

# Structure and Context of Judicial Institutions in Democratizing Countries: The Philippines and South Africa \*

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## Introduction

The recognition of courts as political institutions is widely accepted. Nonetheless, outside the American legal system, courts have been assumed largely unimportant. Comparativists have all but ignored the study of courts as political institutions and judges as political actors presuming them incapable of affecting public policy (Tate 1987). Only 1 percent of the 727 comparative politics articles published between 1982 and 1997 in *Comparative Politics*, *Comparative Political Studies* and *World Politics* dealt with courts (Hull 1999). As Gibson, Caldeira and Baird note:

Comparativists know precious little about the judicial and legal system in countries outside the United States. We understand little or nothing about the degree to which various judiciaries are politicized; how judges make decisions; how, whether, and to what extent those decisions are implemented; ...or what effect courts have on institutions and cultures. The degree to which the field of comparative politics has ignored courts and law is as remarkable as it is regrettable (1998, 343).

Concomitantly, American scholars of judicial behavior have essentially refused to test their theories outside the United States legal system (Tate 1987). Only 14.1% of dissertations in the last five years (35 of 249) included a focus on courts outside the United States. Only five articles were published in the *American Political Science Review* or the

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*American Journal of Political Science* that at least in part explored courts abroad (Epstein 1999, 1).

The assumption that courts are largely unimportant political institutions ignores the fact that as societies become more complex, formal adjudicative mechanisms emerge that are delegated significant powers to resolve political, social and economic conflicts within society. For appellate courts, these determinations of legal rights have broader public policy consequences and decisions are motivated by factors beyond merely the facts and the law.

Ignoring courts in political science research has led to an appalling ignorance of courts and their role and function within societies generally, and their importance in democratization specifically. What role can or do courts play in democratization? We simply do not know. While a number of single nation studies exist, these studies, as critics note, cannot lead to broader generalizations about legal actors and political systems. Judicial scholars must bridge the gap between the extensive research on American courts and the absence of truly comparative research. Only then can we understand the "significance of alternative institutional structures or contexts to the judicial decision" (Hall and Brace 1992, 148), and I would argue the importance of structure and context to establishing the rule of law.

Unfortunately, these programs of research are only beginning to flourish. The law and courts' subfield is beginning to recognize the importance of comparative judicial research. Recently, the Conference on the Scientific Study of Judicial Politics, funded by the National Science Foundation, was devoted to comparative judicial research. Additionally, a recent address of the President of the Law and Courts section of the American Political Science Association, Lee Epstein, was entitled "The Comparative Advantage." In it, Professor Epstein argues that it is "time to think about the steps we can take to fill the enormous void that has been created from years, even decades, of neglect of courts abroad" (1999, 3).

Because of this vacuum, this paper will be limited as well. I will introduce the major function of courts, and focus on two case studies involving the ways in which governments in democratizing countries have structured their judiciaries, and the context within which these structures

emerge. The first will focus on the Supreme Court of the Philippines in the wake of the People Power Revolution in 1986. The second will focus on South Africa in the transition from apartheid to democracy.

### **The Function of Courts**

Becker asserts that government is the "monopolized force of society organized to distribute some values authoritatively and to maintain internal order" (Becker 1970, 18). Dhavan (1985, 20) argues that the State, as a matter of necessity, must delegate this power to various functionaries, among them - courts. Shapiro (1981) similarly maintains that as societies modernize, the state substitutes a formal adjudicative machinery for the informal method of the mediation of conflicts. Modern courts represent the imposition of the authority of the regime within the allocation of gains and losses. The function of resolving conflicts is fulfilled in modern courts not by consent, but by a forum of compelled adjudication where a third party (the defendant) is forced to participate by the actions of the other two (the claimant and the courts). In general, Shapiro argues, the losing party agrees to the decision because it is *believed* to have been achieved by an independent and impartial arbiter. Though the courts are clearly a component of the state, the structure of the courts can nonetheless retain the appearance, if not functioning, of independence. Independent courts are those that are free to resolve conflicts without interference from the government. This independence is crucial in establishing the rule of law.

Adherence to the rule of law must be distinguished from adherence to the rules of the law. Former United States Supreme Court Justice Abe Fortas defined the rule of law to mean:

Both the government and the individual must accept the result of procedures by which the courts, and ultimately the Supreme Court, decide that the law is such and such, and not so and so; that the law has or has not been violated in a particular situation, and that it is or is not constitutional; and that the individual defendant has or has not been properly convicted and sentenced.

...The state, the courts, and the individual citizen are bound by a set of laws which have been adopted in a prescribed manner, and the state and the individual must accept the courts' determinations of what those rules are and mean in specific instances (1970, 30)

It is through the resolution of conflicts in the judicial process, that the rule of law is established and maintained. Ultimately, courts are one component of the "power filter" (Dhavan 1985, 26) through which social and economic forces gain recognition and legitimacy.

Understanding the functioning of the rule of law within societies requires the analysis of the gains and losses distributed by the structure assigned the responsibility of settling social, economic and political conflicts that emerge through the formal rules of the state. Much debate focuses on defining that "structure" which resolves these disputes. Shapiro argues that a mediating continuum exists within societies, with "go-betweens" on one end, and "formal judges" on the other (Shapiro 1981, 3). Though I focus on the latter end of the continuum, I do not ignore the existence or the importance of the former. Rather, I suggest that formal appellate court structures are significant for several reasons. Appellate courts have a high profile existence. In their interpretation of the rules (and thus the values they allocate), their reasoning must be articulated and publicly expressed, two essentials for empirical evaluation. Moreover, as Dhavan notes, "the higher we climb in the echelons of the judiciary, the closer we are to an important part of the constitutional nerve centre of the state" (Dhavan 1985 24). By studying the highest appellate courts within a society, we can examine the relationship between the regime's allocation of the values through "law" and the judiciary's response in its establishment of the "rule of law," through its determinations of who wins and who loses.

Governments vary in the authority they are willing to designate to courts. Governments intent on establishing the rule of law establish strong judicial institutions with measures to protect independence, such as tenure, judicial review, established rights, and to protect impartiality, again through such measures as secure tenure and salary protection. These governments must be willing to lose in the resolution of conflicts. Judges who wish to protect or enhance the institutional status of the judiciary

must feel confident that their ruling will be enforced and that there will be no retaliation for it, or that at least the retaliation will come through legal means.

However, courts can be provided powers that are too broad and expansive which can undermine their legitimacy. If courts are incapable of carrying out all of the functions assigned to them, or if those functions assigned to them increase the visibly political role of the court, this can decrease the court's institutional stature essential for establishing the rule of law. Citizens must accept the right of the court to rule in order to accept the court's ruling. If the court becomes perceived as behaving overtly politically, it can damage the court's capacity to function.

