

**ENDING INJUSTICE AND IMPUNITY BY CHALLENGING THE POWER
BASE OF CORRUPT TYRANTS BY FORFEITING THEIR ASSETS AND TURNING
THE ASSETS OVER TO THEIR VICTIMS: PRACTICAL LESSONS FROM THE
PHILIPPINES AND THEORETICAL PERSPECTIVES FROM BEYOND**

The Republic of the Philippines is located in south-east Asia. In relation to Zimbabwe, the Philippines is across the Asian continent and the Indian Ocean. It is an archipelago of 7,107 islands south of Taiwan and Japan and north of Malaysia, with Manila City as its capital. The Philippines has an area of 127,000 square kilometers that spreads through three major islands, Luzon, Visayas and Mindanao.

Though consisting of 120 ethno-linguistic groups, the peoples in the Philippines are uniformly referred to as Filipinos, now numbering 103 million as of July 2012. It has a unitary form of government with three branches: the Executive Department, which the President heads; the Congress, which consists of two houses, the House of Representatives and the Senate; and the Judiciary, which is made up of one Supreme Court and several lower courts permanently stationed in different parts of the Philippines. These branches are collectively referred to as the National Government. The Philippines has political subdivisions, known as Local Government Units, which administer their respective territories. They each have their local chief executive and local legislative body but their powers are only those granted by the laws formulated by the National Government.

The Philippines is a republican and democratic state, with the level or stage of its democracy discussed below. It is republican in the sense that the peoples elect their leaders to run the government. The President, the Senators who compose the Senate, and the party-list members which occupy around 54 seats in the House of Representatives, are elected nationally. The other members of the House of Representatives and the leaders of the Local Government Units are also elected but through pre-defined local territories. Members of the Judiciary – holding titles of Justices and Judges – including those in the Supreme Court and its Chief Justice are appointed by the President.

While the Philippines was once a colony of Spain for about 400 years and then the United States of America for just a fourth of that, the brand of formal democracy it carries radiates with US influence. Except for its criminal and civil law, vintages of Spain and Continental Europe, the Philippines political and legal systems have by far followed US traditions. Philippine courts follow the adversarial system of hearing and deciding cases, with the judge deciding issues of both facts and law though its rules of evidence are those adapted to a jury trial. This disjunction is perceived to be one of the reasons for the delay in the progress of a trial.

The democratic traditions of the Philippines are defined in the texts of the *Constitutions* that have come and gone as well as that subsisting. There was the historically significant but largely marginal revolutionary *Constitution* in 1898 when the Philippines successfully repulsed Spain; the colonial *Constitutions* during the American occupation in 1901 till 1935; the *Commonwealth Constitution* in 1935, which lasted until 1972; the *Constitution* in 1972 formulated by Ferdinand Marcos for his constitutional

authoritarianism; the *Freedom Constitution* after the authoritarian Marcos was removed from power; and presently, the *Constitution* adopted in 1987.

Huntington (1991) and Shin (2008) identify the Philippines as belonging to the third wave of democratization. According to these authors, countries shifting from authoritarianism to democracy in the 1980's and 1990s rode this wave. In the case of the Philippines, Ferdinand Marcos was the turning point. Freely elected president in 1965 and 1969, but unable to run a third time for the presidency, and this was under the *Commonwealth Constitution*, he in 1972 used martial law powers, to stay in office. He then brokered the 1972 *Constitution* to keep himself in power.

Dahl (1971) lists three pre-requisites of democracy, namely, *competition, inclusiveness, and civil liberties*. Marcos' 1972 *Constitution*, theoretically, allowed elections, guaranteed civil liberties, and retained the functions of the courts. Realities however rejected flatly the theory. The elections were rigged and therefore unreliable dispensers of popular mandate (Rivera 2002). Marcos monopolized power, both political and economic (Hernandez 1985). He violently suppressed dissension; his government used killings and enforced disappearances towards this end and turned himself literally the many martyrs' last visions (Sison 2012). In his time political and civil rights were dead. Economic rights proved no better. Marcos was the only wielder of power, and his control and influence extended from politics to economics (Hernandez 1985). He lucratively turned the economy into his cronies' businesses ultimately for his benefit, creating *crony capitalism* (Rivera 2002).

Marcos' administration was not just a case of "potential risk of heightened concentration of executive power" (Payle 2002; Armony and Schamis 2005). He was not simply power hungry. Under Doreenspleet's (2000) democracy typologies, he led an authoritarian government as he failed to meet the requirement of competition, *i.e.*, no citizens' access to policy options and participation in policy creation, nor "institutionalized constraints" on Marcos' exercise of power.

Amidst pressure from the United States and his own constituencies, Marcos was compelled to call special elections for the posts of President which he held and of Vice-President. His adversary was Corazon Aquino, the widow of Benigno Aquino whose death in 1983 had sparked massive outrage against the political repression and economic deprivation attributed to Marcos' government. Official results had Marcos winning over Corazon Aquino. The peoples protested the perceived grotesqueness of this result.

