

JUDICIAL HISTORICAL REVISIONISM IN THE PHILIPPINES: JUDICIAL REVIEW AND THE REHABILITATION OF FERDINAND MARCOS

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I. INTRODUCTION

In *Ocampo v Enriquez*, the Supreme Court of the Philippines allowed the burial of former dictator Ferdinand Marcos in a cemetery reserved for heroes.¹ The Court held that there is no clear legal basis that would justify a judicial check on President Rodrigo Duterte’s decision to allow the interment. The Court upheld “what is legal and just” and said that it “is not to deny Marcos of his rightful place at the [cemetery].”² On the surface, the decision was presented as a purely legal appreciation of the issues, claiming that “certain things that are better left for history—not this Court—to adjudge.”³

Through *Ocampo*, the Supreme Court accomplished what Marcos’ own writings could not. It made him the hero that he always wanted to be. This decision has serious consequences for history.

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¹ *Ocampo v Enriquez*, G.R. Nos. 225973, 225984, 226097, 226116, 226117, 226120 & 226294 (S.C., Nov. 8, 2016) (Phil.). Nine Justice voted in favour of the internment. Chief Justice Sereno, and Justices Carpio, Leonen, Caguioa, and Jardeleza dissented. Justice Reyes took no part. The decision was affirmed on August 8, 2017.

² *Id.* at 35.

³ *Id.*

Decisions of the Supreme Court “form part of the law of the land.”⁴ The Supreme Court has “the sole authority to interpret what the Constitution means, and all persons are bound to follow its interpretation.”⁵ *Ocampo* is not only a legal document; it presents a version of history that historians cannot erase.

I make two arguments in this paper. The first is that the Court’s approach—cutting out history from its ruling—is a farce. The Court engaged in judicial historical revisionism by presenting the dictator stripped of his faults. The refurbished judicial version of Marcos is a soldier who defended the country against foreign invaders and not a politician who was responsible for the erosion of Philippine democracy and who pillaged the national coffers.⁶ This decision constitutes history, and it cannot be justified as a purely legal and ahistorical document.

The second argument I make is that the Court abandoned its judicial history-writing function and declined to provide the narrative of oppression and injustice that the victims of the martial law regime deserved. This judicial history-writing function is typically expected

⁴ Citizens’ Battle against Corruption (CIBAC) v. Commission on Elections GARCIA, (COMELEC), G.R. No. 172103 (S.C., Apr. 13, 2007) (Phil.).

⁵ Carpio-Morales v. Court of Appeals, G.R. Nos. 217126–27 (S.C. Nov. 10, 2015) (Phil.).

⁶ See, e.g., Nilan G. Yu, *Interrogating Social Work: Philippine Social Work and Human Rights Under Martial Law*, 15 INT. J. SOC. WELFARE, 257, 259 (2006) (stating that “[t]he Marcos dictatorship was ‘exceptional’ for the quantity and quality of its violence, embodying a systematic and brazen assault on human rights and human dignity”). For other accounts of the Philippine experience under the Marcos regime, see William H. Overholt, *The Rise and Fall of Ferdinand Marcos*, 26 ASIAN SURV. 1137, 1137–63 (1986) (providing a comprehensive overview of the entire Marcos regime), and see generally PRESS FREEDOM UNDER SIEGE: REPORTAGE THAT CHALLENGED THE MARCOS DICTATORSHIP (Ma. Ceres P. Doyo ed., 2019) (describing the struggles of the Philippine press against the repressive policies of the Marcos government). There is a two-volume issue of *Kasarinlan*, a journal of the Third World Studies Center of the College of Social Sciences and Philosophy at the University of the Philippines Diliman, documenting discussions of a public forum series, which is called *Marcos Pa Rin! Ang mga Pamana at Sumpa ng Rehimeng Marcos [Marcos Still! The Legacy and the Curse of the Marcos Regime]*. See generally 27 & 28 KASARINLAN: PHIL. J. THIRD WORLD STUD. CTR. 265–74 (Reyes & Jose eds., 2012–2013), <https://www.journals.upd.edu.ph/index.php/kasarinlan/issue/view/602/showToc> [<https://perma.cc/HR5L-PJ7V>].

from international criminal courts, but *Ocampo* implicated issues that are similar to those before these criminal courts. For this reason, I argue that it was incumbent upon the Court to provide the historical record of Marcos' atrocities.

Ocampo bolstered the political resurgence of the Marcos family. In 2016, his son, Ferdinand Jr., lost his bid for the vice-presidency by less than a million votes.⁷

This Article will proceed in the following manner. In Part 2, I discuss the Supreme Court's ruling in *Ocampo*, in relation to Philippine case law on the power of the President. In Part 3, I discuss Ferdinand Marcos' obsession with casting himself as a hero. This part shows how his writings have always painted himself as a hero, by writing himself into Philippine mythology, claiming to be a war hero, and as the savior of Philippine democracy. Part 4 reviews the literature on historical revisionism. In Part 5, I present my first argument that law and historical are inseparable. I argue that despite the Supreme Court's justifications, its decision is inextricably linked to history, and that any pretext to a purely legal decision, *Ocampo* is in fact an act of historical revisionism. In Part 6, I make my second argument—that the Supreme Court abandoned its history-writing function. Commonly recognized as a function of international criminal courts, I argue that this function should be expected from other courts when dealing with cases that deal with mass atrocities. In Part 7, I present an analysis of *Ocampo* showing examples of how other courts managed to exercise its history-writing function. Part 8 shows how *Ocampo* bolstered the political careers of the Marcos family. I make my conclusions in Part 9.

II. TWO CASES

Ocampo is the second of two important cases that touch on the powers of the Philippine President. The first was *Marcos v Manglapus*, where the Supreme Court backed President Corazon

⁷ U.P. Third World Studies Center/VERA Files, *Analysis: Imee's Win to Boost Efforts to Restore Marcos Name in History*, ABSCBN NEWS (May 26, 2019), <https://news.abs-cbn.com/spotlight/05/26/19/opinion-imees-win-to-boost-efforts-to-restore-marcos-name-in-history> [<https://perma.cc/ZK4D-BWAN>].

Aquino's decision to bar the Marcoses from returning to the Philippines.⁸

In 1986, popular protests forced Ferdinand Marcos into exile. After many years, Marcos signified his wish to return to the Philippines to die, but President Corazon Aquino decided against it. She cited the potential consequences of his return at a time when the stability of government was threatened from various directions and the economy was just beginning to rise and move forward.⁹

The Marcoses filed a petition asking the Supreme Court to order the respondents to issue travel documents to Mr. Marcos and the immediate members of his family, and to enjoin the implementation of the President's decision to bar their return to the Philippines.¹⁰

The issue in *Marcos* was whether, in the exercise of the powers granted by the Constitution, the President may prohibit the Marcoses from returning to the Philippines.¹¹ The Supreme Court ruled in favor of the State. According to the Court, the President had residual powers to protect the general welfare of the people and balance it against the rights of the Marcoses. She had implicit powers to ensure that laws are faithfully executed.¹²

The President, said the Court, has to attend to the problems of maintaining peace and order and ensuring domestic tranquility in times when no foreign foe appears on the horizon.¹³

The Court explained that the case cannot be decided solely on the constitutional rights on a person's liberty of abode and the right to travel. Rather, it should be viewed in light of those "residual unstated powers of the President which are implicit in and correlative to the paramount duty residing in that office to safeguard and protect general welfare."¹⁴ The President has exercise discretion to determine whether the Marcos' request must be granted or denied.¹⁵

⁸ *Marcos v Manglapus*, G.R. No. 88211 (S.C., Sept. 15, 1989) (Phil.), https://www.lawphil.net/judjuris/juri1989/sep1989/gr_88211_1989.html [<https://perma.cc/3UU2-S7NT>].

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

In *Ocampo*, the petitioners argued that the interment of Marcos at the *Libingan ng mga Bayani* (LNMB) will desecrate the national shrine where “the mortal remains of our country’s great men and women are interred for the inspiration and emulation of the present generation and generations to come.”¹⁶ The Court disagreed.¹⁷

In resolving this issue, the Supreme Court checked whether Marcos’ burial satisfied the regulations governing the cemetery and ignored the implications of his removal from office.

The Supreme Court held that there is no law or executive issuance preventing the President from using the land where the LNMB is located for uses other than those intended by past Presidents.

The allotment of a plot for Marcos satisfied the “public use requirement” because he was a former President and Commander-in-Chief, a legislator, a Secretary of National Defense, a military personnel, a veteran, and a Medal of Valor awardee. The disbursement of public funds to cover the expenses incidental to the burial is granted to compensate him for valuable public services rendered.

President Duterte's decision to have Marcos' remains interred at the LNMB was inspired by his desire for national healing and reconciliation, and the court could not consider arguments that it was a favor to the Marcoses.

The Court then explained that Marcos was qualified for burial under existing regulations of the Armed Forces of the Philippines.¹⁸

¹⁶ *OCAMPO V ENRIQUEZ*, *supra* note 1, at 18.

¹⁷ *Id.* at 18–24.