Thus it is critical that the courts themselves must also function legitimately. This is not to suggest that courts must not respond politically. I would argue that courts are political bodies and judges are political actors who function within a legal framework. Within that framework, judicial behavior must be beyond reproach. The dilemma for judges is to function within a political framework while attempting to preserve the essence of mechanical jurisprudence - the simple application of the facts to the law. If judges walking this tightrope lose their balance and move beyond the boundaries of the legal framework, through either bribes or overt political influence, the judge will tumble and can bring the court down with her. I argue that for democratization to succeed, courts must be strengthened sufficiently to enhance the rule of law and must behave in a manner *perceived* as beyond political influence. Courts must have the right to rule, and citizens must accept the legitimacy of that right to rule. Both South Africa and the Philippines transitioned from non-democratic states to democratic ones. This paper investigates the structures adopted by the governments in the reorganizing of the legal systems for these countries and evaluates the success, or lack thereof, for each.

### **The Philippines<sup>1</sup>**

Much has been written about the pre-Marcos court and it will not be reiterated here (but see Araneta and Carroll (1968) and Grossholtz (1964)

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<sup>1</sup> Much of this discussion draws heavily on Haynie (1998).

as well as Tate and Haynie (1993, 1994)) except to note that the pre-Marcos court was considered a powerful institution with a reputation for independence and integrity. The court had extensive powers of constitutional review over a number of important economic, political and social issues (Tate and Haynie 1993). The court was considered one of the most powerful and politically respected appellate courts in existence (Becker 1970; Wurfel 1964).

The groundwork for Marcos'"constitutional authoritarianism" began with his declaration of martial law in September 1972. This groundwork would lead ultimately to the politicization of the court. Though Marcos cited economic problems as well as the communist insurgency as motivations for his declaration, his inability to seek a third term as president provided sufficient motivation in and of itself. Immediately following the declaration of martial law, violence and crime were dramatically reduced leading to some support among the population for his actions. However, Marcos abandoned all pretense of democratic processes: he disbanded Congress, detained oppositionists, suspended the rights of *habeas corpus*, speech, press and assembly and imposed strict censorship requirements, but all of this was accomplished by legislative fiat under the guise of martial law. Ironically, the one exception to the laundry list of these recisions of the rule of law was the capacity of the courts to review his actions.

While the structure and jurisdiction of the courts remained largely unchanged, Marcos had eight years of presidential rule to staff the courts with individuals sympathetic to him. In fairness to the courts, most Filipinos were initially sympathetic to the declaration of martial law and to Marcos' continued power. The fact that the Supreme Court supported Marcos in his legal battles certainly surprised few, and was welcomed by many.

With the abolition of Congress and with the support of the court, Marcos was able to push through a new constitution that established a parliament clearly subservient to an executive power that had no limit on the number of presidential terms. There were no remaining obstacles to unfettered authoritarian rule. Marcos dictated by decree and was never successfully challenged in any major way in the establishment of his "New Society."

Though Marcos allowed his actions as “benevolent dictator” to be challenged in court, such challenges were never genuine threats to his capacity to rule. As one judge noted who served on the Supreme Court during this period:

What the critics would want is to have a frontal clash with Mr. Marcos. In a martial law regime...I don't think that's advisable...[The court] would have been abolished if it went against Marcos like that. If it went against his pet projects, I'm certain that it would have been abolished. (Tate and Haynie 1994:217)

The Supreme Court favored the Marcos regime in all of the major political challenges brought to it. Though the court eventually decided against Marcos in a few cases,<sup>2</sup> the Supreme Court never presented any real threat to Marcos' rule.

By the end of martial law, the reputation and prestige of the Supreme Court had declined dramatically. The court was perceived as incapable or unwilling to limit the effects of Marcos' dictatorship. Unfortunately for the court, not only were its reputation and prestige declining precipitously, so were Marcos'. Marcos' attempts to legitimize his dictatorial rule through the use of "constitutional authoritarianism" merely destroyed the role of the court as a true arbiter of political conflict in the eyes of the population at large, undermining the rule of law in the process.

Marcos' politicization of the Supreme Court did not go unrecognized by those who sought to strengthen the constitutional foundation of the emerging democracy in the hopes of returning to or at least creating, a rule

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<sup>2</sup> For example, the court ruled that authorities must show a clear and present danger of a substantive evil to deny a permit (*Reyes v. Bagatsing* 125 SCRA 553); the government was prohibited from summarily closing a radio station without demonstrating a clear and present danger (*Eastern Broadcasting Corp. v. Dans* 137 SCRA 628); the court nullified the closure of a newspaper critical of Marcos (*Burgos v. Chief of Staff* 133 SCRA 800); military officers were prohibited from intimidating members of the media (*Babst v. National Intelligence Board* 132 SCRA 316); individuals could not be criminally indicted for political discussions (*Salonga v. Pano* 134 SCRA 438; among others (Cruz-Pano and Martinez 1989:46-47).

of law. Following the relatively peaceful People's Power Revolution in 1986, Corazon Aquino accepted the resignations of the entire bench. She then reappointed those members of the pre-1986 court who were deemed sufficiently oppositionist. The remaining appointees were presumed Aquino loyalists, allowing President Aquino to reconstitute the court according to her own ideological preferences. Because the court was staffed largely with individuals who had been at least minimally defiant of Marcos, it was perceived publicly as a bastion of independence. The reputation of the court soared immediately following Marcos' departure from the archipelago. An association of business executives, the Makati Business Club, were asked in a survey to rate the performance of government agencies. They placed the court at the top. The court's popularity continued under the leadership of Chief Justice Teehankee, considered a protagonist of Marcos in the latter years of his rule. The new constitution placed the courts in a critical position of guarding the excesses of future personalities who might also wish to undermine the rule of law, creating a genuine bulwark of the democratic ideal.

But alas, paradise lost. A decade later, a similar survey by the Makati Business Club ranked the court 19 of 32 bodies, below the generally unpopular military and labor departments. The court system generally ranked 30 of the 32, not even able to rate higher than garbage collection. A critical opportunity to enhance and strengthen the legitimacy, independence and reputation of the court in the post-Marcos era was lost? What led to this decline in the court's reputation over such a short span of time? Controversies continue to plague the court. On October 23, 2003 the House of Representative passed an impeachment complaint initially signed by 81 representatives against Chief Justice Davide for allegedly mismanaging the Judiciary Development Fund (JDF).<sup>3</sup> Many assert that the impeachment is politically motivated in response to decisions of the Supreme Court which have angered politically influential parties. The direct inclusion of the court in such political machinations is indicative of the court's political vulnerability. I argue a

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<sup>3</sup> Former President Joseph Estrada, Jr. also filed an impeachment complaint against Chief Justice Davide and seven Associate Justices for their decision to confirm the election of Gloria Macapagal-Arroyo, but the complaint was dismissed by the House Justice Committee.

number of structural and contextual effects contributed to the court's demise. Among the most important factors were: the expanded power of the court and the internal structure of the court itself.

