

## Article

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# The Philippine Supreme Court and Regime Response, 1970–2000

**Abstract:** The behaviour of appellate courts has long fascinated scholars. Specifically, scholars have been attentive to the effect of the political context on judicial outcomes. This paper focuses on the decision-making of the Philippine Supreme Court (“Court”) over multiple decades with particular attention to the influence of changes in the executive branch on the outcomes of cases brought to the Court. The analysis evaluates the decisions of the Court from 1970 through 2000, encompassing the turmoil of the Marcos years through the first few years of the tumultuous tenure of Joseph Estrada. We test the hypothesis, grounded in Galanter’s seminal work, that the government has substantial advantages in the legal system and thus enjoys greater success than other litigants. The government has theoretically unlimited resources with which to litigate, control over the staffing of the bench, and authority over, or at least major influence on, the laws that the courts interpret. As a result, the government is expected to win the majority of the challenges that come before the Court. The Philippines provides an excellent laboratory to test this thesis. In the Marcos era the Court faced a dictator professing “constitutional authoritarianism” whose regime ultimately was toppled by the People Power Revolution. His successor, Corazon Aquino, was initially embraced as the popular wife of an assassinated hero, Senator Benigno Aquino, Jr., but later faced a series of attempts to topple her regime. President Fidel Ramos served for 6 years leading the nation through a period of economic growth. Elected by a wide margin in 1998, President Joseph Estrada quickly lost the confidence of the Filipino people as well as the business and military sectors. By 2001, he was removed from office through political actions which some consider the People Power II. This analysis evaluates the winners and losers before the Philippine Supreme Court across the tenures of these presidencies with particular focus on the ability of the Filipino government to succeed when compared to individuals and

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businesses and the success of different regimes over time as the executive's popularity surges and wanes. The results suggest, that like other institutions, the Philippine Supreme Court responded to the rise and fall of the personal politics that dominates the distribution of power in this Asian archipelago.

**Keywords:** appellate court behaviour, Philippine Supreme Court, regime response, 1970–2000

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## I. INTRODUCTION

The Philippine Supreme Court in the modern era has enjoyed substantial institutional power. In the modern republic, it has consistently possessed the power of judicial review and broad jurisdiction over a wide variety of legal issues. Even Ferdinand Marcos continued to submit his actions to its purview which demonstrated, he argued, his respect for the rule of law within his “constitutional authoritarianism.”<sup>1</sup> The 1987 *Constitution* further expands the Court's jurisdiction and maintains its power of judicial review. Throughout the history of the post-colonial years, the Supreme Court serves a critical role in Filipino politics. Thus, we argue it is important for scholars to understand the decision-making behaviour of the Court.

We also contend that the decisions of judiciaries can be studied at the macro-level similar to analyses of legislatures, voters, businesses, executives, non-governmental organisations and others whose collective behaviours affect outcomes. For the highest courts of appeal, the aggregate of the judges' votes realise a gain or loss for the parties in conflict over some political, social or economic resource. In this analysis, we seek to understand the effect of regime transitions on outcomes before the Philippine Supreme Court. Does the Court persistently support the “government gorilla”<sup>2</sup> or does the Court respond to its political context as other institutions do? We examine three decades of the

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1 See Carolina G. Hernandez, “Constitutional Authoritarianism and the Prospects of Democracy in the Philippines” (1985) 38 *Journal of International Affairs* 243.

2 See Herbert M. Kritzer, “The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?” in Herbert M. Kritzer & Susan Silbey, eds., *In Litigation: Do the 'Haves' Still Come Out Ahead?* (Stanford, CA: Stanford University Press, 1996) at 342.

Court's decision-making to determine its response to the rise and fall of political regimes.