In February 1986 Ferdinand Marcos' reign of terror and corruption came to an end. Peoples marched through the streets of EDSA, the abbreviation of that stretch of highway that links south and north of the capital of the Philippines. The key actors were Corazon Aquino; Cardinal Jaime Sin of the Philippines' Catholic Church; Fidel Ramos, then deputy commander of the Philippines' Armed Forces and commander of the national police force; Juan Ponce Enrile, then Marcos' defense secretary; and the several movements, backed by formal organizations, from the left to the right of the political spectrum, united in the aspiration to put an end to the political repression, violent stifling of free expression, and teeming centralized corruption.

Rakner Menocal & Fritz (2007) uses temporal frames to situate the phases of democratization: liberalisation from authoritarian rule, transition to democracy, and consolidation to a democratic system. O'Donnell (1994) calls the desirable last phase as representative democracy; for Doorenspleet (2000) it is liberal democracy. For a democracy that does not reach this stage, if it does not revert to authoritarianism (Rakner Menocal & Fritz 2007), it is labelled unconsolidated or hybrid regimes (Rakner Menocal & Fritz 2007), O'Donnell's (1994) delegative democracy, or Dahl's polyarch.

In liberal democracy, Dahl's pre-requisites of democracy are present, *i.e.*, "meaningful and extensive competition, sufficiently inclusive suffrage in national elections, and a high level of civil and political liberties" (Doorenspleet 2000). Rustow (1970) says that complete democracy must have these features: internalization of a sense of national political community; sensible resolution of conflicts over societal issues; institutionalization of crucial aspects of democratic procedure; and consensual submission to democratic rules of contestation.

In a hybrid regime, delegative democracy or polyarch, the deficiencies or weaknesses are two-fold – failure to achieve a shared commitment to build and strengthen democratic institutions, AND absence of effective means to cope with social and economic problems (O'Donnell 1994). Here, what substitutes for democratic institutions – "regularized patterns of interaction that are known, practiced, and regularly accepted (if not necessarily normatively approved) by social agents" expecting to interact "under the rules and norms formally or informally embodied in those patterns" – are "x x x other nonformalized but strongly operative practices – clientelism, patrimonialism, and corruption" (O'Donnell 1994, pp. 57, 59).

Accountability is central to democratic consolidation. The types of accountability are vertical, *i.e.*, through the ballot, horizontal, *i.e.*, institutions designed for that purpose, and societal, *i.e.*, civic associations, other NGOs and independent mass media auditing State actions (O'Donnell 1994; Rakner Menocal & Fritz 2007). Accountability is hampered, when democracy is in the delegative stage, a re-statement of its weakness, because of its "anti-institutional bias" and characteristic "high personalization and concentration of power in the executive." This should explain in this democracy stage the propensity for and attractiveness of extra-institutional means of addressing social and economic ills and regime change, like massive social protests and coup d'état (O'Donnell 1994).

The efforts at consolidating Philippine democracy, post Marcos, involved initiating measures to compel accountability and creating institutions for that purpose. Hence in February and March 1986 President Corazon Aquino, using her legislative powers under the *Freedom Constitution* that was put in place immediately after Ferdinand Marcos was toppled from power and the 1972 *Constitution* was set aside, ordered to "freeze" all such assets and properties in the Philippines, "prohibit" their disposal, and "require" full disclosure by all persons in the Philippines holding such assets or properties, and created the Presidential Commission on Good Government (PCGG) – while proceedings are taking place to determine the assets' legitimacy or illegitimacy.

The tasks of the PCGG are:

(a) The recovery of all ill-gotten wealth whether located in the Philippines or abroad, including the takeover or sequestration thereof;

(b) The investigation of such cases of graft and corruption as the President may assign to the Commission from time to time.

(c) The adoption of safeguards to ensure that the above practices shall not be repeated in any manner under the new government, and the institution of adequate measures to prevent the occurrence of corruption.

Its power and authority are to:

(a) conduct relevant investigation;

(b) sequester or place or cause to be placed under its control or possession any property believed to be ill-gotten;

(c) provisionally take over in the public interest such property or to prevent its disposal or dissipation;

(d) enjoin or restrain any actual or threatened commission of acts against the PCGG;

(e) administer oaths, and issue subpoenas necessary for the PCGG's tasks;

(f) hold any person in direct or indirect contempt and penalize him or her;

(g) seek and secure the assistance of any office, agency or instrumentality of the government.

(h) promulgate such rules and regulations as may be necessary to carry out the purposes of this order.

