the only way, as the Court in *Ocampo* implored, for the nation to move on and this issue be put to rest.

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COLLEGE OF LAW
UNIVERSITY OF THE PHILIPPINES

FACULTY

EDGARDO CARLO L. VISTAN II, B.S., LL.B., LL.M., *Dean*
JAY L. BATONGBACAL, B.A., LL.B., M.M.M., J.S.D., *Associate Dean*

PROFESSORS OF LAW

ELIZABETH H. AGUILING-PANGALANGAN, B.A., LL.B., LL.M.
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RAUL C. PANGALANGAN, B.A., LL.B., LL.M., J.S.D.

ASSOCIATE PROFESSORS OF LAW

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