## II. POWER AND THE DISTRIBUTION OF RESOURCES

For sufficiently differentiated systems, power relationships are institutionalised and the distribution, or redistribution, of resources is realised via mechanisms typically administered by the government. These mechanisms can affect policies as varied as highway construction to wage control. Thus, political institutions, i.e., legislatures, bureaucracies and even judiciaries, become funnels for the preferences of those who possess or are delegated the authority to determine who gets what. Indeed, political science has been described as the study of “who gets what, when, how.”<sup>3</sup> Understanding success in the political arena has inevitably led scholars to focus on variables associated with winning. Specifically, scholars have focused on the relationship of resources to outcomes.

Rousseau more succinctly echoes the dominant power thesis when he argues that “the universal spirit of Laws, in all countries is to favor the strong in opposition to the weak, and to assist those who have possessions against those who have none. This inconveniency is inevitable, and without exception.”<sup>4</sup> If political institutions serve merely as filters for the dominant powers, we should find similar outcomes across systems. That is, if the dominant powers are able to influence social policies, we should find those effects consistently exhibited across the decisions of the executive, legislative, and judicial sectors. If, however, by either design or desire, institutions have the capacity not merely to serve as filters for those in power but can in fact be facilitators of opposition against the dominant powers, we would expect variation in the policy outcomes across these institutions; those with greater wealth and power would not always be the primary beneficiaries of political, social and economic policies. This would be particularly true for governments with strong executives against whom popular opposition erupts.

Galanter's classic treatise provides the framework for why the law would favour more powerful litigants – those he terms the “haves” – relative to those who are less powerful – the “haves nots.”<sup>5</sup> Galanter articulates a number of

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<sup>3</sup> Harold D. Lasswell, *Politics: Who Gets What, When, How* (New York: P. Smith, 1950).

<sup>4</sup> Jean-Jacques Rousseau, *Emile* (London: J. M. Dent & Sons Ltd., 1911, translated by Barbara Foxley) at 148.

<sup>5</sup> Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9 *Law & Soc’y Rev.* 95.

advantages enjoyed by the “haves.” First, Galanter argues that repeat players (RPs) who utilise the courts more frequently are more likely to succeed than those who access the courts rarely or singularly (one-shotters or OSs). RPs are able to foster on-going relationships with “institutional incumbents.”<sup>6</sup> Knowing the court’s personnel, including judges and clerks, facilitates informal relationships that Galanter argues inevitably benefits the RPs. Additionally, RPs tend to have greater resources that allow them to secure talented legal representation, engage long-term strategies to shape the rules in their favour, and strategically settle cases RPs deem likely to produce unfavourable precedents. Thus, the development of both statutory law and common law will ultimately favour RPs. RPs also have the money and time to navigate the litigation process.

Galanter specifically argues that RPs are advantaged in appellate courts. Because RPs are focused on longer term strategies, they are most likely to appeal those cases for which they expect a favourable decision in order to establish precedent that will be beneficial to future litigation. Conversely, they will settle those cases in which they fear an adverse outcome that could negatively affect their interests, not merely in the case at bar, but more critically for their long-term interests. Galanter suggests the increased likelihood of RPs in appellate courts is prompted by their ability “to trigger promising cases” and avoid the “unpromising ones.”<sup>7</sup> Indeed Galanter argues that litigants before courts of law:

...are treated as if they were equally endowed with economic resources, investigative opportunities and legal skills. Where, as is usually the case, they are not, the broader the delegation to the parties, the greater the advantage conferred on the wealthier, more experienced and better organized party.<sup>8</sup>

In sum, Galanter provides a theoretical foundation for why, as Rousseau argues, the “universal spirit of the Laws” will favour the “haves” and the government represents a special type of RP. Indeed, Kritzer<sup>9</sup> argues that the advantages the government enjoys in litigation result in the “government gorilla” in the courtroom.

Shapiro similarly argues that the government looms exceptionally large in the legal system and presumably will succeed as a result.<sup>10</sup> The regime facilitates the establishment of both constitutional and statutory law, and while courts and the judges who staff them are theoretically to be both independent

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**6** *Ibid.* at 99.