In exercising its mandate, the PCGG uses the writs of "Sequestration" (means taking into custody or placing under the PCGG's control or possession through its fiscal agent any asset, fund or other property, as well as relevant records, papers and documents, in order to prevent their concealment, destruction, impairment or dissipation pending determination of the question whether the said asset, fund or property is ill-gotten wealth under Executive Orders Nos. 1 and 2); "Freeze Order" (an order intended to stop or prevent any act or transaction which may affect the title, possession, status, condition, integrity or value of the asset or property which is or might be the object of any action or proceeding under Executive Orders Nos. 1 and 2, with a view to preserving and conserving the same or to preventing its transfer, concealment, disposition, destruction or dissipation); and "Hold Order" (an order to temporarily prevent a person from leaving the country where his departure will prejudice, hamper or otherwise obstruct the PCGG's task to enforce Executive Orders Nos. 1 and 2).

The PCGG is granted immunity from claims for damages and from being called to testify or reveal information in any court or any other body. It is also empowered to grant immunity from criminal prosecution to any person who provides it information or testifies in any investigation it is conducting. The criminal and civil cases to be initiated by the PCGG were to be filed with the Sandiganbayan, a third level collegial court in the Philippines and ranked just below the Supreme Court. Notably the Sandiganbayan can compel a witness to testify or provide information but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony, or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

The Sequestered Assets Disposition Authority and later the Asset Privatization Trust, independent boards, and PCGG's fiscal agent are responsible for the disposition of assets, business enterprises or corporations transferred to the PCGG or pursuant to a decision of a court of law. Their job is to transfer, sell, assign or otherwise dispose of these assets "on such terms and conditions as are in the best interest of the National Government." Resources obtained from the PCGG's exercise of power have been earmarked for various at times criss-crossing purposes. Hence, Republic Act 9700 (2011) makes land acquired by the PCGG in the exercise of its mandate open to distribution for agrarian reform while Republic Act 8532 (1998) earmarks receipts from proceeds of assets and sales of ill-gotten wealth to fund the agrarian reform program. Republic Act 7202 (1992) allocates "assets or funds that may be recovered, or already recovered, which have been determined to have been stolen or illegally acquired from the sugar industry" for compensating "all sugar producers from Crop Year 1974–1975 up to and including Crop Year 1984–1985 on a pro rata basis." Executive Order 313 (2000) sets aside the coconut levy shares in the San Miguel Corporation as initial capital for a trust fund to be used for "the purpose of financing programs of assistance for the benefit of the coconut farmers, the coconut industry, and other agri-related programs intended to maximize food productivity, develop business opportunities in the countryside, provide livelihood alternatives, and promote anti-poverty programs."

Claims for compensation by victims of violations of human rights are not one of those identified for financing by PCGG-generated assets. This exclusion is rather weird since Marcos' government was deposed for among others its rabid repression of human rights. Monuments have been erected for human rights victims yet not a single money was allotted to recognize and compensate them for their sufferings and sacrifices. Worse, accountability was reiterated as a fundamental democratic principle in the 1987 *Constitution* (Juego 2007).¹ Ostensibly, this *Constitution* is a documentation of Appadurai's (2007) "politics

¹ Hence, a whole article in the 1987 *Constitution* is devoted to accountability. It re-instituted existing institutions – Civil Service Commission, Office of the Ombudsman, Sandiganbayan, power of impeachment – to compel accountability. For the first time, the *Constitution* elevated to fundamental prominence the rule that "[t]he right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches, or estoppel." The *Constitution* also recognized the validity of the PCGG's sequestration or freeze orders but required that these writs be issued only upon showing of a prima facie case and that these writs are deemed automatically lifted if no judicial action or proceeding is commenced.

of hope” where “social development (including a deeper consciousness of rights, broader access to knowledge, and fuller participation in the public sphere) is taken to be the best road to equality (seen as the reduction or elimination of poverty).” While the *Constitution* impresses the “classical idea of popular sovereignty” and rule of law in which citizens are equal, and simultaneously seeks legitimacy by obliging the State to “provide for the well-being of the population” (Chatterjee 2004), a budget for human rights claims have been altogether ignored.

To be sure, the efforts to institutionalize accountability in the Philippines did not begin in 1986 or after Ferdinand Marcos’ fall from power. For even before he began his authoritarian rule and throughout his reign of terror and corruption, existing statutes against corruption and violation of human rights remained part of the legal system and thus ought to have been followed.

For instance, Republic Act 1379, which was enacted in 1955, provides the procedure for the forfeiture in the State’s favor any property found to have been unlawfully acquired by any public officer or employee. This statute says whenever any public officer or employee has acquired during his or her incumbency an amount of property manifestly out of proportion to his or her salary as such public officer or employee and to his other lawful income and the income from legitimately acquired property, the property shall be presumed prima facie to have been unlawfully acquired.

Republic Act 3019, the “Anti-Graft and Corrupt Practices Act,” was passed into law in 1960 and penalized every conceivable corrupt and graft practices by any public employee or officer. Under the *Civil Code*, which came to fore in 1949, any violation of human rights which results in an injury, physical or otherwise, provides a cause of action for damages.