### **Expanded Power of the Court**

The excesses of the Marcos regime and the nostalgia for the perceived independence of the Supreme Court prior to martial law combined to fuel a constitutional convention which dramatically increased the power of the courts generally, and the Supreme Court in particular. The court's supervision of the judiciary was expanded; the court's constitutional jurisdiction was expanded; and the appointment process was revised.

First, prior to the 1987 Constitution the administration and supervision of the lower courts, including all judges and employees, resided with the Justice Department. Under the new constitution, the Supreme Court is completely responsible for the administration and discipline of the bar, dramatically increasing the bureaucratic power of the court over a wide range of resources. However, it has become increasingly difficult to maintain the perception of independence while supervising a vast governmental agency with its own constituencies and political brokers. Removing the courts from the supervision of the Secretary of Justice was seen as an important step in removing the politics from the political process. Unfortunately, the change merely shifted the inevitable politics of the judicial process from the Justice Department to the Supreme Court itself.

A variety of political confrontations have highlighted the political nature of the legal system as well as that of the court. Allegations of judicial corruption require the Supreme Court to assume the role of investigator, as well as administrator, and ultimately adjudicator. If the court rules in favor of the attorney or judge accused of wrong-doing, it appears to be protecting its own. Previously, if the Justice Department were to conduct the investigation and determine there was insufficient evidence to bring criminal charges or discipline various judges and attorneys, the court would be above the fray. Under the revised structure, the court is perpetually drawn into the political quagmire of every accusation of judicial misconduct some of which are based on mere

allegations and gossip. Inevitably the court to appears to be administratively inadequate at best or corrupt at worst.

Second, the Constitution expanded the jurisdiction of the court by limiting its ability “to decide not to decide.” The court was accused during the Marcos era, of avoiding politically sensitive questions that could have limited Marcos’ authoritarianism by citing the “political question” doctrine. By arguing that certain issues were not justiciable the court averted a number of political confrontations with Marcos. The 1987 Constitution eliminated that avenue of deference. Under the new constitution the court has the power “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of Government.”<sup>4</sup> This section was largely understood as the mechanism to prevent the court from avoiding politically sensitive cases. The court clearly retains the capacity to interpret what amounts to a “grave abuse,” but limits the ability of the court to avoid evaluating the political machinations of government elites.

Regardless of the intent of the constitutional framers, the court has clearly interpreted the phrase broadly, accepting virtually every opportunity to decide presented to it. With the lack of discretionary jurisdiction and the requirement to review alleged abuses of discretion, the court's approval has essentially become an inevitable hoop through which all congressional and executive actions must pass. As a result, the Supreme Court in many ways is perceived as a third component of the legislative process.

### **Internal Court Structure and Norms**

Several aspects of the court’s institutional context have had unintended negative consequences. These include the appointment process to the court, the requirement that the court sit in divisions, and the sheer volume of cases the court decides. Each of these issues has increased the evidence of the political nature of the court.

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<sup>4</sup>Article VIII Section 1.

The constitutionally created Judicial and Bar Council (JBC) was an attempt to limit the political nature of the appointment process and to increase the role of merit in the selection of judicial candidates. The JBC is comprised of the Secretary of Justice, one Senator, one member of Congress, an academic, a member of the private sector, a representative of the Integrated Bar of the Philippines, one retired justice and the Chief Justice of the Supreme Court. This body reviews all potential candidates for the bench and must provide at least three nominees to the President. The President must select one of the three to fill a vacancy or reject them all. Previously, appointments to the bench were made by the President and approved by a constitutional body, the Commission on Appointments. Appointments to the judiciary have always been politically motivated. Appointments were given as rewards for past political favors or expectations for future ones, and appointments were given to ideologically compatible nominees. The JBC has been criticized for the increasingly evident political nature of its appointment process. The JBC was intended to increase the independence and competence of the judiciary, but just as the role of the governor looms large in the Missouri Plans of the states, the President is influential in the composition of the JBC and thus its ultimate nominees. Politicians continue to pressure the JBC for nominations of their preferred appointees, with reciprocal expectations, and not surprisingly, nominations to the Supreme Court have been increasingly filled by individuals believed to be loyal to the appointing president.

That politics is a component of judicial nominations is certainly not a novel discovery that arrived in the Philippines with the creation of the JBC. What is unique is that the Chief Justice and a retired Supreme Court justice sit on the JBC which inevitably draws the Supreme Court into the political fray. Previously, the President was presumed to be politically motivated in his or her appointments. Now, the Chief Justice comprises at least a small component of an increasingly contentious judicial appointment process.

In addition to this, the requirement that justices retire at 70 ensures a greater turnover on the court than if justices served for life. Concomitantly, there is an expectation among the most senior justices of the Court of Appeals that toiling in the judicial bureaucracy should ultimately be rewarded with Supreme Court appointments and the accompanying increase in retirement benefits. This leads to some

Supreme Court appointees who have only a few months to a few years of service remaining prior to the mandatory retirement age. In turn, stability in terms of court membership is practically impossible. With natural courts changing literally within months of each other, stability among precedents is often short-lived. While judicial politics scholars consider it a truism that the policy decisions of the court can be altered depending upon the court's personnel, for the population at large, the reversals of the court in politically sensitive cases reinforce negative perceptions of the court as corrupt and incompetent.

The mandatory retirement age of 70 poses another delicate problem. Many justices who leave the court at 70 cannot or choose not to retire from the legal profession. Considering the paltry (by western standards) retirement pensions provided them, many judges and justices feel compelled to return to very lucrative private practices. Companies often scramble to hire former justices. While some are no doubt motivated to hire justices who remain some of the brightest legal minds in the country, other companies are surely motivated by the perception that hiring a former justice provides access to the current members of the court. Former justices roam freely in and out of sitting justices' offices, which should not be surprising given that lasting friendships can be formed among colleagues. However, former justices are seen entering the offices of sitting justices to whom cases have been assigned for which the former justice is counsel. To avoid this becoming public, former justices are often hired in an unofficial capacity and not listed as the counsel of record. While there is no evidence that these "intermediaries" actually alter votes, the interactions of former justices with the current members of the court have not gone unnoticed by the press.