**7** *Ibid.* at 103.

**8** *Ibid.* at 120.

**9** *Supra* note 2.

**10** Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, IL: University of Chicago Press, 1981).

and impartial, Shapiro argues the ideal is incompatible with the reality of the institutionalisation of legal systems. Shapiro argues that prior to the development of formalised adjudicative bodies, individuals or organisations in conflict agree to settle their differences, that is, they “consent” to an agreed upon settlement or to a procedure to reach an agreement.<sup>11</sup> Once a formal legal structure is in place, “consent” is replaced with the coercive nature of the law.<sup>12</sup> Individuals are compelled to participate in civil litigation or are brought to court for violating social norms enumerated in criminal statutes. Shapiro argues that the prototypical court involves a triad of an independent judge who applies pre-existing legal norms after adversary proceedings to determine who is assigned legal fault – the loser – and who is not – the winner.<sup>13</sup>

Shapiro suggests that rather than an adversarial conflict in which two parties battle before a neutral umpire, the triad devolves into two against one given that the judiciary itself is the government. Shapiro argues that:

...the notion of an “independent judiciary,” which is central to the conventional prototype of courts, is simply an elaborate rationalization for the substitution of coercion for consent. The state<sup>14</sup> now imposes a judge on the parties. The judge is openly and admittedly a state official. It is repeatedly asserted, nonetheless, that he is “independent.” The myth of judicial independence is designed to mollify the loser.<sup>15</sup>

Shapiro suggests that the government’s heavy hand is pervasive in the rules that shape the laws that govern the conflicts. More critically, he argues, the government employs the very individuals tasked to determine the winners and losers. Despite judges’ best efforts, the nature of the government’s ability to staff the legal system from stem to stern inevitably leads to judges engaging in politics. As Shapiro notes:

Like most other political institutions, courts tend to be loaded with multiple political functions, ranging under various circumstances from bolstering the legitimacy of the political regime to allocating scarce economic resources or setting major social policies.<sup>16</sup>

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**11** *Ibid.* at 2.

**12** *Ibid.* at 5.

**13** *Ibid.* at 1.

**14** Shapiro interchangeably uses the terms “state” (*e.g.*, at 65), “regime” (*e.g.*, at 24, 26, 27, 34), “political system” (*e.g.*, at 20), “central authorities” (*e.g.*, at 23), and “government” (*e.g.*, at 24, 28). Like Shapiro, the state, for our purposes, refers to the political regime or authority to which the judicial function is tied. We are not referring to the broader political order that persists beyond ruling regimes. We are focused on the Court’s response to particular political regimes as a function of the triadic structure which ties the judges to the regime.

**15** *Ibid.* at 65.

**16** *Ibid.* at 63.

Shapiro's thesis supports the theoretical foundation of Galanter's classic argument that the government is "a special kind of RP."<sup>17</sup> Like Shapiro, Galanter recognises that the rules are shaped by the government which results in repeated success for the "haves." Shapiro would argue that the rules over time will benefit the government, and the decisions of the courts will as well.<sup>18</sup>

Shapiro's goal is to move the subfield of comparative politics "toward a more general theory of the nature of judicial institutions."<sup>19</sup> To demonstrate the generalisability of his arguments, Shapiro applies his thesis to three countries that represent the cases most likely to falsify his theory: the English courts, mediation in Imperial China, and the courts of Islam. In each case, he finds support for his arguments, lending credence to the general applicability of his hypotheses to other countries. While Galanter develops his arguments with an eye toward courts in the United States, he later expands his thesis to India, evaluating the effect of inequality on legal outcomes there as well.<sup>20</sup>