¹⁸ Under AFP Regulations G 161-375, the following are eligible for interment at the LNMB:

- (a) Medal of Valor Awardees;
- (b) Presidents or Commanders-in-Chief, AFP;]
- (c) Secretaries of National Defense;
- (d) Chiefs of Staff, AFP;
- (e) General/Flag Officers of the AFP;
- (f) Active and retired military personnel of the AFP to include active draftees and trainees who died in line of duty, active reservists and CAFGU Active Auxiliary (CAA) who died in combat operations or combat related activities;
- (g) Former members of the AFP who laterally entered or joined the PCG and the PNP;

In addition, the Court held that the purpose of the LNMB, from both the legal and historical perspectives, “has neither been to confer to the people buried there the title of ‘hero’ nor to require that only those interred therein should be treated as a ‘hero.’”¹⁹

The Court pointed out that the privilege of interment at the LNMB has been relaxed through the years.²⁰ Since 1986, those eligible for interment included non-military personnel who were recognized for their contributions to Philippine society. These included dignitaries, statesmen, national artists, and the widows of former Presidents, and other government officials.²¹ According to the court, whether the extension of burial privilege to civilians is unwarranted is immaterial to the case “since it is indubitable that Marcos had rendered significant active military service and military-related activities.”²²

It is at this point the Court refused to acknowledge Marcos’ faults, saying that:

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

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- (h) Veterans of Philippine Revolution of 1890, WWI, WWII and recognized guerillas;
 - (i) Government Dignitaries, Statesmen, National Artists and other deceased persons whose interment or reinterment has been approved by the Commander-in-Chief, Congress or the Secretary of National Defense; and
 - (j) Former Presidents, Secretaries of Defense, Dignitaries, Statesmen, National Artists, widows of Former Presidents, Secretaries of National Defense and Chief of Staff.

Those disqualified are “Personnel who were dishonorably separated/reverted/discharged from the service; and (b) Authorized personnel who were convicted by final judgment of an offense involving moral turpitude. *Ocampo v. Enriquez*, G.R. Nos. 225973, 225984, 226097, 226116, 226117, 226120 & 226294, November 8, 2016.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

he was not all good, he was not pure evil either. Certainly, just a human who erred like us.

Our laws give high regard to Marcos as a Medal of Valor awardee and a veteran. R.A. No. 9049 declares the policy of the State “to consistently honor its military heroes in order to strengthen the patriotic spirit and nationalist consciousness of the military.”²³

Violations of human rights, according to the Court were “alleged” and that he made mistakes.²⁴ His military background was the only consideration that mattered to the Court.

Finally, the Court added that Marcos possessed none of the disqualifications stated in AFP Regulations because he was neither convicted by final judgment of the offense involving moral turpitude nor dishonorably separated/reverted/discharged from active military service.²⁵

According to the Court, Marcos’ ouster from the presidency during the EDSA Revolution is not “dishonorable separation, reversion or discharge from the military service.”²⁶ The fact that the President is the Commander-in-Chief of the AFP under the 1987 Constitution only enshrines the principle of supremacy of civilian authority over the military. Not being a military person who may be prosecuted before the court martial, the President can hardly be deemed “dishonorably separated/reverted/discharged from the service” as contemplated by AFP Regulations.²⁷

In the end, the Court refused to read anything into Marcos’ removal from office, saying that his ouster cannot be given a “legal meaning.”²⁸ It held that “there is no clear constitutional or legal basis to hold that there was a grave abuse of discretion amounting to lack or excess of jurisdiction which would justify the Court to interpose its authority to check and override an act entrusted to the judgment of another branch.”²⁹

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 34.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 35.

According to the Court, it must uphold what is legal and just and it cannot deny Marcos of his rightful place at the LNMB. “[F]ull respect for human rights is available at any stage of a person’s development, from the time he or she becomes a person to the time he or she leaves this earth.”³⁰ It is at this point that the Court separated its work from historical context:

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.³¹

The commentary on these cases has been sparse. One account analyzed the Supreme Court’s approach to both cases, saying that the Court was consistent in its rulings.³² Both *Marcos* and *Ocampo* identified a political question and ruled that Presidents Corazon Aquino and Rodrigo Duterte did not act whimsically or arbitrarily, resulting in grave abuse of discretion.³³ Both decisions were hinged on the concept of executive power.

The same author opined that the political situation explained the Presidents’ actions: in *Marcos*, the Philippines was still a nation in transition. President Corazon Aquino believed that to allow Marcos to return so soon after he was deposed had several possible repercussions. *Ocampo* was promulgated at a time when the political tides of nation were shifting. Duterte’s win in the 2016 elections was accompanied by the fact that Marcos’ son almost won the vice-presidency.³⁴ This was a huge difference when Joseph Estrada

³⁰ *Id.*

³¹ *Id.*

³² Sedfrey M. Candelaria & Angelo Francesco F. Herbosa, *Coming Full Circle with the Application of Executive Power and Judicial Consistency in Marcos v. Manglapus and Ocampo v. Enriquez*, Special Issue ATENELO L.J. 271, 279 (2017).

³³ *Id.* at 10.

³⁴ *Id.* at 289. See also Rafael Lorenzo A. Pangalangan et al., *Marcosian Atrocities: Historical Revisionism and the Legal Constraints on Forgetting*, 19 ASIA-PACIFIC

proposed Marcos' interment at the LMB. At that time, there was "vociferous opposition" to the proposal from "a highly impressive and distinguished cross-section of Philippine society."³⁵

In the Resolution of Motions for Reconsideration, the Supreme Court addressed charges that it had engaged in historical revisionism to rehabilitate the Marcos name, dismissing the allegations as "pure and simple speculations that are devoid of any factual moorings."³⁶ The Court then addressed allegations of historical revisionism and said that the President of the Philippines cannot declare anyone a hero adding that it is the National Historical Commission of the Philippines (NHCP) that makes that call. The NHCP settles controversies regarding historical personages, places, dates and events, and resolves issues on Philippine history.³⁷

As I show in this Article, *Ocampo did* have the effect of vindicating *Marcos* because a Supreme Court decision is not ahistorical—it is in fact the judicially approved version of history. The Marcos clan has been rejuvenated and its political fortunes have improved. Neither President Duterte nor the National Historical Commission of the Philippines declared Marcos a hero; the Supreme Court did because it ignored its history-writing function and the crimes of Mr. Marcos and interred him alongside genuine heroes of the Philippines.

Incidentally, the NHCP opposed Marcos' burial in the LNMB. In a document uploaded on its website,³⁸ the Commission's study concluded that:

J. ON HUM. RTS. L. 140, 145 (2018), where the authors reconciled "freedom of thought" and "the right to the truth," arguing that attempts to revise history may be the proper subject of State regulation.

³⁵ Greg Bankoff, *Selective Memory and Collective Forgetting: Historiography and the Philippine Centennial of 1898*, 157(3) J. HUM. & SOC. SCI. SOUTHEAST ASIA & OCEANIA 539, 555 (2017). To be clear, *Ocampo* also generated protests. Major cities "were rocked by intermittent protests" as a result of the Supreme Court's decision. See also Jennifer Monje, "Hindi Bayani/Not a Hero": *The Linguistic Landscape of Protest in Manila*, 5(4) SOC. INCLUSION 14, 14–28 (2017).

³⁶ *Ocampo v Enriquez*, G.R. Nos. 225973, 29 (S.C., Aug. 8, 2017) (Phil.) [hereinafter *Ocampo v Enriquez* (2017)] (affirming Supreme Court's 2016 decision).

³⁷ *Id.* at 30.

³⁸ NATIONAL HISTORICAL COMMISSION OF THE PHILIPPINES, WHY FERDINAND E. MARCOS SHOULD NOT BE BURIED AT THE LIBINGAN NG MGA BAYANI (July 12, 2016), <https://www.martiallawchroniclesproject.com/wp->

Mr. Marcos' military record is fraught with myths, factual inconsistencies, and lies. The rule in history is that when a claim is disproven—such as Mr. Marcos' claims about his medals, rank, and guerilla unit—it is simply dismissed. When, moreover, a historical matter is under question or grave doubt, as expressed in the military records about Mr. Marcos' actions and character as a soldier, the matter may not be established or taken as fact. A doubtful record also does not serve as sound, unassailable basis of historical recognition of any sort, let alone burial in a site intended, as its name suggests, for heroes.³⁹

Despite this statement, the Supreme Court of the Philippines defied, in its own words, the “principal government agency responsible for history and has the authority to determine all factual matters relating to official Philippine history.”⁴⁰

III. MARCOS AND MYTH-MAKING

Ferdinand Marcos had always engaged in myth-making, consciously crafting an image of himself as a hero.

As the first couple (Ferdinand and Imelda Marcos) saw themselves as the legend of the first Filipino man and woman. They imagined themselves as the parents of an extended Filipino family.⁴¹ The Marcoses contrasted themselves against the former Administration's “uptight blandness to their youth, vitality and yes, even beauty.”⁴² Photographers and videographers captured and transmitted images to cement their grip on power.⁴³ Photos produced

content/uploads/2018/09/National-Historical-Commission-of-the-Philippines-Report-on-Marcos-Medals.pdf [https://perma.cc/D4DV-DFXK].

³⁹ *Id.* at 1.

⁴⁰ OCAMPO v ENRIQUEZ (2017), *supra* note 1.

⁴¹ Vicente L. Rafael, *Patronage, Pornography, and Youth: Ideology and Spectatorship during the Early Marcos Years*, in WHITE LOVE AND OTHER EVENTS IN FILIPINO HISTORY 122, 122 (2000).

⁴² Jose Santos P. Ardivilla, *The Marcos Memes and the Manipulation of Memory*, in REMEMBERING/RETHINKING EDSA 84, 85 (JPaul S. Manzanilla & Caroline S. Hau eds., 2016).

⁴³ *Id.*

albums of the Marcoses as “heroic, cosmopolitan, elegant, determined, worthy of pedestals.”⁴⁴

Marcos also claimed to be a war hero.⁴⁵ In 1946, he filed claims alleging that before the fall of Bataan, the United States Army awarded him the Silver Star and Distinguished Service Cross (DSC), and that his commanding general had recommended him for the Medal of Honor.⁴⁶ The local U.S. Army headquarters rejected his claim to the Medal of Honor, but accepted his claims to the Silver Star and DSC without issuing another general order.⁴⁷ The original DSC general order, if any, has never surfaced. In later years, Marcos proudly wore his American decorations, including the DSC. But since the team could not find either the general order or the original recommendations, they removed his name from their working list.⁴⁸

Marcos cast himself as the indispensable hero in a quest to save Philippine society. Seemingly certain that his role in history would be evaluated largely on his authoritarian bent, Marcos wrote to justify emergency rule.