Equally disturbing, attorneys reiterate the perception that these types of access influence votes. Some attorneys actually charge clients fees to "facilitate access." If the "intermediaries" prove unsuccessful, the losing party merely claims that the other side paid more. Because the justices are reluctant to turn away former colleagues from their office doors, the actions of the retired justices continue to fuel the allegations of influence peddling.<sup>5</sup>

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<sup>5</sup> It should be noted that similar criticisms are made of relatives and former law clerks and partners, etc. of sitting justices who similarly approach justices who are handling cases to which they are a party.

Second, the use of panels combined with the court's lack of discretion over its dockets has created a variety of problems. Typically, the court sits in three divisions with five justices devoted to hear a case. The court also has little discretion over its docket, typically hearing and deciding formally more than a thousand cases annually, with several thousand others disposed of through minute resolutions, short dispositions of a few sentences dismissing the case for lack of merit. With each division responsible for three to five hundred cases, a number of problems ensue.

Because there are so many cases, the individual determined to write the opinion is crucial. Petitions are "raffled" to each division. Within that division, a specific justice will be designated to handle the opinion. Due to importance of the case or at the suggestion of the division, a few cases are assigned to the court *en banc*. Similar to the United States Supreme Court, law clerks read through the petitions and draft memos concerning the cases which are discussed during conference. In general, the justice initially designated to handle the case will draft the opinion. Dissenting and concurring opinions follow the receipt of the draft, though the vast majority of all opinions are decided unanimously.

With such heavy caseloads, the justices give great deference to the *ponente* or the justice assigned to write the majority opinion for the court. His or her opinion generally becomes the decision of the court. Legal practitioners function under the assumption that the *ponente* is the determining factor in the outcome of a case. Rumors abound concerning the amount of money that changes hands with attorneys and court staff to obtain the name of the *ponente*. Whether true or not, allegations are made to clients concerning the capacity to influence the outcome of the case through either an intermediary respected by the justice or through outright bribes.<sup>6</sup>

For example, in 1992 the Supreme Court reversed the government's decision to allow a competitor of the Philippine Long Distance Telephone (PLDT) company to operate an international gateway. Allegations

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<sup>6</sup> For an excellent discussion of the corruption charges see Coronel (1997a, 1997b, and 1997c).

surfaced in the leading broadsheets that the court's opinion had been written by the lawyer for PLDT rather than the designated *ponente*, Justice Hugo Gutierrez. A local paper hired a foreign writing analyst to compare the PLDT opinion with previous opinions authored by Justice Gutierrez's and determined the differences were too striking for the PLDT decision to have been authored by the Justice. The Chief Justice at the time, Narvasa, created an ad hoc committee to investigate the Gutierrez case, as well as other allegations of impropriety. Though a few lower court justices were eventually chastised in matters unrelated to the PLDT scandal, no evidence of corruption in the Supreme Court was found by the committee, not surprisingly many critics argued. Justice Gutierrez denied any impropriety and insisted he was indeed the author, but he subsequently took early retirement from the court, citing his unwillingness to bring further negative attention on the institution. His resignation was viewed in the press as confirmation of corruption in the court.

Whether or not *ponentes* can be purchased, the perception remains. In the United States Supreme Court, the impossibility of successfully bribing a minimum winning coalition of five is a sufficient deterrent to any foolish enough to believe the court capable of corruption. For the Philippine Supreme Court, huge caseloads increase the importance of the opinion writer, thus successfully persuading the *ponente* could in fact significantly affect outcomes.

The opinion assignment process - or "raffling" - has also been criticized. Though cases are randomly assigned to *ponentes*, circumstances can intervene to limit the "randomness" of the process. The court has a long-standing policy that all incidents related to a case are assigned or referred to the originally designated *ponente*. For example, motions for reconsideration or even similar petitions subsequently filed are treated as extensions of the original case and consolidated with it and referred to the *ponente* initially assigned to the case for disposition. While the logical benefits of the assignment are clear, the justice would already be familiar with the case and attendant pleadings, the departure from the random assignment of the case allows for opportunities, or the perception of opportunities, for manipulation in opinion assignment. The Supreme Court has been criticized in a number of cases for such machinations.<sup>7</sup>

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<sup>7</sup> The lower courts have been particularly castigated for the questionable assignments of cases to judges. Numerous media investigations suggested that cases could be

Because of the sheer volume of cases decided by the court, it is almost impossible for Justices to be cognizant of every decision of all three divisions. Rarely and perhaps inevitably, does one division rule on a case and a different division rules differently in a similar dispute. When the court reverses itself in cases decided by a division that are subsequently elevated to the court *en banc*, the apparent "flip-flopping" is usually attributed to political influence by "the Palace" or to bribery by the ultimate winner in the case. But imagine if the United States Supreme Court sat in three divisions of three. Depending on the three justices comprising the panel, one could imagine cases where the division would often be overruled when the entire court decided the same issue. Similarly, for the Philippine Supreme Court, the ideological composition of the division may differ sufficiently from the majority of the court that decisions made *en banc* will reverse the decision of the division. Students of judicial politics find nothing earth shattering about the concept that politics influences decisions. But for an institution that bases its right to rule on impartiality and mere "interpretation" of the law, the blatant evidence of ideological influence in the process of that interpretation undermines the important legal myth of the apolitical nature of judicial decision-making. The belief in an impartial and independent judiciary, free of personal bias in its judges, is critical to establishing respect for the rule of law. Though that goal is never truly feasible, the belief in it is. The structure and norms of the Philippine Supreme Court have undermined the perception of independence on the part of the court.

### **South Africa.**<sup>8</sup>

The apartheid-era regime in South Africa was governed by constitutional and statutory guidelines. Formal rules were legally constituted, and the legality of the rules was never questioned in so far as the government technically followed its constitutional framework in

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assigned to particular judges for a price. Sufficient proof emerged resulting in public raffling in most courts.

<sup>8</sup> This section draws heavily on Haynie (1997).

establishing its political, social and economic policies.<sup>9</sup> However, legitimacy requires far more than technical rigor. Legitimacy is beyond "whether the activities of government are lawful as whether they accord with what are generally perceived to be or what have for long been held up to be, the fundamental principles ... to which government is or ought to be conducted" (McAuslan and McEldowney 1985, 11). Regimes can behave lawfully, without acting legitimately. The apartheid-era regime universally was considered illegitimate by all but the minority Nationalist Party government and its sympathizers.