One of the earliest empirical studies that informed our knowledge of the "haves" versus "have-nots" debate outside the United States was Silliman's study of the Philippine Court of Agrarian Relations (CAR).<sup>21</sup> The CAR was created in the 1950s and largely resolved landlord-tenant disputes between the land owners and their tenant farmers. Silliman studies a sample of the decisions of the CAR from 1968 to 1976 and finds that despite the agrarian reformers who mobilised to create the CAR, it did not function as a "significant instrument for social change."<sup>22</sup> Silliman argues that even though reformers succeed in the creation of the CAR, the rules that the CAR ultimately implemented reflect a "conservative orientation" that restricts the types of issues brought before the bench. The few minor conflicts brought to the court change little of the fundamental advantages of the RPs over the OSs. As a result, he argues, "the evidence from Philippine agrarian law provides greater support for the view that the law is imposed from above with the aim of bolstering the dominant status of society's elite."<sup>23</sup>

In other contexts, judges may elect to favour those with less, appreciating the inherent inequality that drives these systems. In interviews with justices of

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<sup>17</sup> *Supra* note 5 at 111.

<sup>18</sup> *Supra* note 10 at 49.

<sup>19</sup> *Ibid.* at vii.

<sup>20</sup> Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley, CA: University of California Press, 1984).

<sup>21</sup> G. Sidney Silliman, "Dispute Processing by the Philippine Agrarian Court" (1981) 16 *Law & Soc'y Rev.* 89.

<sup>22</sup> *Ibid.* at 107.

<sup>23</sup> *Ibid.* at 109.

the Philippine Supreme Court, Tate and Haynie<sup>24</sup> find that the justices are both aware of and sensitive to the resource differentials of the litigants before them. At least some of the justices believed their role was to “protect the down-trodden.”<sup>25</sup> The Court, one justice noted, subscribes to “the doctrine that he who has less in life should be more favored in the law,”<sup>26</sup> though the justice was quick to note that this does not mean the Court will openly or consistently side with the disadvantaged. The justice recognised that “they need our protection because they are always at a disadvantage the moment they report a case.”<sup>27</sup> In particular, a justice noted that in employment cases, the Court had been quite sympathetic to individual claimants, pointing to a decision in which the Court rewarded an employee terminated after 18 years of service because “that has been the thinking of the Court, an obligation of some of the tenets of social justice, so that this fellow does not get thrown out in the streets after 18 years.”<sup>28</sup>

In a previous study, Haynie<sup>29</sup> analyses the decisions of the Philippine Supreme Court from 1961 to 1986, a period coinciding with the rise and demise of the Marcos dictatorship. She finds less support for the dominant power thesis, at least for some issue areas, and the results support the reflections of the justices in the interviews. Haynie<sup>30</sup> finds that the legal underdog is more likely to win at least for some issue areas and attributes the findings to the perspectives articulated by some of the justices interviewed by Tate and Haynie.<sup>31</sup> Individuals succeeded in 84% of the workers’ compensation challenges brought before the Court, but individuals also had success in employment cases, winning 53% of them. In line with Galanter’s expectations, corporations had greater success in property cases, winning creditor/debtor issues 62% of the time and landlord/tenant issues almost 80% of the time. The government also succeeded in torts (70% success rate) while corporations did not (43% success rate). Overall, the analysis provides only mixed support for the dominant power thesis.<sup>32</sup>

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24 C. Neal Tate & Stacia L. Haynie, “The Philippine Supreme Court under Authoritarian and Democratic Rule: The Perceptions of the Justices” (1994) 22 *Asian Profile* 209.

25 *Ibid.* at 220.

26 *Ibid.*

27 *Ibid.*

28 *Ibid.*

29 Stacia L. Haynie, “Resource Inequalities and Litigation Outcomes in the Philippine Supreme Court” (1994) 56 *Journal of Politics* 752.

30 *Ibid.*

31 *Supra* note 24.

32 *Supra* note 29 at 763.