Marcos used myth-making to justify the imposition of martial law, by invoking his theory of “democratic revolution,” which he also referred to as the “revolution from the center” or “constitutional revolution.”⁴⁹ He would later justify the consolidated power of his executive leadership seen during the period of martial law by stating that it was a form of “constitutional authoritarianism.”⁵⁰

In his view, a “revolution from the center” is “a democratic government’s expression of its obligation to “make itself the faithful instrument of the people’s revolutionary aspirations.”⁵¹ It is supposed to mediate “between the majority of the poor masses and the minority of the landed, industrial, business and commercial

⁴⁴ *Id.*

⁴⁵ James C. McNaughton, Kristen E. Edwards, & Jay M. Price, “*Incontestable Proof Will Be Exacted*”: *Historians, Asian Americans, and the Medal of Honor*, 24 *THE PUB. HISTORIAN* 11, 30 (2002).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ McNaughton, Edwards & Price, *supra* note 45.

⁴⁹ Gene Segarra Navera, *Metaphorizing Martial Law: Constitutional Authoritarianism in Marcos’s Rhetoric (1972-1985)*, 66 (4) *PHILIPPINE STUD.* 417, 421 (2018).

⁵⁰ *Id.*

⁵¹ *Id.*

elites.”⁵² The “revolution from the center” warns of rejects the totalitarianism of both right and left; a “democratic revolution”—a supposedly peaceful means of addressing sociopolitical problems and ‘engaging in deep and far-ranging changes in the country.’⁵³

Marcos rationalized his declaration of martial law by saying that “[all] indications that the country was fast slipping into irretrievable chaos were present, so large and persistent.”⁵⁴ He cited leftist revolutionaries, rightists, Muslim secessionists, private armies and political warlords, criminal elements, oligarchs, and foreign interventionists as perils that would have eventually endanger the peace and stability of society.⁵⁵

The conceptualization that martial law is a democratic instrument to preserve society was advanced by underscoring the supposedly grave danger that confronted the nation as a result of which the government was constitutionally sanctioned to use martial law to save the nation and to restore civil order, this ensuring the country’s constitutional survival.⁵⁶

Martial law was a means to social change—emancipation from the old society—to preserve society from a bloody revolution that would be instigated by extremists of the right and the left.⁵⁷ In this view, constitutional authoritarianism is needed to protect a democratic society from the threats of communism and socialism. Marcos cast himself the savior of society as well as the instigator of change or the person who could bring about a democratic revolution.⁵⁸

“Constitutional authoritarianism” replaced the form of government from the declaration of martial law in 1972. Marcos fused executive and legislative powers into the Presidency, and the

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 427.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 423.

⁵⁸ *Id.* at 440.

country's democratic political institutions have since declined.⁵⁹ Marcos banned political parties, turned the legislative assembly into a rubberstamp, shut down media (later allowed to operate only under military supervision), suspended fundamental rights, and subordinated the judiciary.⁶⁰ The military also emerged as a major political force⁶¹ After five years of "constitutional authoritarianism," Marcos's security squads shifted from formal mass arrests to extrajudicial operations.⁶² During the last years of his rule, the police grew increasingly brutal, using torture and salvaging (tortured and killed with the scarred remains dumped for display) as the standard practices against political dissenters and petty criminals.⁶³ Under the Marcos regime 3,257 were murdered, 35,000 were tortured, and 70,000 were arrested.⁶⁴ 77% of those who died were salvaged.⁶⁵ Robles lists several acts of murder and massacre by the Marcos Administration, including "hamletting" or forced relocation of families from their homes to heavily guarded sites.⁶⁶ But these accounts are not found in standard school books.

Moreover, part of the problem with ridding Philippine politics of Marcos is that unlike other emerging democracies, the Philippines did little towards an accounting for past crimes. Rather, the Philippines tried to forget its authoritarian past through formal amnesty and informal inaction.⁶⁷ This invigorates the Marcos revisionism project, which now comes in three parts: (1) The "glorious past" of the Marcos era; (2) the coup against Marcos,

⁵⁹ Carolina G. Hernandez, *Constitutional Authoritarianism and the Prospects of Democracy in the Philippines*, 38 J. INT'L AFF. 243, 245 (1985).

⁶⁰ *Id.* at 247–52.

⁶¹ *Id.* at 252–54.

⁶² ALFRED W. MCCOY, *POLICING AMERICA'S EMPIRE: THE UNITED STATES, THE PHILIPPINES, AND THE RISE OF THE SURVEILLANCE STATE* 398 (2011).

⁶³ *Id.* at 403.

⁶⁴ *Id.*

⁶⁵ *Id.* See also MARK R. THOMPSON, *THE ANTI-MARCOS STRUGGLE: PERSONALISTIC RULE AND DEMOCRATIC TRANSITION IN THE PHILIPPINES* 72 (1995) ("Between September 1972 and February 1977, Marcos had 60,000 political arrests, although many of these persons were held only for a short time. In May 1975, the Marcos regime held 4,553 prisoners.").

⁶⁶ RAISSA ROBLES, *MARCOS MARTIAL LAW: NEVER AGAIN* 143–156 (2016).

⁶⁷ Alfred W. McCoy, *Dark Legacy: Human Rights under the Marcos Regime, in MEMORY, TRUTH-TELLING, AND THE PURSUIT OF JUSTICE: A CONFERENCE REPORT ON THE LEGACIES OF THE MARCOS DICTATORSHIP* 129, 129 (2001).

orchestrated by his successor, Corazon Aquino; and (3) the “fallen dark” present.⁶⁸

The first suggests the Philippines was better off under his martial law regime.⁶⁹ The second portrays Marcos as a benevolent President who was a victim of a conspiracy of individuals who banded around Corazon Aquino.⁷⁰ The third portrays Marcos as a victim of social media’s “fake news.”⁷¹ Scholars admit that in the euphoria that followed the removal of Marcos in 1986, they never imagined that the Marcoses would assert their own narrative, and that the present historical revision is because of their “collective failure to revise and rewrite history after Marcos’ downfall.”⁷²

Contemporary scholars observed the dominant and persistent discourse that portrays the Marcos regime as “[a] period of economic prosperity and social harmony.”⁷³ “This narrative, that paints the Marcos regime as the golden age in Philippine history, gained traction in the 2016 national elections when Ferdinand Marcos, Jr. ran for Vice President.”⁷⁴ Filipinos seemed ready to elect the dictator’s son because of the “absence of an inclusive national collective memory of the Marcoses’ rule.”⁷⁵ The country’s social institutions, such as schools, media, family, and state, failed in transmitting memories about the Marcos regime, as shown in the popularity and near election of Marcos to the second highest elected post in the country.⁷⁶

⁶⁸ Victor Felipe Bautista, *The Pervert’s Guide to Historical Revisionism: Traversing the Marcos Fantasy*, 66 PHILIPPINE: STUD. HIST. & ETHNOGRAPHIC VIEWPOINTS 273, 279 (2018).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Filomeno V. Aguilar, Jr., *Political Conjuncture and Scholarly Disjunctures: Reflections on Studies of the Philippine State under Marcos*, 67 PHILIPPINE: STUD. HIST. & ETHNOGRAPHIC VIEWPOINTS 3, 11–12 (2019).

⁷³ Ma. Rhea Gretchen Arevalo Abuso, *Narrating Human Rights in the Philippines: Collective Memories of the Filipino Youth on the Marcos Regime*, 3 JSEHR 7, 13 (2019) [hereinafter *Narrating Human Rights in the Philippines*].

⁷⁴ *Id.*

⁷⁵ Cleve Arguelles, *It Takes a Nation to Raise a Dictator’s Son*, NEW MANDALA (Mar. 31, 2016), <http://www.newmandala.org/it-takes-a-nation-to-raise-a-dictators-son/> [<https://perma.cc/BF4T-FJ6D>].

⁷⁶ *Id.*

IV. HISTORICAL REVISIONISM

“Revisionist history” or “historical revisionism” was a derisive term used to discredit historians who are seen as diverting from what traditionalists believed was “a single history.”⁷⁷ Reinterpretations of history were criticized because they dishonor American traditions and demean Western values.⁷⁸

Revisionism denotes both legitimate reassessment of the past and illegitimate manipulation of it. Differentiating between revisionism (provocative, controversial nonconformist questioning of entrenched beliefs) and “revisionism” (denial of crimes, distortion of the truth apologetic of extreme policies) is not easy.⁷⁹

Revisions may be legitimate or illegitimate. There are three forms of legitimate historical revisions. A revision may be warranted if guided by the emergence of evidence that supports a new thesis.⁸⁰ The second type involves revisions guided by meaning—the ones that historians believe “holds great importance in history.”⁸¹ In these cases, the perception of the significance of the evidence gets altered by historical changes. That is, the importance of certain events and their outcomes may become clear only long after they happened.⁸² “The third type includes revisions which are guided by values and they emerge when historians reevaluate the historical events and processes that they describe.”⁸³

There is no “absolute reliable” way to distinguish between true scientific revision from “dogmatic, illegitimate revisionism or negationism.”⁸⁴ One can check the reliability of the source of the new claim or examine how new claims fit with the extant body of knowledge, and examine whether the rules of research were followed. Negationists may fail these tests because they rely on evidence which

⁷⁷ GARY B. NASH, ET AL., *HISTORY ON TRIAL: CULTURE WARS AND THE TEACHING OF THE PAST* 9 (1997).