The *Revised Penal Code*, which has been in effect since 1930, requires public officers and employees who commit crimes in relation to or aided by their office to restore the thing obtained or repair the damages caused thereby.

The wholesale plunder of economic resources and violations of human rights by Ferdinand Marcos, his family and his associates cannot therefore be attributed to the absence of formal mechanisms to control public officers’ malfeasance or misfeasance in office. The explanation, it appears, is the inability of the Philippines to complete its process of democratization with the features identified by Rustow (1970) or to surpass O’Donnell’s (1994) characterization of a delegative democracy or polyarch – failure to achieve a shared commitment to build and strengthen democratic institutions, absence of effective means to cope with social and economic problems, and conversely, the rise of clientelism, patrimonialism, and corruption. Rivera (2002, p. 468) describes Philippine democratization as a “colonially rooted installation of formal democratic rules of contestation lacking the initial nourishing environment of a working national unity.” Lacking is a national consciousness of “institutionalised uncertainty,” i.e., “in a democracy, all outcomes are unknown and are open to contest among key players x x x and the only certainty is that such outcomes will be determined within the framework of pre-established democratic rules” (Przeworski cited in Rakner Menocal & Fritz 2007).

Unfortunately, this condition of Philippine democracy persists till today though the degree to which they do may vary from time to time. It gives important context to a survey which concluded that for most Filipinos economic development is more important than democracy (Abueva & Guerrero 2003). Subliminally, this means that Filipinos are willing to go authoritarian if food, job and shelter are abundant (Abueva & Guerrero 2003). The same sentiment was expressed by most Filipinos when asked about how the 1986 transition has affected their lives. They felt that it lacked the capacity to foment good governance and lasting social change (Liu & Gastardo-Conaco 2011). These perceptions about democracy as incapable of delivering the social entitlements promised by the 1987 *Constitution* are dangerous because democratic institutions are seen to be inutile.

Still, the official discourse in the Philippines is to turn the issue of accountability, including those of Ferdinand Marcos, his family and his cronies, into a legal one. This would have been ideal if democracy and its institutions were flourishing in the country. But like other court cases, institutional problems affect a speedy and just resolution of the complaints against Marcos et al. For one, the parameters of this legal discourse have been limited to, first, proving that corruption existed during the Marcos regime, and second, establishing that the assets in the names of Marcos, his family and cronies were products of such corruption. Accountability has ignored or neglected human rights claims. In fact, the official position of the Philippine Government is to reject compensation for human rights victims as among the official destinations for the proceeds of the Marcos assets, ill-gotten or otherwise, see *e.g.*, *Republic v. Villarama et al.*, G.R. No. 117733, September 5, 1997. Further, a compensation bill is pending before the House of Representatives but has not been acted upon by its leaders. It is easy thus to believe that the Philippine Government gives no or low priority to victims of human rights abuses during Marcos' time.

For another, even if limited to the corruption aspect, the complaints initiated by the PCGG have to struggle for time in the Sandiganbayan's calendar for hearing cases. And if they do get to be heard, the prosecutors handling these cases have to deal with the administrative delay in obtaining evidence if there is any, and, compounded by the high rate of turn-over among lawyers handling these cases, have to spend time getting up to speed with case strategies and other case wherewithal. More often than not, too, prosecutors are ill-equipped to understand critical non-legal facets of the complaints and effectively go to trial. They have no background knowledge on such matters as reading financial statements or comprehending technical commercial terms and procedures, which are necessary to track and recover the ill-gotten wealth of Marcos et al. Other problems include errors in the prosecution of cases through lack of appropriate guidance and trial skills, uncertainties in the interpretation of the law, lack of zeal and commitment, and the invisible hands of clientelism, patrimonialism, and corruption. While all these contribute to the delay in resolving the complaints against Marcos et al. justly and efficiently, there is unfortunately no official study that identifies which of these factors affect the desired goal the most, and which of them, only marginally.

To illustrate:

- Civil Case No. 0009, one of the cases initiated by the PCGG against Marcos, his family and his cronies, was filed with the Sandiganbayan in 1987

but went through pre-trial only in 1996 all the way to 1997. Ordinarily, the pre-trial of a case takes place one month or at most three months after a case is filed in court, and the pre-trial itself does not last a year to complete but in just one or two hearing dates within just a month. For whatever reason, the PCGG through State prosecutors completed presenting its evidence in the year 2000, and as it was about to rest its case, remembered to make a late offer of one important piece of document that it omitted to introduce as evidence, the transcript of the deposition of a key witness. The Sandiganbayan refused to admit this document as one of the PCGG's evidence. In the year 2001, believing the importance of this document in the presentation of its case, the PCGG appealed the Sandiganbayan's refusal to the Supreme Court. Meanwhile, the proceeding before the Sandiganbayan was suspended to await the Supreme Court's action on the appeal. After ten long years, in 2011, the Supreme Court decided to deny the PCGG's appeal. It is only now that Civil Case No. 0009 is again being heard by the Sandiganbayan, and without the transcript of the deposition as evidence, a PCGG defeat might just as well be inevitable.