A truly legitimate legal system emerged for South Africa almost a decade ago with first the interim constitution and then subsequently with the passage of the final constitution on May 8, 1996. With its first truly democratically elected president installed, and following the requisite certification by the Constitutional Court, President Mandela signed the new constitution into law on December 10, 1996.<sup>10</sup>

Without doubt, a wholesale revision of the governing regime occurred in South Africa in the last decade. This revision dramatically alters both the legislative and executive schemes that existed prior to the passage of the new constitution, but the new constitution makes incremental adjustments in the existing adjudicative structure. The court system, by and large, remains intact. While the legitimacy of the apartheid-legal system was questioned, its professionalism, particularly at the appellate level, was not. Completely restructuring the legal system, including staffing and training an entirely new cadre of judges would have been almost impossible for the newly elected government. However, apartheid's legacy cast a long shadow over the existing judicial structure, which at the time of the transition staffed largely with Afrikaners. The challenge for the new regime was to alter the existing legal structure sufficiently so that the population of South Africa, both black and white, accepted it as just and legitimate. In addition, specified rights and liberties

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<sup>9</sup> It should be noted that information submitted to the Truth and Reconciliation Commission indicates that the government engaged in extra-legal actions which were both violent and inhumane. These are not the governmental actions evaluated here.

<sup>10</sup> The Constitutional Court required adjustments to the document, most of which were technical and all of which were ultimately resolved.

were essential as was the creation of a judicial system with the capacity to enforce the rules. However, the stability of the legal system was also important for commercial interests eager to see their financial investments protected legally.

### **Expanding the Power of the Court**

Three specific avenues were pursued by the framers of the new South African Constitution to increase the independence of the judiciary and thus increase its perceived legitimacy. First, the Constitution creates a Constitutional Court at the apex of the judicial system. Second, the Constitution creates a large number of entrenched rights that are supreme and justiciable. Third, the Constitution provides the courts with the right of judicial review.

## The Constitutional Court

The creation of the Constitutional Court was intended to enhance the legitimacy of the legal system in several ways. The Constitutional Court was established both to ensure legislative and executive adherence to entrenched principles and to resolve all constitutional challenges as the final arbiter of legal disputes. The Constitution specifies that the Constitutional Court "makes the final decision" over issues relating to the "interpretation, protection and enforcement of the Constitution."<sup>11</sup> The decisions of the Constitutional Court are binding on all legislative, executive and judicial organs of state.<sup>12</sup> The salaries of all judges are protected from reduction, and judges can only be removed by "the President on grounds of misbehavior, incapacity, or incompetence" which is determined by the Judicial Service Commission discussed below.<sup>13</sup> Thus, the Court provides a foundation for the supremacy of the constitution itself.

Moreover, the Constitutional Court has the distinct advantage of having no apartheid "legal baggage." The Court represents a new structure separate from the old legal system, which had been responsible for "interpreting and applying" the statutory edifice of apartheid. The creation of a new court allowed the new majority-led government to control the appointment of the entire Constitutional Court, thus ensuring more liberal jurists than the current bench. This was critical in enhancing the black majority's perceptions of the judicial system's legitimacy. Under the previous apartheid regime, the highest court of appeal was the Appellate Division. While one obvious solution would have been to expand the Appellate Division's existing jurisdiction to include constitutional issues, interviews with Appeal Judges revealed perceptions that the creation of the Constitutional Court was the direct result of the perceived illegitimacy of the Appellate Division. The new majority was unwilling to rest critical decisions with a bench that was comprised largely of white Afrikaners

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<sup>11</sup> Chapter 8, Section 167, 1996 Constitution

<sup>12</sup> Chapter 8, Section 165 & 167, 1996 Constitution

<sup>13</sup> Chapter 7, Section 176 & 177, 1996 Constitution

who were perceived as sympathetic to the old regime. Further evidence of the framer's distrust of the Appellate Division, renamed the Supreme Court of Appeal in the new constitution, is the ability of the Constitutional Court to review and reverse the decisions of the Supreme Court of Appeal.

There is some resentment among the "older, established" judicial hierarchy that individuals are appointed to the Constitutional Court who have little or no experience on the bench, such as academics and attorneys or advocates. This represents a very clear break with the more recent tradition of appointing judges strictly from the "silks" who had been practicing advocates for many years. While this has reduced the legitimacy of the Court among the existing judicial elite, it is precisely this characteristic which increases the legitimacy and reputation of the Constitutional Court among the majority black population.

The Constitutional Court is comprised of a Chief Justice, a Deputy President and nine other judges.<sup>14</sup> Clearly, one of the primary considerations in the appointments to the Court was the acceptability of the political ideologies of the judges to the current ruling majority. While politics played a role in judicial appointments in the past, for example during the National Party's packing of the courts in the 1950s, the appointment of individuals with little or no judicial background stood in stark contrast to recent practice and accented the political nature of the Constitutional Court itself. The creation of the Constitutional Court was motivated in part by the desire of the ruling African National Congress (ANC) to remove political challenges from the Supreme Court of Appeal, perceived to be the hold-over court with the accompanying conservative ideologies. Constitutional Court justices as well as Supreme Court of Appeal judges interviewed agreed that the Constitutional Court was the result of three circumstances. First, the Court was created from the desire to establish a new court outside the old "illegitimate" one. Second, the Court would provide the opportunity to immediately shape, through ideologically compatible appointments of an entire bench, the policy outcomes of judicial decisions. Third, it would increase the perceived legitimacy of the legal system by the insertion of a new final arbiter above the old apartheid structure, which would additionally, and many Appeal

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<sup>14</sup> Chapter 8 Section 167 of the 1996 Constitution. Acting Judges are also appointed to the Court and there are routinely two to three Acting Judges at any one time.

Judges argued intentionally, reduce the stature and influence of the Supreme Court of Appeal in particular.

Thus far, the decisions of the Constitutional Court have been respected, and implemented without overt efforts at undermining the Constitutional Court's rulings. Indeed, in *S v. Makwanyane*<sup>15</sup> the Court ruled that the death penalty violated the constitutional guarantees of life, equality and dignity. The decision was met with intense opposition by a significant portion of the population, but it was immediately implemented. Most recently, in a highly controversial decision, the Constitutional Court required the government to provide anti-retroviral nevirapine to pregnant women to help prevent transmission of the AIDS-causing virus to their unborn children.<sup>16</sup> Many credit the court's decision as moving the recalcitrant President Mbeki to provide access to anti-retroviral drugs, seen as essential in preventing the acceleration of aids-related deaths. Though clearly opposed to the court's decision, the government has moved toward its implementation.