⁷⁸ *Id.* at 10.

⁷⁹ Vladimir Petrović, *From Revisionism to “Revisionism:” Legal Limits to Historical Interpretation*, in *PAST IN THE MAKING: HISTORICAL REVISIONISM IN CENTRAL EUROPE AFTER 1989* 17, 18 (Michal Kopecek, ed. 2007).

⁸⁰ Marko Škorić & Milivoj Bešlin, *Politics of Memory, Historical Revisionism, and Negationism in Postsocialist Serbia*, 28 (3) *FILozOFIJA I DRUSTVO* 631, 634 (2017).

⁸¹ *Id.* at 635.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

fit into their ideology.⁸⁵ Negationists usually do not offer new theories of history but undermine existing ones. Even if they present a new version of history, their version cannot explain the past the way the model they are criticizing can.⁸⁶

V. FIRST ARGUMENT: LAW AND MEMORY ARE INEXTRICABLE

Courts write history.

The Supreme Court's attempt to separate law and history cannot be done because law and history are inextricable. Law participates actively in writing history and constructing memory. Law is not the victim of historical forces external to itself.⁸⁷ Law can be an author of history "in the ways that law constructs and uses history to authorize itself and to justify decisions."⁸⁸

Law constructs a history that it wants to present as authoritative.⁸⁹ 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."⁹⁰

When lawyers interpret the Constitution, they engage the task as carriers of social memory, equipped with certain belief structures that will shape the way in which they understand law. When they interpret the Constitution, they are contributing to the stick of narratives that, passed from generation to generation, constitute our civic identity, norms and purposes.⁹¹ "Judicial decisions are thus

⁸⁵ *Id.* at 635–36.

⁸⁶ *Id.* at 636.

⁸⁷ Austin Sarat & Thomas R. Kearns, *Writing Memory and Registering Memory in Legal Decisions and Legal Practices: An Introduction*, in *HISTORY, MEMORY, AND THE LAW* 1, 2 (Austin Sarat & Thomas R. Kearns eds., 2005).

⁸⁸ *Id.* at 3.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

products of social memory; at the same time, they are one of the many social institutions that produce social memory.”⁹²

Law is “a powerful force in the construction of social meaning, identity, and everyday consciousness, as well as in the more material production of social ordering and relations of power.”⁹³ The law may be instrumental by shaping social and economic relations through its mandates and orders. It may be more symbolic or ideological by shaping culture, opinion, and attitudes not only through the material effects of its official orders but through its language and form. Law has a hegemonic function; it has the ability to “constitute” society by validating particular sets of moral meaning while disrupting others.⁹⁴

It is difficult to see how *Ocampo* cannot affect Filipino “culture, opinion, and attitudes” even as it purports to be an ahistorical ruling.⁹⁵ *Ocampo*’s hegemonic function is to validate the Marcos narrative where he is hero not a villain of Philippine history.⁹⁶

Historical truths are elaborated, selected, manipulated, and reinterpreted, in ways that provide room for the shocking opinions of revisionists and negationists.⁹⁷ This is why “[t]he law is an important instrument in struggles for recognition of different victims of past injustices because law formalises and legitimises particular narratives of victimhood.⁹⁸ The law turns private memories into public narratives.”⁹⁹ The law establishes the facts in an authoritative way and serves those who claim oppression and forces them to present their particular interpretation in universal and absolute claims.¹⁰⁰

⁹² Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning about “the Woman Question” in the Discourse of Sex Discrimination*, in HISTORY, MEMORY, AND THE LAW 131, 134–35 (Austin Sarat & Thomas R. Kearns eds., 2005).

⁹³ Kitty Calavita, *Blue Jeans, Rape, and the “De-Constitutive” Power of Law*, 35 L. & SOC’Y REV., 89, 101 (2001).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See *infra* Part 8.

⁹⁷ Pietro Sullo & Lois Mémorielles, *Post-Genocide Societies: The Rwandan Law on Genocide Ideology under International Human Rights Law Scrutiny*, 27 LEIDEN J. INT’L L. 419, 419 (2014).

⁹⁸ Stiina Loytomaki, *Law and Memory: The Politics of Victimhood*, 21 GRIFFITH L. REV. 1, 18 (2012).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 19. This is not to ignore the fact that law is a space for contesting perspectives or a field of political struggle. Battles of interpretation over what constitutes victimhood, who are the victims and how far victimhood carries over

VI. SECOND ARGUMENT: COURTS HAVE A HISTORY WRITING FUNCTION

My second argument is that courts have a history writing function that comes from various sources. This function may at times be explicitly provided for as when international criminal courts are established. These courts may be directed to establish an authoritative account of atrocities committed by defendants. It has also been argued that this function can be discerned from other international law norms such as “the right to the truth.” Finally, constitutions or their amendments can contain explicit provisions against an authoritarian past, that should guide courts in interpreting its provisions.

A. *International Criminal Courts*

Legal decisions “performatively produce the archive of sovereign violence when they distinguish a legal order from an unjust past and reorient the law in the wake of histories of violent sovereign impositions.”¹⁰¹ Record-keeping is justice and resistance to injustice.¹⁰²

Courts have a specific function when it comes to hearing cases of mass atrocities. Certain functions of international criminal courts arise from their inherent connection to the adjudicative task of determining the culpability of the accused. One such function is what may be termed the *historical function* of international criminal courts—the capacity of such courts to produce historical records concerning both the accused and the broader mass atrocity situation in which they are alleged to have participated. Trials involving top military or political leaders, collect documents and record testimonies

time exist in the realm of law, and legal engagements in memory and identity politics tend to give rise to competition between victims and to heightened tensions concerning identity politics, leading to further polarisation of particular groups against each other and the state.

¹⁰¹ Stewart Motha & Honni van Rijswijk, *Introduction: A Counter-archival sense*, in LAW, MEMORY, VIOLENCE: UNCOVERING THE COUNTER-ARCHIVE 1, 1 (2016).

¹⁰² *Id.* at 3.

of hundreds of witnesses—creating a historical record.¹⁰³ The historical function of international criminal courts is reflected in the close association between adjudicative justice and establishing the truth.”¹⁰⁴ Trials “publicly contextualize and share past experience of wrongdoing.”¹⁰⁵ The International Tribunal for the former Yugoslavia (ICTY), for example, was created in part to “establish a definitive record of truth documenting the tragic events that unfolded in the former Yugoslavia.”¹⁰⁶ These trials highlight the scope and nature of atrocities because authoritarianism misleads and confuses the public not only with the values but also with empirical facts.¹⁰⁷ Trials allow the victims of human rights abuses to recover their self-respect.¹⁰⁸

¹⁰³ *Id.*

¹⁰⁴ Barrie Sander, *The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts*, 19 MELB. J. INT’L L. 299, 300 (2018) (emphasis added) (quoting Fergal Gaynor, *Uneasy Partners—Evidence, Truth and History in International Trials*, 10 J. INT’L CRIM. JUST. 1257, 1262 (2012)).

¹⁰⁵ Michael Humphrey, *From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing*, 14 AUSTL. J. ANTHROPOLOGY 171, 172 (2003). The other option for victims is resorting to “truth commission” an option beyond the scope of this paper. Truth commissions receive private individual memory and transforms them into shared public knowledge as part of the basis of the political legitimacy and authority of the successor state, re-establishing the rule of law and promoting reconciliation. The victim is placed at the center of the State’s post-atrocities strategies to reform governance, rehabilitate state authority, and promote reconciliation. See Michael Humphrey, *From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing*, 14 AUSTL. J. ANTHROPOLOGY 171, 172 (2003). The difference between these options is that truth commissions are supposed to find truth; trials determine whether the criminal law standard has been satisfied for each charge. See Elizabeth B. Ludwin, *Trials and Truth Commissions in Argentina and El Salvador*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 273, 288 (Jane E. Stromseth ed., 2003). The advantages and disadvantages of both options is discussed in Chrisje Brants & Katrien Klep, *Transitional Justice: History-Telling, Collective Memory and the Victim-Witness*, 7 INT’L J. CONFLICT & VIOLENCE 36–49 (2013).

¹⁰⁶ Aram A. Schvey, *Striving for Accountability in the Former Yugoslavia*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 39, 56 (Jane E. Stromseth ed., 2003).

¹⁰⁷ CARLO SANTIAGO NINO, RADICAL EVIL ON TRIAL 146 (1996).

¹⁰⁸ *Id.* at 147.

History is frequently written through judgments evaluating and giving weight to conflicting accounts of events.¹⁰⁹ International tribunals determine the facts relevant to the case, while shaping collective memory pertaining to the world's biggest evils.¹¹⁰ Legal documents emanating from these courts involve in-depth historical analysis and propose a certain narrative contextualising legal findings.¹¹¹ The tribunals are uniquely placed to attribute expressive weight to a certain version of events.¹¹²

Judicial history-writing is particularly evident in the work of international courts for two main reasons. First, international cases strongly affect both the nation in question *and* the collective consciousness of the global community. Domestic proceedings may also resonate internationally, but do not, usually, have the same clout of impartiality as their international courts. Second, the issues brought to the international courts were complex and involved many actors at different levels of state hierarchy, making the attribution of responsibility contingent on the broader cultural, historical, and political backgrounds. Historical narratives are particularly prominent in international prosecutions of mass atrocities. The magnitude of events leading to the commission of international crimes has the potential to build national collective identities. At the same time, responsibility must be apportioned on an individual basis. This “scaling down” from communal to individual requires detailed contextualisation. This is why the narrative-setting function finds its strong expression in international criminal law.¹¹³

Aksenova argues that any international criminal trial assumes two identities—*social* and *legal*.¹¹⁴ As a legal event, an international criminal trial pronounces on the individual guilt or innocence of the alleged perpetrator of mass atrocities.¹¹⁵ International trials pursue traditional criminal law objectives of retribution and deterrence.