- In 1986 the PCGG sequestered the company Tourist Duty Free Shops, Inc. and froze all bank accounts of this company. In 1987 the PCGG filed with the Sandiganbayan Civil Case No. 0008 against Ferdinand Marcos, his wife and his business associates. In 2001 the same Sandiganbayan stopped the enforcement of the sequestration and freeze orders. Proceedings in Civil Case No. 0008 were suspended as the PCGG appealed to the Supreme Court the Sandiganbayan's order to stay the sequestration and freeze orders. After 10 years, in year 2011, the Supreme Court decided to reverse the order of the Sandiganbayan. It is only now that Civil Case No. 0008 may now be decided.

- In 1987 the PCGG initiated Civil Case No. 0011. It completed presenting its evidence, after proceedings before the Supreme Court, only on in the year 2010. Noticeable from this civil case is the recognition that "[g]iven the voluminous documents and papers involved in ill-gotten wealth cases, it was indeed unavoidable that in the course of trial certain documentary exhibits were omitted or unavailable by inadvertence, as what had happened in this case where the subject original documentary evidence were found misfiled in a different case folder." There must therefore be excellent records management in the prosecution of ill-gotten wealth cases.

- Civil Case No. 0014 was dismissed for failure of the PCGG to present evidence against the Ferdinand Marcos, his wife and his business associates.

The legal discourse has therefore failed on two fronts – as it continues to ignore the human rights violations that the Marcos regime had perpetrated, the corruption cases the PCGG initiated to forfeit the assets illegal acquired are also floundering.

To be sure, the PCGG has had some success in discharging its mandate. For example, properties were ceded to the PCGG, on behalf of the Philippine Government, in exchange for immunity from prosecution for the assignors. The assignors were former cronies of Ferdinand Marcos, *e.g.*, *City of Pasig v. Republic*, G.R. No. 185023, August 24, 2011; *Republic v. Sandiganbayan et al.*, G.R. No. 108292, September 10, 1993. Success was also registered through the use of the statutory presumption of when assets are deemed ill-gotten and the trial technique of summary judgment, which does not require the presentation of evidence through a regular trial, *e.g.*, *Republic v. Sandiganbayan et al.*, G.R.

No. 152154, July 15, 2003. These instances of recovery of wealth alleged to be ill-gotten stress the difficulty of proving this fact solely by the legal, especially a trial, process.

Chatterjee (2004) distinguishes between two conceptualizations of societies: civil society, where the theoretical popular sovereignty, rule of law and equal rights description of democracy are expounded but often contested, and political society, where protests are addressed on a political terrain quite divorced from, though legitimated by, normative democratic values. These typologies should be handy in resolving an impasse when seeking to recover proceeds of assets unlawfully acquired by deposed public officers not only for purposes of restoring faith in the justice system but also, though no less importantly, of preventing access by rogue leaders to resources to backstop their nefarious plans. As the Philippine experience shows, trusting this mission solely to the legal fiction of the rule of law and the theory of the supremacy of democratic institutions may result in tragic consequences. Interventions on the political terrain are indispensable – surely, the Marcos’ cronies or associates would not have agreed to assign properties to the Philippine Government had the political movements lied low; the statutory presumption of ill-gotten wealth is not a product of law working above people and institutions, but of people working through institutions to make law. Significantly, human rights claims will not be forgotten even if ignored or neglected by institutions of the State.

The Philippine *Constitution*’s bias for societal accountability, i.e., a wide public place where “a robust civil society [has] militantly advanced the social and economic interests of the various disadvantaged sectors,” has compensated the historical experience of weak institutional contestation, i.e., vertical and horizontal accountability (Rivera 2002). This is inevitable in a society like the Philippines where some 34 million Filipinos live in dire poverty under horrendous public fiscal position, where 40% of government budget goes to debt servicing alone and an active military mindset of intervention, or euphemistically called “nationbuilding” (Acop n.d.) pervades the thinking even of civilian leaders (Doronilla 2011). There are wide opportunities to rupture institutions so it makes sense to reserve at times the strength of the legal system in the hands of political contexts. Political society “occupies a unique interstitial ground between the highly concentrated powers of the state and the usually highly diffuse powers of popular sentiment, will, and mobilization. It provides the institutional channels, or lineaments, along which power flows, or becomes blocked and diverted” (Hearn 2001, p. 346).