Haynie<sup>33</sup> argues that the political context affects litigation outcomes. The concern for stability and legitimacy in developing nations may actually advantage OSs in authoritarian regimes. Haynie contends that:

To enhance the stability of the court in society, decisions are rendered that favor those with less, and this likelihood increases as the Court's legitimacy is threatened. This does not prevent the court from deferring to the "haves" for major political controversies, a handful of cases in any year. By balancing these interests, the court encourages the goals of stability and development in society.<sup>34</sup>

Subsequent analysis confirms the thesis that courts may be sensitive to those with less. An analysis of the effect of economic development on the decisions of the Philippine Supreme Court finds that the Court is most likely to favour "have nots" whose cases emanate from the least developed regions in the country.<sup>35</sup>

It must also be noted that some judges, in particular, argue that courts merely apply the law to specific facts in a political vacuum protected by independence and tenure, and motivated by allegiance to the impartiality of the judicial function. Political scientists have rejected the latter, though judges embrace the legitimacy it affords their decisions. If in fact outcomes are based only on the application of the law to the facts of the case, and neither external politics nor the advantages of RPs affect outcomes, the decisions of courts should not evidence systematic patterns but reflect the stochastic nature of dockets and decisions in a truly independent and impartial structure. We reject such a legalistic approach to understanding judicial outcomes. Certainly legal disputes are resolved within the context of the law and the institutions charged with resolving the conflicts, but rules are shaped by both the dominant powers of those who create them and the dominant powers who utilise courts to bend them to their preferences. We also argue that suggesting the "haves" will always dominate is equally simplistic. External political factors, especially the rise and fall of popular support for a regime, can also affect outcomes.<sup>36</sup>

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<sup>33</sup> *Supra* note 29 and Stacia L. Haynie, "Resource Inequalities and Regional Variation in Litigation Outcomes in the Philippine Supreme Court, 1961-1986" (1995) 48 *Political Research Quarterly* 371.

<sup>34</sup> *Supra* note 29 at 769.

<sup>35</sup> *Supra* note 33.

<sup>36</sup> It is also the case that RPs may win by losing if the precedent established in the losing outcome creates a more favourable trajectory for the government's interests than prior decisions even if the outcome itself is a loss. However, we are not analysing the content of the opinion for its adherence to or divergence from past precedent. Like other scholars evaluating Galanter's thesis (see for example, Stanton Wheeler, *et al.*, "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970" (1987) 21 *Law & Soc'y Rev.* 403; Donald R. Songer &



We argue that one avenue to assess the influence of those who are presumed to have greater resources is through the decisions of the highest courts of appeal in legal systems. Using the decisions of the Philippine Supreme Court, we empirically assess the legal outcomes before the Court to evaluate one specific RP – the government. We evaluate the Court's support for the government over three decades. If Galanter and Shapiro are correct, the government, over time, should enjoy greater and consistent success. If the political context also shapes outcomes, the government's success before the Court should mirror the general support of the population at large.

### III. DATA AND ANALYSIS

The Philippine Supreme Court disposes of thousands of petitions annually. The Court's docket is comprised of both mandatory and discretionary routes. However, even those cases that come to the Court as a matter of right can be disposed of through short "opinions" known as minute resolutions. Evidence suggests that like the United States Supreme Court, the Court has substantial control over its docket. Unlike the United States Supreme Court, the Philippine Supreme Court issues hundreds of full opinions each year. Data on the workload of the Court are sparse and difficult to come by, but Tate and Haynie<sup>37</sup> report over 3,000 cases were disposed of annually in the 1980s with an average of 600 reported opinions annually. The reported opinions are the basis for this analysis. Clearly, these decisions represent strategic choices on the part of litigants who bring the challenges before the Court. Presumably, each side has evaluated the likelihood of success weighed against the resources required for litigation and