¹⁰⁹ Marina Aksenova, *The Role of International Criminal Tribunals in Shaping the Historical Accounts of Genocide*, in *LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY* 48, 49 (Uladzislao Belavusau & Aleksandra Gliszczyńska-Grabias eds., 2017).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 49–50.

¹¹⁴ *Id.* at 51.

¹¹⁵ *Id.*

These trials are simultaneously social events as they fulfill an important communicative function in modern societies by actively reflecting consensus about the values agreed upon internationally.¹¹⁶

The Nuremberg trials, for example, were staged to satisfy the requirements of “both principled judgment and historical tutelage.”¹¹⁷ The Nuremberg trials were called “the greatest history seminar ever held in the history of the world” that would “provide...an authoritative and impartial record to which future historians may turn for truth.”¹¹⁸ These trials were “designed to show the world the facts of astonishing crimes and to demonstrate the power of law to reintroduce order into a space evacuated of legal and moral sense.”¹¹⁹ “Crimes against humanity got a central place in the judgment and for the first time in history, were recognized to be an established part of international law.”¹²⁰ The courtroom listened to a narrative of “murder, ill-treatment, pillage, slave labor, persecutions, all giving rise to international criminality.”¹²¹ As difficult as it was, survivors of concentration camps testified against their former tormentors, “driven by a desire for justice, as well as a sense of duty, both to history and to the dead.”¹²²

In a 2004 report, the then U.N. Secretary-General Kofi Annan listed the goals of international criminal tribunals which included among others, “holding those responsible for serious violations of human rights and international humanitarian law accountable. . . securing justice and dignity for the victims, *establishing a record of past events*, promoting national reconciliation, re-establishing the rule of law, and contributing to the restoration of peace.”¹²³

This “historical record” objective is important because international criminal justice deals not only with

¹¹⁶ *Id.*

¹¹⁷ LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 2* (2001).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 3.

¹²⁰ PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”* 351 (2016).

¹²¹ *Id.*

¹²² NIKOLAUS WACHSMAN, *KL: A HISTORY OF THE NAZI CONCENTRATION CAMPS* 606 (2015).

¹²³ Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT’L L. 79, 84 (2009).

situations of mass violence, but also with situations of mass denial. Each side to a conflict will often deny that crimes were committed against the other side or suggest that such crimes were limited in scope or were the responsibility of a few bad apples rather than the result of a centralized plan...It is also true long after conflicts have ended. . . ¹²⁴

...[I]n the context of mass atrocities, there are inevitably disputes about the order of magnitude of the atrocities involved, their causes, and the links between the atrocities and the government or the rebel forces. The scale of these atrocities is so great as to create a pressing moral obligation to obtain the truth about them, as best as the truth can be determined.”¹²⁵

Trials of Serbia’s Slobodan Milosevic and Rwanda’s Théoneste Bagosora affirmed the claims of survivors, refugees, and Western journalists, as these courts were set up to verify “incredible events by credible evidence.”¹²⁶ This was important to victims who were told that “their suffering would go unnoticed, unremembered, and above all unredressed.”¹²⁷ Victims needed to hear evidence of what occurred, many hoping that the perpetrators knew what had happened to their children and other victims of the violence.¹²⁸

In fact, the role of these courts is also viewed:

. . . as a tool of social reconstruction which was supposed to contribute to the establishment and maintenance of peace among the formerly warring parties, to foster reconciliation among ethnic groups and to assist, if not even to spearhead, the

¹²⁴ *Id.* at 88.

¹²⁵ *Id.* at 89.

¹²⁶ SAMANTHA POWER, “A PROBLEM FROM HELL:” AMERICA AND THE AGE OF GENOCIDE 500–501 (2002).

¹²⁷ *Id.* at 501.

¹²⁸ *See Id.* at 502.

establishment of the rule of law in societies ravaged by conflict and mass atrocities.¹²⁹

Accomplishing this history writing function is by no means an easy task. Opinion surveys found that that “the ICTY failed to persuade the relevant target populations that the findings in its judgments are true.”¹³⁰ It failed in “combatting denial and preventing attempts at revisionism,” let alone in “mak[ing] it impossible for anyone to dispute the reality of the horrors that took place” in the Yugoslav wars.¹³¹

The reality of the horrors that took place remains in dispute, while revisionism is rampant. The surveys showed that significant majorities of the different populations of the former Yugoslavia are ethnically biased and are much more likely to acknowledge the existence of crimes when their own group was the victim of that crime, but not the other way around.¹³²

The history-writing function may also run into “narrative pluralism beyond the courtroom” which is “the gap between the intended meaning of the historical narratives constructed within international criminal judgments and their public or social meaning within different audiences.” “Judicially constructed narratives are received differently by various publics depending on a range of factors, many of which are beyond the control of international criminal judges.”¹³³

B. International Law: the “Right to Truth”

Despite these difficulties, international law has been recognizing a “right to truth” to regulate individual and collective memory, revisionism, and denialism of historical events and mass

¹²⁹ Refik Hodžić, *Living the Legacy of Mass Atrocities: Victims’ Perspectives on War Crimes Trials*, 8 J. INT’L CRIM. JUST. 113, 113–14 (2010).

¹³⁰ Marko Milanovic, *Establishing the Facts about Mass Atrocities: Accounting for the Failure of the ICTY to Persuade Target Audiences*, 47 GEO. J. INT’L L. 1321, 1323–24 (2016).

¹³¹ *Id.* (quoting UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, ACHIEVEMENTS, <https://www.icty.org/sid/324> [https://perma.cc/2JS3-H9EK] (last visited Sept. 9, 2020)).

¹³² *Id.* at 1325.

¹³³ Barrie Sander, *History on Trial: Historical Narrative Pluralism Within and Beyond International Criminal Courts*, 67 INT’L COMP. L. Q. 547, 568 (2018).

atrocities.¹³⁴ This right springs from the right to access to justice and the right against torture or to inhumane or degrading treatment.¹³⁵ It is also argued that aspects of the right to truth are based on jurisprudential sources and human rights, including the prohibition of torture, the right to life, the right to an effective remedy, and the State obligation to end impunity and prevent recurrence of mass atrocity.¹³⁶ “The right to truth has been held to belong not only to victims and their families, but also to victims of similar crimes and to society as a whole,”¹³⁷ and emerged as a legally binding norm of international law.¹³⁸

C. Constitutions and Memory

Legal scholars look to constitutions to find the best way to negotiate complex questions of history, belonging, or citizenship after periods of “violent conflict, civil unrest and institutionalized exclusions.”¹³⁹ Constitutions may serve as a springboard for memory. The importance of the Constitution is explained by one author this way:

Constitutions perform a crucial part of their constituent work by harnessing the power of a common past and giving it legal form. The appeal to the past is part of the constitution’s bid for legitimacy. Memory supports the constitution’s claim to speak for the people. By invoking memory, the constitution asserts its claims on citizen hearts and hands. . . . [B]ut

¹³⁴ Patricia Naftali, *The “Right to Truth” in International Law*, in *LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY* 70, 70 (Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias eds., 2017).

¹³⁵ *Id.* at 71; see also Dermot Groome, *The Right to Truth in the Fight against Impunity*, 29 *BERKELEY J. INT’L L.* 175, 175–99 (discussing the origin of the “right to truth”).

¹³⁶ See Sam Szoke-Burke, *Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies*, 33 *BERKELEY J. INT’L L.* 526, 536–539 (2015).

¹³⁷ *Id.* at 532.

¹³⁸ *Id.* at 535.

¹³⁹ Stacy Douglas, *Constitutions are not Enough: Museums as Law’s Counter-Archive*, in *LAW, MEMORY, VIOLENCE: UNCOVERING THE COUNTER-ARCHIVE* 140 (2016).

the constitution provides a particularly powerful pulpit—an unusually resonant site of memory. It retains that resonance through constitutional justice. Constitutional courts in many nations have invoked the ethos of a national epic and claimed the mandate of a common past. Constitutional judges around the world have bolstered their decisions by frequent appeal to constitutional memory.¹⁴⁰

“Many constitutions respond to historic evil, and many constitutional courts invoke the memory of that evil.”¹⁴¹ States with experience of authoritarian or totalitarian dictatorships such as Germany, Italy, Spain, and Portugal, wrote clauses in their constitutions prohibiting the re-establishment of parties or associations which adhere to a fascist or other totalitarian ideology.¹⁴² Germany’s post-war courts considered the country’s “disastrous experiences”¹⁴³ in the past and had developed an anti-totalitarian attitude.¹⁴⁴

The text of the Constitution can manifest a break with that past where “the evils of a prior regime can be remembered (and disowned) . . . as the evils of another.”¹⁴⁵ After the collapse of communist rule, for example, new constitutions were written in most of the Eastern European countries mainly to “concretise the departure from the communist system.”¹⁴⁶ When a certain interpretation of past events is elevated to become an integral part of a constitution, a

¹⁴⁰ Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 267–268 (2019).

¹⁴¹ *Id.* at 269.

¹⁴² Michael Schäfer, *Memory in the Construction of Constitutions*, 15:4 RATIO JURIS, 403, 404 (2002).

¹⁴³ *Id.* at 407.

¹⁴⁴ *Id.*

¹⁴⁵ Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 2000 (2003).

¹⁴⁶ Heino Nyyssönen & Jussi Metsälä, *Highlights of national history? Constitutional memory and the preambles of post-communist constitutions*, 21 EUR. POL. SOC. 1, 6 (2020).

snapshot of history “is lifted outside of time and cemented into an unchanging mental sphere.”¹⁴⁷

The Philippine Constitution, approved in 1987 after the ouster of Marcos, does not make any explicit reference to the traumatic experiences under the Marcos regime. At best, it alludes to lofty principles in the Preamble, which provides:

We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.¹⁴⁸

There is no reference in the entire document to the Marcos experience despite its emphasis on “democracy under the rule of law.”