Compensation of human rights claims by the violators themselves, howsoever their assets are denominated, should not be denied or ignored. Neither should they be left to legal discourse alone for their resolution. To begin with, it is both a matter of justice and a matter of lessons learned that should not be repeated, that the victims’ victimization is acknowledged with something more than tokenism. To then Associate Justice (now Chief Justice) Ma. Lourdes A. Sereno (2010) of the Philippine Supreme Court, on typifying the importance of a truth commission, the overall need to shape collective memory about injustices done is motivated by several beneficial effects: to prevent impunity from taking place, where otherwise “might makes right” and recycling of oppressors because they have the wealth to do so become the norm; to reinforce the rule of law and educate peoples on the nature and extent of past wrongdoings; to give value to the utility and meaning of truth to those who have been aggrieved; to help society, especially the victims, to obtain the

courage to believe that a just society exists.² The Philippine Chief Justice, quoting from Hom and Yamamoto, concludes:

This disregard need not prevail. There is much value to be found in memory [and quoting from Hom and Yamamoto] x x x

For many of the 10,000 Philippine citizens tortured and murdered for their political opposition to the former Ferdinand Marcos regime, reshaping memory became both a means to challenge injustice and a psychological end in itself. Consider the anguish of the family of Archimedes Trajano, a college student who posed a mildly critical question to Marcos's daughter at a forum and was whisked away, tortured for days, and thrown off a building. For his family, and thousands of others, there existed the need to create a new memory beyond the excruciating story of personal loss and suffering — a memory that included a sense of social justice and government accountability. To write this new memory collectively, many families, lawyers, bureaucrats risked much in the Philippines to aid the thirteen-year human rights multidistrict class action litigation in the United States.

There are some recommendations on how to avoid the delays that derailed the corruption cases against Ferdinand Marcos, his family and his cronies.³ These require State action. But equally important, the intersecting concerns of human rights, corruption and recovery of ill-gotten wealth could learn from the commitment and activism of social movements which broke the inertia of State passivity.

² She said: “Striking down efforts to give the public information regarding the misdeeds of powerful officials sends a signal of the continuing dominance of ‘might makes right’ and the futility of attempting to hold public officials accountable for their actions. Conversely, by carrying out investigations of the past actions of public officials, and by holding up its results to public scrutiny and criticism, the government reinforces respect for the rule of law and educate the people on the nature and extent of past wrongdoing. Moreover, the characterization of public discussion — the ‘second forum’ — as an inappropriate venue for the release of the PTC’s findings devalues the utility and meaning that truth possesses for the aggrieved group, and denigrates the need for the construction and repair of the group’s collective memory. Indeed, the Concurring Opinion implies that the PTC’s influence on public perceptions — and consequently the shaping of the collective memory of Filipinos — will only instigate more injustice. To the contrary, the need to shape collective memory as a way for the public to confront injustice and move towards a more just society should not be diminished or denied. The Concurring Opinion disregards the significance to justice of what is seen and remembered and eliminates the vital role of the people themselves in ‘constructing collective memories of injustice as a basis for redress.’ This disregard need not prevail. There is much value to be found in memory x x x x”

³ These are: a. There must be a strong and legally enforceable presumption of when wealth is deemed ill-gotten. b. The body tasked to enforce the build-up and prosecution of ill-gotten wealth cases must have as much power as the PCGG but given more resources and allowed to hire the best staff with legally binding commitments to stay for a minimum period of time. c. An efficient and fail-proof records-keeping must be put in place, always considering the probability of a long-drawn legal battle where a deluge of documents is inevitable. d. A dedicated court must be assigned for purposes of trying this type of cases. Appeals in the course of the proceedings must be disallowed; so must tactics, both those obviously dilatory and even merely tending to delay, be prohibited. If appeals are sanctioned, a deadline must be required for the resolution thereof.

To begin with, an adversarial court system may not be the best mechanism for resolving these issues. It is not improbable that the victims would once again feel victimized by the terrorizing atmosphere of a court hearing where the court or the judge must sit as a disinterested umpire. Other types, such as truth commissions and inquisitorial bodies, provided due process rights are respected, are more efficient and humane than the ones in place in the Philippines. Social movements must be at the forefront of laying the groundwork for such accountability forum. The latter cannot be left to official legal discourse to unravel. Social movements must also involve themselves in the consistent and incessant efforts to inform, educate and persuade the peoples about the importance and centrality to their lives of retrieving ill-gotten assets and of determining and writing the truth about human rights violations and corruption. Only then can significant progress be achieved.

In the Philippines, for example, the Center for People Empowerment in Governance has published a dictionary of the words used by rent-seeking officials and bribers to facilitate their illegal transactions and pursuits. This dictionary aims to expose and shame these corrupt individuals and keep the peoples' consciousness active and alive against graft and corrupt practices and the individuals who engage in them. Obviously, for parochial reasons, the Philippine Government would not have conceived of making this book available to anyone.