While the Constitutional Court is now predominately non-white, the Supreme Court of Appeal remains overwhelmingly white, though a number of the recent appointments come to the bench after years of opposition to apartheid. For example, Supreme Court of Appeal Judge Edwin Cameron, a former advocate and academic, was an outspoken critic of the apartheid government and of the pro-executive sentiment of the apartheid-era Appellate Division (Cameron 1987a, 1987b, 1982).<sup>17</sup> Despite its more conservative reputation, the Supreme Court of Appeal has recently decided several cases which have been seen as expanding individual rights in opposition to the government. In *Richtersveld Community and others v Alexcor Ltd and Another*<sup>18</sup> the Supreme Court of

<sup>15</sup> 1995 (3) SA 391 (CC).

<sup>16</sup> *Minister of Health and Others v. Treatment Action Campaign and Others* 2002 (5) SA 721 (CC).

<sup>17</sup> It is interesting to note that though Judge Cameron is considered one of the most brilliant legal minds in the country, his recent criticisms of the ANC's aids policy, or lack thereof, will prevent him from consideration for appointment to the Constitutional Court.

<sup>18</sup> 2003 (6) SA 104 SCA.

Appeal found that tribal communities who had been deprived previously of their land were entitled to restitution of the customary law interest in land, a decision opposed by the ANC for its potential exponential cost. In a similarly impressive display of expanding the protection of individual rights, *Minister of Safety and Security v Carmichele*,<sup>19</sup> the Supreme Court of Appeal ruled that the police and the prosecutor were negligent, and thus liable, for not opposing the bail of an accused who subsequently attempted to murder Ms. Carmichele. The decision was seen as establishing a category of protection previously unavailable to individuals, and was seen as particularly symbolic in a country with high rates of crime.

### Fundamental Rights and Judicial Review

A broad range of "fundamental rights"<sup>20</sup> are entrenched in the new South African Constitution. These rights represent the first time in the history of South Africa that individual rights and liberties have been specified and protected by constitutional law.<sup>21</sup> Moreover, the constitution provides the judiciary with the power to review legislative actions for constitutional compliance, enhancing the capacity for an independent judiciary to emerge. The Constitution explicitly addresses the independence of the courts. The courts are deemed "independent and subject only to the

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<sup>19</sup> 2004 (3) SA 305 (SCA).

<sup>20</sup> Among these are equality, human dignity, life, freedom from servitude and forced labor, religion, belief and opinion, privacy, expression, assembly, demonstration and petition, association, political rights, freedom of movement and residence, labor protections, economic activity, property protections, housing rights, health care, food, water, and social security rights, language and culture protections, cultural, religious and linguistic protections, rights of the accused, environmental rights, children's welfare protections, and education

<sup>21</sup> A number of individual rights and liberties were preserved under the common law of the apartheid-era legal system, but these rights were revocable by simple parliamentary statute. Only two rights were considered "entrenched." One concerned the equality of English and Afrikaans as official languages. The second was the protection of the mixed-race voters in the Cape. Altering either required two-thirds votes of Parliament. However, in the 1950s, through various political machinations, Parliament removed the coloured voters by expanding the members of Parliament so as technically to achieve the requisite two-thirds votes.

Constitution and the law, which they must apply impartially and without fear, favour or prejudice."<sup>22</sup> Moreover, "No person and no organ of state may interfere with the functioning of the courts..." and the "organs of state" are required to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."<sup>23</sup> The concept of judicial review is also important in enhancing the legitimacy of the courts in the eyes of the minority white population who favored specific protections of individual rights.

Establishing the power of judicial review greatly increases the independence of the courts, but such guarantees mean little if the court's decisions are repeatedly ignored or undermined by the regime. The Constitutional Court, staffed with judges who are basically ideologically sympathetic to the regime, by and large, has ruled consistently with the ANC's preferences. However, as noted above, in a few judgements, the new government has lost; nonetheless, the government has supported the court's capacity to rule against it thus far. This increases both the stature and independence of the Constitutional Court.

### **Enhancing Legitimacy**

Three specific avenues have been pursued to enhance the legitimacy of the legal system. First, a strong affirmative action policy was initiated to diversify the judiciary and, in fact, the entire public service. Second, a system of lay assessors has been established to provide members of the community at large a chance to participate directly in conflict resolution. Third, the constitution creates the Judicial Service Commission to nominate judicial candidates.

### **Affirmative Action**

The first avenue to increase the legitimacy of the legal system has been the use of affirmative action. A massive program has been initiated by the government to rapidly increase the numbers of nonwhites in the public sector. Everyone interviewed, from professors of law, to Afrikaner

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<sup>22</sup> Chapter 8, Section 165, 1996 Constitution

<sup>23</sup> Chapter 8, Section 165, 1996 Constitution

public prosecutors and judges, to magistrates, attorneys, and advocates were all sympathetic to the need for affirmative action. Apartheid largely inhibited the economic advancement of nonwhites. Skilled positions were reserved for whites; nonwhite labor opportunities were geared to the enhancement of the economic position of whites. In addition, the so-called Bantu education programs prohibited the education of blacks beyond the minimal level to ensure they were capable of only non-skilled jobs (Beinart 1994).

Assessments of these affirmative action programs vary and often vary by the skin color of the evaluator. Without doubt, the program has been successful in diversifying both the bench and the prosecutor's office. In the first two post-apartheid years, the public prosecutor's office went from being overwhelmingly white, to 50% black; women achieved impressive gains as well. Some assessments emphasize the success of affirmative action programs in identifying and employing capable candidates. Some assessments suggest that more senior, experienced white males are routinely "passed over" in favor of less senior, experienced nonwhites.

Appointments to the two highest courts of appeal receive particular attention. As noted earlier, the Constitutional Court is now predominately non-white. Though its Chief Justice, Arthur Chasklason, is white, his anti-apartheid credentials - or struggle credentials as they are known - are unquestioned. His imminent retirement has fueled speculation about his replacement, but all odds are on a non-white Chief Justice which will be the first non-white to head the highest court of appeal in the country. For the Supreme Court of Appeal, the seniority norm that was typically the route to the Presidency of the court<sup>24</sup> has similarly been eschewed. Speculation is that Deputy President Lex Mpati will surely succeed to the Presidency of the court following the retirement of the current President C. T. Howie. Judge Mpati would be the first black to serve as head of the Supreme Court of Appeal.

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<sup>24</sup> The formal head of the judicial hierarchy under the final constitution was the head of the Chief Justice of the Supreme Court of Appeal. The constitution was amended (Constitution of the Republic of South African Amendment Act No. 34 of 2001) to place the head of the judiciary in the Constitutional Court. The titles of the heads of the courts were also switched. The head of the Constitutional Court is now the Chief Justice, and the head of the Supreme Court of Appeal is now the President.