VII. ANALYSIS

A. *Domestic Courts Writing History*

Ocampo was not a criminal case trying Marcos for his transgressions against the Filipino people. The petitioners were questioning the President’s decision to allow a dictator’s burial in a cemetery designed for heroes. Nevertheless, the case implicated issues similar to those raised in international criminal courts. Questions that were pertinent to *Ocampo* such as—Did Marcos violate the Filipinos’ human rights? Was he responsible for the deaths, torture, and disappearance of those who opposed his regime?—were ignored by the Supreme Court.

Courts other than international criminal courts have found the need to address historical revisionism. One case involved Professor

¹⁴⁷ *Id.* at 14 (warning, however, that a rigid stance towards the past can be dangerous because the lack of a critical discussion on national history can revive an “undemocratic political culture”).

¹⁴⁸ CONST., (1987), pmbl (Phil.).

Deborah Lipstadt who was sued for libel when she called historian David Irving (among other things) a “Hitler partisan wearing blinkers” who distorted evidence . . . manipulated documents [and] skew[ed] . . . and misrepresent[ed] data in order to reach historically untenable conclusions.”¹⁴⁹ In the trial that ensued, the judge opined that it was not his function to determine what did or did not happen during the Nazi regime.¹⁵⁰ But he was forced to conclude that Irving had portrayed Hitler in an unwarrantedly favourable light, principally in relation to his attitude towards and responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-semitic (*sic*) and racist and he associates with right-wing extremists who promote Neo-Nazism.”¹⁵¹ The ruling was “even stronger than the words written by Lipstadt.”¹⁵²

Another example would be the class action suit against the Marcos estate filed by those who were tortured and murdered, or who disappeared after they were arrested from 1972 to 1986. *In re Marcos Human Rights Litigation* consolidated five separate civil suits originally filed in three different judicial districts shortly after Ferdinand Marcos was forced into exile in Hawaii.¹⁵³

The US District Court Judge held that Marcos ruled the country by autocratic decree, issuing almost daily lists of individuals who were to be rounded up.¹⁵⁴ Many of those detained were subject to “tactical interrogation,” the phrase used to refer to the various torture techniques listed as follows:

1. Beatings while blindfolded by punching, kicking and hitting with the butts of rifles;

¹⁴⁹ See generally, DEBORAH E. LIPSTADT, DENIAL: HOLOCAUST HISTORY ON TRIAL (2005).

¹⁵⁰ Marouf Hasian, Jr., *Holocaust Denial Debates: The Symbolic Significance of Irving v. Penguin & Lipstadt*, 53 COMM. STUD. 129, 144 (2002).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation*, 67 ST. JOHN’S L. REV. 495–517 (1993) for a detailed examination of these cases.

¹⁵⁴ *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1463 (D. Haw. 1995).

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 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.¹⁵⁵

There were more than forty testimonies of victims which demonstrated a pattern of suppression of dissent during the Marcos regime:

...potential critics of the regime were arrested with an arrest order, “broken” through torture and months—sometimes years—of detention in “rehabilitation centers,” and released with a Temporary Release Order, which often required them to report regularly to the military or police. While on temporary release, it was close to impossible for them to find employment, as they lacked security clearance. Following years of good behavior, they would sometimes be granted a final release order and finally be left alone by the security services. In this way, torture and the terror created by the salvaging and disappearance of other dissidents were only the initial stages of a long-term bureaucratic system of suppression of dissent.¹⁵⁶

Here, the US court produced a record of acts of the Marcos government that inflicted harm and indignities on the claimants. It produced a record despite the fact that it was not an international criminal court. This list of atrocities stands in stark contrast to the complete silence in *Ocampo* where the issue was whether a Head of State capable of these acts deserved to be buried among the country’s heroes.

The Philippine Supreme Court’s approach in *Ocampo*—which is to separate law and history—displays either naiveté or an insidious attempt to honor a dictator. It is more likely the latter. The Court is aware of the impact of its decisions. The Court is the branch

¹⁵⁵ Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses*, 8 CHAP. L. REV. 153, 155–56 (2005).

¹⁵⁶ Natalie R. Davidson, *Toward a Self-Reflexive Law: Narrating Torture’s Legality in Human Rights Litigation*, 21 L. TEXT CULTURE 100, 110–111 (2017).

empowered by the Constitution to compel obeisance to its rulings by the other branches of government.¹⁵⁷ According to the Court, “submission should follow the court’s final fiat. To undermine the authority of this Court as the final arbiter of legal disputes is to foster chaos and confusion in our administration of justice.”¹⁵⁸

In the U.S., courts play a significant role in policy making; thereby, decisions in tort, product liability, and constitutional adjudication may strengthen democracy by protecting the rights of all citizens, or they may weaken democracy by removing from public debate and democratic choice issues of moral and substantive importance.¹⁵⁹

The impact of *Ocampo* is doubly significant because the Marcos regime’s atrocities are documented.¹⁶⁰ Expunging Marcos’ records by clearing the path to his interment deprives his victims of human rights abuses “to recover their self-respect as holders of human rights.”¹⁶¹

My main criticism against *Ocampo* is simple: It is true that the regulations of the LMB have become lax and that technically those laid to rest there are not all heroes. But Marcos’ interment is unique because he is the only one accountable for the deaths, torture, and disappearance of thousands of Filipinos. This is why the Court should have included his entire public service record—including his stint as dictator and the atrocities that marked his rule—in its decision.

There is no such thing as a purely ahistorical Supreme Court opinion: “when justices decide on the constitutionality of a statute or on the validity of an important administrative act, their political values, especially their view on the interrelationships between the different institutions of government, color their concept of justice, and their decisions are expressions of the operation of political power.”¹⁶²

¹⁵⁷ *Gudani v. Senga*, G.R. No. 170165 (S.C. Aug. 15, 2006) (Phil.).

¹⁵⁸ *Guieb v. Civil Service Commission*, G.R. No. 93935 (S.C. Feb. 9, 1994) (Phil.).

¹⁵⁹ Gerald Rosenberg, *The Impact of Courts on American Life*, in *THE JUDICIAL BRANCH* 280, 306 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

¹⁶⁰ Marvin E. Frankel et al., *The Philippines: A Country in Crisis—A Report by the Lawyers Committee for International Human Rights*, 15 *COLUM. HUM. RTS. L. REV.* 69, 73–4 (1983).

¹⁶¹ NINO, *supra* note 107.

¹⁶² Pacifico A. Agabin, *The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change*, in *UNCONSTITUTIONAL ESSAYS* 170–71 (1996).

B. *The Victims*

The majority of the Supreme Court seemed oblivious to the plight of those who suffered under Marcos' martial law regime. The story of activists who challenged the martial law regime remains to be told.¹⁶³ These stories were systematically repressed by the State, and if these stories of activism were made public, they can critically engage the official narrative of the nation, particularly the history of the martial law period.¹⁶⁴ The Marcos' martial law regime can be labeled as traumatic, because studies have established direct correlations between practices of the regime and the victims who manifest signs of posttraumatic stress disorder.¹⁶⁵

Marcos' burial opened old wounds, especially for Filipinos who used to live under Marcos' dictatorship.¹⁶⁶ The protesters failed to stop Marcos' burial at the LNMB, but managed "to show their solidarity in reviving the memories of Marcos' violence, as well as to counter the national narrative propagated by President Duterte."¹⁶⁷ Protesters revived the memories of violence during Marcos' regime to make the population aware of and be sensitive to his crimes, hoping that the crimes and violence would not be repeated.¹⁶⁸

In his book, *The Holocaust: A New History*, historian Laurence Rees, ended by saying, "Finally, although the contents of the book you have just read are distressing, I believe that it is still important to understand how and why this crime happened. For this history tells us, more than any other, just what our species can do."¹⁶⁹ This is precisely why the Supreme Court's ruling in *Ocampo* is problematic. The decision ignored the crimes Marcos committed and instead gave him a hero's burial. The Court's commitment to its history-writing function would have drawn the readers' attention to

¹⁶³ See Ferdinand C. Llanes, *Introduction: Memory of a Generation*, in *TIBAK RISING: ACTIVISM IN THE DAYS OF MARTIAL LAW 1* (Ferdinand C. Llanes ed., 2012).

¹⁶⁴ *Id.* at 1–2.

¹⁶⁵ See Jocelyn Martin, *Martial Law as Philippine Trauma: Group Culture, the Sacred, and Impunity in Three Memoirs*, 66 *PHIL. STUD.* 453, 454 (2018).

¹⁶⁶ Kadir Norizan, *Remembering and Forgetting the Memories of Violence: The Filipinos Protest Over Hero's Interment for Marcos, 2016-2017*, in *JEBAT: MALAYSIAN JOURNAL OF HISTORY, POLITICS, & STRATEGIC STUDIES* 46, 47 (2019).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See LAURENCE REES, *THE HOLOCAUST: A NEW HISTORY* 429 (2017).

our distressing past so that we can be aware of just what acts Marcos was capable of.

Ocampo undermined the efforts for these stories to be heard because the Supreme Court chose to relegate Marcos' human rights record to historians. Omitting atrocities from *Ocampo* also cleansed the Marcos' name.