Human rights victims have successfully prosecuted a class action suit for damages against Ferdinand Marcos and his estate in Hawaii, United States.⁴ They have been adjudged victims and compensation has been ordered. The US

⁴ On May 9, 1991, a complaint was filed with the United States District Court (US District Court), District of Hawaii, against the Estate of former Philippine President Ferdinand E. Marcos (Marcos Estate). The action was brought forth by ten Filipino citizens who each alleged having suffered human rights abuses such as arbitrary detention, torture and rape in the hands of police or military forces during the Marcos regime. The Alien Tort Act was invoked as basis for the US District Court's jurisdiction over the complaint, as it involved a suit by aliens for tortious violations of international law. These plaintiffs brought the action on their own behalf and on behalf of a class of similarly situated individuals, particularly consisting of all current civilian citizens of the Philippines, their heirs and beneficiaries, who between 1972 and 1987 were tortured, summarily executed or had disappeared while in the custody of military or paramilitary groups. Plaintiffs alleged that the class consisted of approximately ten thousand (10,000) members; hence, joinder of all these persons was impracticable. The institution of a class action suit was warranted under Rule 23(a) and (b)(1)(B) of the US Federal Rules of Civil Procedure, the provisions of which were invoked by the plaintiffs. Subsequently, the US District Court certified the case as a class action and created three (3) sub-classes of torture, summary execution and disappearance victims. Trial ensued, and subsequently a jury rendered a verdict and an award of compensatory and exemplary damages in favor of the plaintiff class. Then, on February 3, 1995, the US District Court, presided by Judge Manuel L. Real, rendered a Final Judgment (Final Judgment) awarding the plaintiff class a total of One Billion Nine Hundred Sixty Four Million Five Thousand Eight Hundred Fifty Nine Dollars and Ninety Cents (\$1,964,005,859.90). The Final Judgment was eventually affirmed by the US Court of Appeals for the Ninth Circuit, in a decision rendered on December 17, 1996. On May 20, 1997, the present petitioners filed Complaint with the Regional Trial Court, City of Makati (Makati RTC) for the enforcement of the Final Judgment. They alleged that they are members of the plaintiff class in whose favor the US District Court awarded damages. They argued that since the Marcos Estate failed to file a petition for certiorari with the US Supreme Court after the Ninth Circuit Court of Appeals had affirmed the Final Judgment, the decision of the US District Court had become final and executory, and hence should be recognized and enforced in the Philippines, pursuant to Section 50, Rule 39 of the Rules of Court then in force.

Court's judgment is now before a Philippine second level court for its enforcement as a foreign judgment. The long journey by the indefatigable martyrs of Marcos' reign of terror is nearing its hopefully fruitful end – though a bit late because with their resources the Marcos family and their cronies are again back in power in the Philippines.

Another instance is when health workers detained by the military during the administration of then President Gloria Macapagal-Arroyo, on allegations that they were communist guerrillas, sued the former President and concerned military officers for damages. Their causes of action are violations of their human rights, specifically, against torture, illegal detention and manufacture of bogus evidence. The observation has been that the initiation of the means to exact public accountability for violations of human rights of suspected communist rebels in terms of criminal charges and disciplinary proceedings have become largely ineffective because of the unwillingness of government institutions to initiate much less decide favourably on such type of complaints. Private accountability like the civil case for damages against Macapagal-Arroyo et al. needed only the patience, resourcefulness and initiative of political society which are in abundant supply in the Philippines. What is more, as mentioned, hitting these wayward leaders at points where they can no longer recycle themselves as leaders, because their resources for doing so are taken away from them and distributed among their victims, prevents impunity from taking place. As it is, as the family and cronies of Ferdinand Marcos have been able to keep their wealth, they are now back in power in the Philippines. The case for damages of these health workers is awaiting trial.

As well, the killing of around a hundred individuals in Maguindanao, consisting of journalists, lawyers, NGO members, local politicians and their supporters, men, women and children, allegedly done by the clan of a local politician, which has strong links to then President Macapagal-Arroyo, with the aid of the clan's private armed group, is undergoing trial. While this is essentially a criminal case, it is replete with claims for damages and several orders for the freezing of the clan's wealth, supposedly ill-gotten. This case illustrates a wonderful image of seeking accountability through the activism of social movements and an endeavour to destroy the political clout of the clan by depriving them of their financial and economic resources that have in the past been used to buy off witnesses and grease the wheels of justice to turn in their favor. Indeed, strong political society pressure has moved legal discourse to abandon a normative reaction, which is to lump this criminal case with ordinary criminal cases, and instead to treat this case of paramount importance, in local parlance, "the trial of the century," and give it all the resources it needs for its efficient and effective resolution without compromising the rights of all to due process.