## Lay Assessors

A second avenue to increase the legitimacy of the legal system has been the introduction of "lay assessors." The South African legal system abandoned the jury system in the 1960s and created the assessor system. Criminal trials are conducted in the presence of a single judge acting generally with two assessors. These individuals were typically retired magistrates, advocates or attorneys who have a great deal of experience within the legal system and were also typically white and male. Assessors assist the judge in evaluating the facts of the case while the judge is responsible for the determination and application of the law. Lay assessors, by contrast, are lay persons from any number of backgrounds drawn directly from the community. They function similarly to the old assessors, evaluating the evidence though the ultimate determination of the outcome of the case according to the law. The assertion is that this will increase the link with the community and thus increase the legitimacy and representativeness of the courts. There is a great deal of resistance to this concept at the high courts. The judges believe it would simply increase their workload by requiring them to "educate" the assessors so that they can sufficiently assess the facts in the case. There has been less resistance to the lay assessors in the regional courts. It should also be noted that judges at the high court level consider their caseload considerably more complex than that of judges in the magistrates courts, who handle the less difficult civil cases and less serious criminal cases.

Judges of the Supreme Court argue that with affirmative action proceeding as rapidly as it is, within the next few years the bench and the prosecutor's office will be at least 50 percent nonwhite and the need for lay assessors will not exist. The lay assessor controversy has yet to be resolved.

## Judicial Service Commission

The creation of the Judicial Service Commission<sup>25</sup> also is intended to enhance the independence of the courts by creating a separate nominating body. Prior to this, the Minister of Justice basically was responsible for

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<sup>25</sup> Chapter 8, Section 178, 1996 Constitution

appointments to the bench.<sup>26</sup> When the National Party gained control in 1948, it quickly filled the bench with ideologically compatible, and thus conservative, judges. One judge of the Supreme Court assured me that the practice of appointing more senior members to the bench occurred only when the Nationalists were confident of a predominately conservative bench. Then, it "risked" the appointment of judges of opposition parties.

The Judicial Service Commission is composed of 22<sup>27</sup> members, including the Chief Justice of the Constitutional Court, the President of the Supreme Court of Appeal,<sup>28</sup> one Judge President of the Supreme Courts, the Cabinet member responsible for the administration of justice (or a designated alternate), two practicing advocates,<sup>29</sup> two practicing attorneys, one professor of law, six members of the National Assembly,<sup>30</sup> and four permanent delegates to the National Council of Provinces.<sup>31</sup> Through a lengthy, detailed process, the Judicial Service Commission identifies a list

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<sup>26</sup> While the Minister of Justice technically selected the appointees, these were generally the preferred candidate of the Chief Justice of the Appellate Division which was the highest court of appeal under the apartheid regime.

<sup>27</sup> When considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned will also sit.

<sup>28</sup> The Supreme Court Appeal continues to handle the vast majority of appeals and the vast majority of its decisions represent the final step in the appellate process. However, its decisions are now reviewable by the Constitutional Court. On November 22, 2001 the title of Chief Justice was formally altered to refer to the head of the Constitutional Court. The title of President was assigned to the head of the Supreme Court of Appeal.

<sup>29</sup> South Africa divides its Bar similar to the English system of advocates who appear in court and attorneys, the side-bar, who work directly with the client. However, there is currently a move to integrate the bar and side-bar, and attorneys are allowed now to appear in court.

<sup>30</sup> At least three of the six must be members of opposition parties. The National Assembly is the legislative body of parliament comprised of 350 to 400 popularly elected representatives.

<sup>31</sup> The Council of Provinces is the legislative body of Parliament consisting of 10 delegates from each of the nine provinces.

of four nominees from whom the President will select the bench.<sup>32</sup> The Judicial Services Commission identifies meritorious candidates, rather than simply providing the President with straight appointment power. As in the Philippines, this is intended to increase the independence of the courts by decreasing the role of political patronage in appointments and increasing the role of merit. And as in the Philippines, members of the courts, the Chief Justice of the Constitutional Court, the President of the Supreme Court of Appeal, and the Judge Presidents of the Supreme Courts, are members of the commission.

The composition of the Commission is also an attempt to increase the representative nature of those evaluating individuals capable of serving. Moreover, the Commission holds its "interviews" publicly, which has never been done in the history of South Africa.

As in the Philippines, there has been some criticism of the Commission. One Supreme Court of Appeal judge suggested that the hearings have become opportunities for "inquisitions" of past apartheid judgments, and as a result, many of the best candidates will not allow themselves to be nominated in order to avoid appearing before the Commission. Some view the hearings as an assessment of the individual's struggle credentials; nominees must demonstrate that they were vigilant oppositionists to apartheid. Conversely, it was suggested that those who "survive" the hearings and are appointed are "tagged" as having "passed through the ANC machinery," which destroys the credibility of the individual with the older, more established white legal fraternity. If you fail the test of the Commission, "You're okay." Others perceive the hearings as an important vetting opportunity. One judge noted that a recent individual failed to be nominated after it surfaced during the hearings that he had been a member of the Broederbond, the secret Afrikaner association of white males organized to ensure Afrikaner dominance. The judge indicated that this was a valid criterion by which a judge could, and should, be evaluated. Others agree that the hearings are a positive step toward public evaluation and thus increased legitimacy for those who eventually serve.

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<sup>32</sup> A similar process is provided for the appointment of magistrates, who handle the bulk of the criminal and civil litigation. The JSC nominates only for courts above the magistrate and regional magistrate courts.

There has also been some criticisms that the most qualified individuals are not being appointed to the courts. Most recently, one of, if not the, leading advocate in the country, was not nominated by the Commission following his hearing before it. The “skipping over” of such a clearly qualified candidate was considered inexplicable. Carmel Rickard, a highly respected legal correspondent with the *Sunday Times*, has suggested that the litmus test of skin color places the burden of the transformation of the judiciary on black practitioners who will be expected to leave lucrative practices for service in the judiciary while white practitioners, even if willing to serve, will not be asked (Rickard 2004).

Though the appointments of the JBC, or the non-appointments of the JBC, have drawn some criticisms from the bench and from the legal community, the members of the JBC who serve on the bench have been able to separate those criticisms from their judicial decision-making. Though both the head of the Supreme Court of Appeal and the head of the Constitutional Court serve on the JBC, their service has not been controversial. Unlike the Philippines, the Commission has not come under attack for judges’ involvement in the selection process.

## **Discussion**

In both the Philippines and South Africa steps were taken in drafting the new constitutions to enhance the potential for the judiciary to become an independent and impartial arbiter with the capacity to enhance the rule of law. The Philippines judiciary appears to have fared less well than the South African courts. Why? This analysis does not offer any definitive explanations, but will explore some tentative observations.