C. *The Dissents*

How can a Court address the issues that I raised here? How exactly would a complete appreciation of Marcos' record affect the Court's decision in *Ocampo*? There were four dissenting opinions written in this case, each responding to the technical issues used by the majority to justify Marcos' interment. But more than simply meeting the technical arguments head-on, the dissenters emphasized the impossibility of severing the legal from the historical in writing a judicial opinion, and the abandonment of the Court's history-writing function. The most eloquent expressions of the inextricable connection between law and history are worth quoting at length:

According to Chief Justice Maria Lourdes Sereno:

The Court cannot order that a particular event be remembered in a particular way, but it can negate an act that whimsically ignores legal truths. It can invalidate the arbitrary distillation of the nation's collective memory into politically convenient snippets and moments of alleged glory. The Court is empowered to do justice, and justice in this case means preventing a whitewash of the sins of Marcos against the Filipino people.

The burial of Marcos in the earth from whence he came is his right, despite all that he did. However, his burial in the grave of heroes on the impulse of one man would continue the desecration of other citizens' rights, a chilling legacy of the Marcos regime that curiously survives to this very day, long after the death of the dictator.

Respondents may deny the implications of their actions today, but the symbolism of the burial will outlive even their most emphatic refutations. Long after the clarifications made by this administration have been forgotten, the gravesite at the LNMB will remain. That is the peculiar power of symbols in the public landscape — they are not only carriers of meaning, but are repositories of public memory and ultimately, history.

For the Court to pretend that the present dispute is a simple question of the entitlement of a soldier to a military burial is to take a regrettably myopic view of the controversy. It would be to disregard historical truths and legal principles that persist after death. As important, it would be to degrade the state's duty to recognize the pain of countless victims of Marcos and Martial Law. Regardless of the promised national unity that the proposed burial will bring, I cannot, in good conscience, support such an expedient and shortsighted view of Philippine history.¹⁷⁰

At the end of her dissent, the Chief Justice wrote:

Stripped to its core, this case involves an order by the President to bury a dictator—one declared to have perpetrated human rights violations and plundered the wealth of the nation—with all the trappings of a hero's burial. It may not be an express declaration, as respondents themselves concede that the President does not have the power to declare any individual a hero, but it is a pronouncement of heroism nevertheless. It is far from being an empty statement bereft of significance. As respondents themselves recognize, the nature of the office held by the President provides him the opportunity to “profoundly influence the public discourse . . . by the mere expediency of taking a stand on the issues of the day.”

¹⁷⁰ OCAMPO V. ENRIQUEZ, *supra* note 1 (Sereno, C.J. dissenting).

Clearly, the order of the President to allow the burial is, at the very least, a declaration that Marcos is worthy of a grave at a cemetery reserved for war heroes, despite the objections of countless victims of human rights violations during the Martial Law regime. It is an executive pronouncement that his memory may be preserved and maintained using public funds.¹⁷¹

And finally, she wrote that this case is not simply a simple question of the entitlement of a soldier to a military burial.¹⁷² That view, she said is a “regrettably myopic view of the controversy” and disregards “historical truths and legal principles that persist after death.”¹⁷³ It also degrades the state’s duty to recognize the pain of countless victims of Marcos and Martial Law.

Justice Antonio Carpio pointed to the enactment of Republic Act No. 10368 or “The Human Rights Victims Reparation and Recognition Act of 2013,” which established as a “policy of the State” to recognize the heroism and sacrifices of victims of:

- (a) summary execution;
- (b) torture;
- (c) enforced or involuntary disappearance; and
- (d) other gross human rights violations during the Marcos regime.

Section 2 of R.A. No. 10368 states:

Consistent with the foregoing, it is hereby declared the policy of the State to recognize the heroism and sacrifices of all Filipinos who were victims of summary execution, torture, enforced or involuntary disappearance and other gross human rights violations committed during the regime of former President Ferdinand E. Marcos covering the period from

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

September 21, 1972 to February 25, 1986 and restore the victims' honor and dignity. The State hereby acknowledges its moral and legal obligation to recognize and/or provide reparation to said victims and/or their families for the deaths, injuries, sufferings, deprivations and damages they suffered under the Marcos regime.¹⁷⁴

According to Justice Carpio, Republic Act No. 10368 mandates that it is the “moral and legal obligation” of the State to recognize the sufferings and deprivations of the human rights victims of Marcos’ martial law regime.¹⁷⁵ He claimed that interring Marcos in the LNMB, “extols Marcos and exculpates him from human rights violations,” and negates the “moral and legal obligation” of the State to recognize the sufferings and deprivations of the human rights victims under the dictatorship of Marcos.¹⁷⁶

Justice Marvic Leonen in his dissent said:

The decision of the majority to deny the Petitions robs this generation and future generations of the ability to learn from our past mistakes. It will tell them that there are rewards for the abuse of power and that there is impunity for human rights violations. The decision of the majority implies that, learning from the past, our People should be silent and cower in fear of an oppressor. After all, as time passes, the authoritarian and the dictator will be rewarded.

Sooner rather than later, we will experience the same fear of a strongman who will dictate his view on the solutions of his favored social ills. Women will again be disrespected, molested, and then raped. People will die needlessly—perhaps summarily killed by the same law enforcers who are supposed to protect them and

¹⁷⁴ An Act Providing for Reparation and Recognition of Victims of Human Rights Violations During the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes, Republic Act No. 10368, §2 (Feb. 25, 2013) (Phil.).

¹⁷⁵ See *OCAMPO V. ENRIQUEZ*, *supra* note 1 (Carpio, J. dissenting).

¹⁷⁶ *Id.*

guarantee the rule of law. Perhaps, there will be people who will be tortured after they are shamed and stereotyped.

We forget the lessons of the past when we allow abuse to hold sway over the lives of those who seem to be unrelated to us. Silence, in the face of abuse, is complicity.

The burial of Ferdinand E. Marcos at the *Libingan ng mga Bayani* is not an act of national healing. It cannot be an act of healing when petitioners, and all others who suffered, are not consulted and do not participate. Rather, it is an effort to forget our collective shame of having failed to act as a People as many suffered. It is to contribute to the impunity for human rights abuses and the plunder of our public trust.

The full guarantee of human rights is a fundamental primordial principle enshrined in the Constitution. It is not the antithesis of government.

To deny these Petitions is to participate in the effort to create myth at the expense of history.¹⁷⁷

Justice Alfredo Caguioa wrote on behalf of those who suffered under the dictatorship:

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

¹⁷⁷ OCAMPO V. ENRIQUEZ, *supra* note 1 (Leonen, J. dissenting).

exercise of presidential prerogative using *vox populi* as the convenient excuse.

Above all, this is a tribute to the fallen, *desaparecidos*, tortured, abused, incarcerated and victimized so that the dictator could perpetuate his martial rule, and to those who fought to attain the freedom which led to the very Constitution from which this Court derives the power to make the decision that it reached today—that their sacrifices, sufferings and struggles in the name of democracy would be duly acknowledged and immortalized.¹⁷⁸

These exhortations to pay attention to the past, however, may suffer from one crucial weakness in the Philippine Constitution. The Philippine Constitution, as I pointed out earlier is not explicitly rooted in the political trauma of the Marcos era. If it were, there might be a stronger legal anchor for the plea to learn from history. Again, the Constitution's Preamble states, for example:

We, the sovereign Filipino people, imploring the aid of Almighty God, in order to build a just and humane society and establish a Government that shall embody our ideals and aspirations, promote the common good, conserve and develop our patrimony, and secure to ourselves and our posterity the blessings of independence and democracy under the rule of law and a regime of truth, justice, freedom, love, equality, and peace, do ordain and promulgate this Constitution.¹⁷⁹

There is no acknowledgement of the horrors of the past, and no duty on the part of constitutional actors to rectify these horrors. Justices are freed from constitutional memory, and can be selective in their own appreciation of history.

¹⁷⁸ OCAMPO V. ENRIQUEZ, *supra* note 1 (Caguioa, J. dissenting).

¹⁷⁹ CONST., (1987), pmb1 (Phil.).

VIII. POLITICAL WINDFALL FOR THE MARCOSES

On May 13, 2019 Imee Marcos, the dictator's older daughter, ran for a seat in the Senate. During the campaign, she lied about her academic training (falsely claiming that she graduated from both Princeton University and the University of the Philippines, College of Law)¹⁸⁰ but garnered almost 16 million votes in a successful run for a Senate seat.¹⁸¹

Imee's 2019 campaign explicitly called for Marcosian governance to vote for her, and she would revive the programs of the deposed dictatorship, as the votes cast for Imee were not just a product of nostalgia for an authoritarian past or a reflection of first-time voters' ignorance of the brutality and excesses of the Marcos regime.¹⁸² They were also, in part, paid for by long-time allies and cronies of the Marcoses who, in the process of buying respectability from academic institutions, contributed to the cause of burnishing and enthroning the Marcos name in Philippine history and politics.¹⁸³ According to one political analysis, the Marcoses' lucky streak may mean the erasure of memories of both human rights violations and compromises with those who obtained their wealth through plunder or abuse of authority—suggesting that if the Marcoses could get away with such abuses, so can others.¹⁸⁴

In the Philippines, we have the Supreme Court to thank for Marcos' "increasingly favorable political fortunes."¹⁸⁵

Imee's brother, Ferdinand Marcos, Jr. (also known as Bongbong) was nearly as lucky when he ran for the vice-presidency. Maria Leonor G. Robredo won race with 14,418,817 votes, followed by Marcos, Jr. with 14,155,344 votes; thus, Robredo's win was a

¹⁸⁰ Xave Gregorio, *Imee Marcos: I'm Not Running on My Academics*, CNN PHILIPPINES (Apr. 11, 2019, 03:02 PM), <https://cnnphilippines.com/news/2019/4/11/Imee-Marcos-academic-record.html> [<https://perma.cc/NY6D-7MH5>].