Undoubtedly, the mobilization of public opinion is necessary when domestic democratic normative institutions are weak. This mobilization is important for two reasons – it helps unclog the systemic deficiencies in an adversarial legal system by marshalling resources to avoid the usual route; and it focuses attention against corrupt tyrants so they may never again return to power by freezing their assets and in distributing them among their victims obtain real individual justice for each of them. It is hoped that official discourse, legal or otherwise, would one day help in accomplishing the goals that social movements have attained. *For sure, the effort is gargantuan, it is quite like making love in times of the cholera – so sweet but so laborious if not*

deadly. But unless the power base of corrupt tyrants is challenged and they are deprived of the resources to make a comeback, injustice and impunity will be recycled time and time again. Only their names and faces, if at all, will change, but the oppression will haunt ceaselessly.

References

- Shin, Doh Chull, 'The Third Wave in East Asia: Comparative and Dynamic Perspectives', *Taiwan Journal of Democracy* (2008), Volume 4, No. 2.
- Leftwich, A. (1993), 'Governance, Democracy and Development in the Third World' *Third World Quarterly*, Vol. 14, No. 3, 605-624.
- Dahl, Robert A. (1998) Ch. 4. □What is Democracy□, *On Democracy*. New Haven: Yale UP, pp.35-43.
- Nanda, Ved P. (2006) The "good governance" concept revisited, *Annals of the American Academy of Social Science*, Vol.603, pp.269-283.
- O'Donnell, G. 1994 'Delegative Democracy', *Journal of Democracy* 5(1): 55-69.
- Portes, Alejandro (1998) □□Social Capital: Its Origins and Applications in Modern Sociology", *Annual Review of Sociology* 24:1-24.
- Hearn, Jonathan (2001) "Taking Liberties: Contesting Visions of the Civil Society Project." *Critique of Anthropology* 21:339-360.
- Appadurai, A. (2007) 'Hope and Democracy', *Public Culture* 19(1): 29-34.
- Huntington, Samuel P., 1991. *The Third Wave: Democratization in the Late Twentieth Century*. Norman: University of Oklahoma Press. Katulondi. Kabasubaba, June 14, 2005. 'Africa's garden of democracy', <http://www.opendemocracy.net>.
- Armony, A. C., and H. E. Schamis (2005), □Babel in Democratization Studies□, *Journal of Democracy*, 16(4): 113-28.
- Paley, J. (2002) 'Toward an Anthropology of Democracy', *Annual Review of Anthropology* 31: 469-96.
- Doronila, A 2011, 'Stand-off in Fortress Tripoli unlike EDSA 1', *Philippine Daily Inquirer*, viewed 12 September 2012, <http://global.factiva.com.ezproxy2.library.usyd.edu.au/ha/default.aspx>.
- Diokno, B. (2009), 'New President, old challenges', Business World Publishing Corporation, s1/4.
- Rustow, D 1970, Transitions to Democracy: Toward A Dynamic Model, *Comparative Politics* 3 pp. 337-363.
- Liu, J & Gastardo-Conaco, C 2011, *Theory and Methods of a Representational Approach to Understanding Social Movements: The Role of the EDSA Revolution in a National Psychology of Protest for the Philippines*, Springer Science+Business Media, viewed 12 September 2012, <http://www.springerlink.com/content/m57g2278115214n2/fulltext.pdf>.

- Rivera, T 2002, 'Transition Pathways and Democratic Consolidation in Post-Marcos Philippines', *Contemporary Southeast Asia*, Vol. 24, No. 3.
- Hernandez, C 1985, 'Constitutional Authoritarianism and the Prospects of Democracy in the Philippines', *Journal of International Affairs*, Winter 85, Vol. 38 Issue 2, p. 243.
- Abueva, J & Guerrero, L.L. 2003, 'What Democracy Means to Filipinos', *Proceedings of the East Asia Barometer Conference on "How East Asians View Democracy: The Region in Global Perspective"*, Taipei, Taiwan, viewed 12 September 2012, <http://www.asianbarometer.org/newenglish/publications/workingpapers/no.5.pdf>.
- Sison, J.M. 2012, Rise and Fall of Marcos Fascist Dictatorship: Causes and Consequences up to the present, viewed 14 September 2012, <http://www.philippinerevolution.net/statements/rise-and-fall-of-marcos-fascist-dictatorship-causes-and-consequences-up-to-the-present>.
- Rakner, L. Menocal, A.R. and Fritz, V., 'Democratization's Third Wave and the Challenges of Democratic Deepening: Assessing International Democracy Assistance and Lessons Learned,' Research Project (RP-05-GG), (Advisory Board for Irish Aid, Aug. 2007).
- Acop, D, 'Assessing the Expanded Role of the Armed Forces of the Philippines in Nation Building', *Asia-Pacific Social Science Review*, pp. 131-152, viewed 12 September 2012, http://www.dlsu.edu.ph/research/journals/apssr/pdf/200612/science_5.pdf.
- Sereno, M. L. A. (2010), 'Dissenting Opinion,' *Biraogo v. The Philippine Truth Commission*, G.R. No. 192935, December 7, 2010.