First, I briefly will explore the similarities between the two transitions and then evaluate the differences. In both countries, the newly drafted constitution increased the power of the court on paper. Both clearly established the power of the courts to review national legislation and to declare null and void those deemed in conflict with the constitution. Both established a broad set of fundamental rights and made them justiciable. Both constitutions provided judges with tenure and salary protection. Both established judicial commissions that would recommend appointees following public evaluations of the candidates. All of these

revisions have become the staple choices of the menu of options prototypically available in emerging or re-emerging democracies.

However, several important differences exist. In South Africa, judges serve longer periods of time following appointment, particularly on the newly formed Constitutional Court. Justices of the Constitutional Court are appointed for non-renewable 12 year terms and must retire by the age of 70. Members of the Supreme Court of Appeal are still drawn from the lower appeals courts, but the justices of the Constitutional Court are drawn from a variety of legal and political elites. Thus South Africa's Constitutional Court has avoided the revolving door syndrome of the Philippines and has maintained stability in its membership. South Africa's Constitutional Court also does not sit in panels. At least eight justices must hear a case. This avoids the problems associated with both panel assignment and composition and has provided greater predictability and stability in the law. Moreover, the court decides far fewer cases than the 1,500 or more decisions decided annually by the Philippine Supreme Court. While the Philippine Supreme Court certainly does not give its full attention to all of the cases docketed, fully half are determined by formal opinion. The South African Constitutional Court has interpreted its jurisdiction much more narrowly, focusing only on questions of constitutionality. The lower appeal courts hear the broader disputes routinely decided by the Filipino justices. Thus, South Africa has created a clearer division of labor between the common law and constitutional law. While this division is often more of a jurisdictional fiction than fact,<sup>33</sup> it nonetheless eliminates a large number of the routine appeal questions being heard by the appeal courts. While the Supreme Court of Appeal may rule on questions of constitutionality, these must be confirmed by the Constitutional Court to have the force of law. While there is growing concern that the Constitutional Court has restricted its too well leaving it so little work it may be difficult to justify its existence, it certainly has avoided the difficulties of its Filipino counterpart.<sup>34</sup>

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<sup>33</sup> For example, the Constitutional Court recently refused the leave to appeal on the challenge of same-sex marriage. Though the South African constitution clearly bans discrimination on the basis of sexual orientation (Chapter 9, Section 3, 1996 Constitution), the Constitutional Court requested that the Supreme Court of Appeal first address the common law aspects of the case.

<sup>34</sup> Indeed there is increasing concern that the Constitutional Court has far too few cases. Only a handful of cases are scheduled for the August term of 2004.

Additionally, the Philippines is responsible for policing its own. Many have perceived the court as unwilling to prosecute judges, especially Supreme Court justices. Whether the court is unwilling or whether the facts did not warrant prosecution is unclear. What is clear is that making the court its own watchdog has provided fodder for criticism. For South Africa, the Director of Public Prosecutions is responsible for monitoring the administration of justice and determining malfeasance. This protects the judiciary from the perception that it is protecting its own.

While these are not the only structural differences between the two courts, they are certainly among the most striking. Additionally, the informal context differs significantly between the two courts. The informal norms that have become so problematic are not part of the adopted norms for the Constitutional Court, or at least not at this point. The behavior of the Philippine Supreme Court's justices makes them an easier target for accusations of corruption than the judges in South Africa. The South African Constitutional Court has less turnover among its bench, and those who do retire from the bench have not returned to private practice. There have been no charges of corruption or of influence peddling, in large part because the norms of service have avoided the potential for such accusations to arise.

Moreover, the democratization efforts in South Africa included a greater focus on the lower courts. For the Philippines, the greatest focus was in strengthening the Supreme Court and reconstituting its membership.<sup>35</sup> In South Africa, the use of affirmative action as well as lay assessors has strengthened the credibility of the lower courts though the reputation of the lower courts for efficiency may have suffered. However, the limited numbers of successful non-white advocates and lawyers willing to serve on the judiciary has created difficulties in filling the bench. The government has been unwilling to appoint large numbers of white judges. To balance the need for non-white appointees with the need for experienced advocates, the government has appointed large numbers of Acting Judges who are white and male to ensure the workloads are managed. These judges have served for months to years without ever

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<sup>35</sup> Limited training programs were instituted for lower court judges, but the success of these programs was limited as well.

receiving permanent appointments. Acting Judges are supposed to be temporary appointments to serve during absences or illnesses of permanent judges.<sup>36</sup> The government's reliance on white males as Acting Judges, and its refusal to permanently appoint these individuals to the bench, is criticized by the established legal fraternity. There is also criticism that these Advocates return to practice eventually, thus serving in the same court as Acting Judge one day and counsel the next. Despite this, charges of corruption remain essentially nonexistent.

The lower courts in the Philippines remain mired in corruption, both real and imagined, and judges toil for very low wages with exhaustive caseloads that become impossible to manage in tiny cramped courtrooms with little clerical support. Cases languish years, even decades, before coming to conclusion. Financially, there are simply fewer resources dedicated to the legal system. Very little was changed in pre and post Marcos years in the lower courts. Some would argue that the Supreme Court's difficulties represent these factors rising to the top. Thus the Philippines focused on a top-down solution, while South Africa addressed the high court, but did not ignore the lower judiciary.

## Conclusion

This paper has explored two avenues to democratization where judiciaries are concerned and has evaluated to some degree the success in each. While both are still struggling, South Africa's legal system seems to be faring better. This research can provide only pieces for the democratization puzzle. It is limited to only two countries, both with varied political and social contexts within which the rule of law is attempting to emerge. This variation certainly is an important force in shaping the legal system. Some would argue that Marcos' corruption filtered throughout the legal system, and though Marcos was ousted, the political culture of corruption remained strongly intact. By contrast, South African judges, particularly appellate court judges, have always been held in high esteem in terms of training and deemed beyond corruption. While

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<sup>36</sup> It should be noted that there are criticisms of the use of Acting Judges in the lower courts.

the judges were criticized for serving within an oppressive and racist regime, their qualifications and professionalism were beyond reproach.

Ascertaining any causal effects between structure and context, and the rule of law will require a great deal more analysis than is possible here, as well as significantly more data. Two case studies are insufficient to determine any real patterns. As noted initially, the lack of comparative judicial research has hampered the ability of scholars to determine the relationships between the organizational design for a legal system and the effect of that design on establishing independence and legitimacy for courts. Until substantially more data can be collected, the answers to these questions will remain important, but unanswered.

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