¹⁸¹ UP Third World Studies Centre/VERA Files, *Analysis: Imee's Win to Boost Efforts to Restore Marcos Name in History*, ABSCBN NEWS (May 26, 2019, 10:38 PM), <https://news.abs-cbn.com/spotlight/05/26/19/opinion-imees-win-to-boost-efforts-to-restore-marcos-name-in-history> [<https://perma.cc/8EQT-RJ7M>].

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

close vote of 263,473 votes.¹⁸⁶ Marcos filed an electoral protest, and of this writing, has not yet been resolved.

In the meantime, Bongbong called for the revision of textbooks, saying that the contents are controlled by politicians who use them as propaganda against the Marcoses; thereby, accusing these politicians of historical revisionism.¹⁸⁷ Confident of sufficiently blurring the past, he also announced plans to run for national office in 2022.¹⁸⁸

The younger Marcos' call to revise history irked academics and it was called "a clear deviation and manipulation of the truth"; and according to the University of the Philippines' Department of History, "[i]t has no intent other than to conceal the countless human rights violations and corruption under the Marcos dictatorship from 1972 until 1986."¹⁸⁹ They added that "if any textbook revision would take place, it's to expound on the tragedy and long-term consequences of Martial Law under the Marcoses."¹⁹⁰ The statement also pointed out, as I argued here, that "[i]t's been a longtime agenda of the Marcoses to change the reputation of their family's name, especially with their insisting that Ferdinand E. Marcos Sr. be recognized as a hero. Marcos Jr. plans to fulfill this desire by running in 2022 so his family can return to Malacañang."¹⁹¹

A member of Congress, France Castro, rejected the call for revisionism saying "that accounts of injustice proved that there were

¹⁸⁶Jovan Cerda, *Duterte, Robredo Win in Final, Official Tally*, PHILIPPINE STAR (May 27, 2016), <https://www.philstar.com/headlines/2016/05/27/1587569/duterte-robredo-win-final-official-tally> [<https://perma.cc/Y9DX-9JLG>].

¹⁸⁷ Neil Arwin Mercado, *Bongbong Marcos Wants Textbooks Revised: You're Teaching Children Lies*, INQUIRER.NET (Jan. 10, 2020, 05:13 PM), <https://newsinfo.inquirer.net/1211401/bongbong-marcos-wants-textbooks-revised-youre-teaching-children-lies> [<https://perma.cc/H785-SWYC>].

¹⁸⁸ *Bongbong Marcos Says He Will Run for National Post in 2022*, PHILIPPINE STAR (Jan. 10, 2020), <https://www.philstar.com/headlines/2020/01/10/1983695/bongbong-marcos-says-he-will-run-national-post-2022>. [<https://perma.cc/9SPY-ELTV>].

¹⁸⁹ Ratzel San Juan, *UP History Profs Slam Bongbong's Call to Revise Martial Law in Textbooks*, PHILIPPINE STAR (, Jan. 18, 2020), <https://www.philstar.com/headlines/2020/01/18/1985651/history-profs-slam-bongbongs-call-revise-martial-law-textbooks> [<https://perma.cc/47M7-86F9>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

atrocities under martial law.”¹⁹² Additionally, she claimed that “historical revisionism” started under the Duterte administration, which began with the Supreme Court’s ruling to bury president Ferdinand Marcos...at the Libingan ng mga Bayani.¹⁹³ She continued to state that “[t]eachers will not allow a revision of history books and rewrite it as if the Marcos era was all good, with no injustice and corruption, when in fact history already judged him as a plunderer, murderer, fascist and criminal.”¹⁹⁴ Furthermore, she raised points, as I did here, in my critique of the the Supreme Court’s ruling in *Ocampo*, 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.”¹⁹⁵ “It denies 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,” Castro added.¹⁹⁶ Castro also urged the Department of Education to conduct an anti-historical revisionism review after receiving reports of revisions in some textbooks.¹⁹⁷

There was always fertile ground for historical revisionism by the Marcoses. From 1986 to 2015, schoolbooks did not detail the human rights abuses of Marcos’ administration. The Marcoses exploited this vacuum to refurbish the Dictator’s image by extolling his achievements and denying any human rights violations ever took place.¹⁹⁸ One history professor bemoaned the failures of educating Filipinos on Marcos and his martial law legacy, saying:

Rather than let the teachers analyze and properly discuss Martial Law, students were encouraged to think for themselves, to come to their own conclusions. Such awful naïveté only created a generation that

¹⁹² Divina Nova Joy Dela Cruz, *Lawmaker Slams Marcos ‘Historical Revisionism*, THE MANILA TIMES (Jan. 12, 2020), <https://www.manilatimes.net/2020/01/12/news/top-stories/lawmaker-slams-marcos-historical-revisionism/673487/> [https://perma.cc/26WX-6ZYK].

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ ROBLES, *supra* note 66, at 9.

didn't know the truths they needed to know, unless their parents took it upon themselves to fill in the gaps left by formal education.¹⁹⁹

Marcos' success took other forms. In 2019, the *Sandiganbayan*, the Philippine graft court, dismissed three cases for the recovery of ill-gotten wealth against Marcos, his widow, and associates in 2019 due to insufficient evidence.²⁰⁰ The pattern was criticized by one member of Congress who said that “[i]t is as if the *Sandiganbayan* is in overdrive to dismiss all the cases involving the Marcoses and revise history altogether.”²⁰¹ A senator echoed this view that the string of losses in the graft court “could be part of alleged efforts to revise the nation’s history.”²⁰²

Now emboldened by court victories, the Marcos family has upped the ante and is calling for a reassessment of the dictator’s legacy.²⁰³

Interestingly, the commentary on the Marcos historical revision project shows that some critics cite *Ocampo* as the trigger of this project. They also claim that the series of judicial victories are all designed to contribute to the project. The judiciary is not being

¹⁹⁹ Jose K. Tirol, *The Frailty of Our Martial Law ‘Education’*, CNN PHILIPPINES (Nov. 15, 2016, 05:43 AM), <https://cnnphilippines.com/life/culture/politics/2016/11/15/martial-law-education-opinion.html>. [<https://perma.cc/G8E2-D4EP>].

²⁰⁰ *Id.* See also DJ Yap & Mariejo S. Ramos, *3rd Wealth Case vs. Marcoses Junked*, PHILIPPINE DAILY INQUIRER (Oct. 26, 2019, 05:05AM), <https://newsinfo.inquirer.net/1181936/3rd-wealth-case-vs-marcoses-junked#ixzz6DNFACBAx> [<https://perma.cc/VM5P-JFHW>]. Last August, the Sandiganbayan dismissed a P102-billion forfeiture case against the Marcoses and their late crony Roberto Benedicto. In September, it threw out a P1.052-billion civil suit against the Marcos couple and Rustan’s Commercial Corporation founders Bienvenido Tantoco Sr. and Gliceria Tantoco. This third case sought the recovery of P267.371 million pesos.

²⁰¹ *Id.*

²⁰² Daphne Galvez, *Hontiveros Fears Dismissal of Marcos Cases Part of ‘Historical Revisionism’*, PHILIPPINE DAILY INQUIRER (Oct. 28, 2019), <https://newsinfo.inquirer.net/1182577/hontiveros-fears-dismissal-of-marcos-cases-part-of-historical-revisionism> [<https://perma.cc/4NNA-T6CY>].

²⁰³ Gaea Katreena Cabico, *Bongbong wants textbooks about Marcos ‘fixed’*, PHILIPPINE STAR (Jan. 10, 2020), <https://www.philstar.com/headlines/2020/01/10/1983709/bongbong-wants-textbooks-about-marcos-years-fixed> [<https://perma.cc/W8XR-QCMN>].

regarded as an independent branch of government; rather, it is regarded an agent in the rehabilitation of Ferdinand Marcos.

IX. CONCLUSION

These days, we live in a country with an unpredictable past.

—Iurii Afanasiev, *The Use and Abuses of History*²⁰⁴

And I tell him that I have tried. That I have tried to keep memory alive, that I tried to fight those who would forget. Because if we forget, we are guilty, we are accomplices.

—Elie Wiesel, *Night*²⁰⁵

In *Marcos v. Manglapus*, the Supreme Court of the Philippines sanctioned the President's decision to bar the return of Ferdinand Marcos from exile. Twenty-seven years later, the Court granted the former dictator a hero's burial.

The Philippine Supreme Court's efforts at refurbishing the Marcos myth revised history. The Court stepped in after Marcos failed to immortalize himself as a hero, acting as his agent by sifting through data and declaring Marcos worthy of burial in a cemetery for heroes.

The Court, through *Ocampo*, created a fictional difference between Marcos as the war hero and the Head of State and Marcos as the brutal dictator, claiming that the latter task is one left for historians to accomplish. This is a farce because of the inextricable connection between the law and the creation of memory. The Court adopted a version of history where Marcos' sins were expunged.

Courts that deal with issues implicated by massive human rights violations should be alert to its judicial history-writing

²⁰⁴ MARGARET MACMILLAN, *THE USES AND ABUSES OF HISTORY* 131 (2009).

²⁰⁵ Elie Wiesel, *The Nobel Peace Prize Acceptance Speech Delivered by Elie Wiesel in Oslo on December 10, 1986*, in *NIGHT* 117–120 (Marion Wiesel trans., 2006).

function—to turn private memories into public narratives.²⁰⁶ *Ocampo*, despite the Supreme Court’s explanations, denied the victims of Marcos’ rule of the recognition of these experiences.

Law has been a tool to make a record of atrocities elsewhere in the world, but the Philippine Supreme Court decided to use the law to shield Marcos from criticisms. The only beneficiaries of this decision seem to be the Marcoses whose political fortunes have been refueled. Since *Ocampo*, the Marcoses have ironically been leading the charge against historical revisionism in order to revise history’s verdict on their father’s administration.

²⁰⁶ LOYTOMAKI, *supra* note 98, at 52.