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Reginald S. Sheehan, "Who Wins on Appeal? Uppercuts and Underdogs in the United States" (1992) 36 *American Journal of Political Science* 235; Donald R. Songer *et al.*, "Do the 'Haves' Come Out Ahead Over Time? Applying Galanter's Framework to Decisions of Appeals, 1925-1988" (1999) 33 *Law & Soc'y Rev.* 811; Reginald S. Sheehan, "Ideology, Status, and the Differential Success of Direct Parties Before the Supreme Court" 86 *American Political Science Review* 464; Reginald S. Sheehan & Kirk A. Randazzo, "Explaining Litigant Success in the High Court of Australia" (2012) 47 *Australian Journal of Political Science* 239 among many others), we are only analysing winners and losers in terms of the affirmance or reversal of the lower court outcome. We concede that contradictions between the winner of the outcome and the winner of the precedent are possible in the results, but we suggest those results would be the exception rather than the rule. Subsequent analysis should evaluate the role of precedent in the Court's opinion rather than outcomes alone, but that analysis is beyond the scope of this study.

37 C. Neal Tate & Stacia L. Haynie, "Authoritarianism and the Function of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961-1987" (1993) 27 *Law & Soc'y Rev.* 712.

elect to proceed. Moreover, the Court has decided the amount of attention to devote to the case as either a minute resolution or a reported case. Appellate courts generally, and the Philippine Supreme Court is no exception, represent a skewed sample of legal decision-making. It is precisely this aspect of the judiciary that is of interest to us. These are the policy decisions of the Court that signal its determination of significant issues, or at least those to which the Court must devote greater attention. Just as scholars of the United States Supreme Court focus on its reported judgments, the reported decisions of the Philippine Supreme Court's docket should garner the greatest attention of judicial scholars of the Philippines. These are the decisions in which the Court creates both precedent and policy, and the decisions on which we focus for this analysis.

The data are derived from the High Courts Data Base<sup>38</sup> and consist of a random sample of 100 cases decided each year by the Philippine Supreme Court from January of 1970 through May of 2000. The samples are drawn from the cases reported in the *Supreme Court Reports Annotated*,<sup>39</sup> and 3,066 cases are included in the analysis. Of these cases, the government was either the first appellant or the first respondent in 1,597 of them. Thus, the government is involved in about half of all cases disposed of by the Court. This provides a sufficient pool of cases from which to analyse the behaviour of the Court over time.

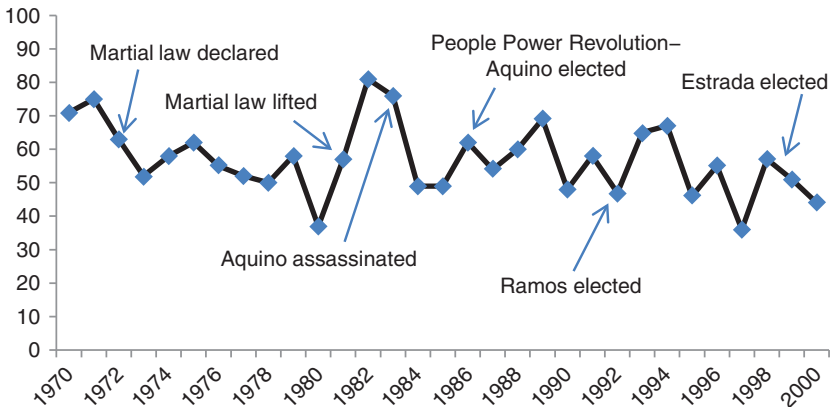
While the time frame is limited to the available data, it comprises critical periods of political transition for the country. Although it would be preferable to extend the analysis to the founding of the Commonwealth in 1935 through the current period, the analysis is constrained by the available data. Nonetheless, no empirical analysis of the decision-making of the Philippine Supreme Court during this period currently exists; this analysis provides critical insight currently lacking in the literature.

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**38** The High Courts Data Base was created with support from the Law and Social Science Program of the United States National Science Foundation (see Stacia L. Haynie, Louisiana State University; C. Neal Tate, University of North Texas; Reginald Sheehan, Michigan State University; Donald Songer, University of South Carolina, "Fitting More Pieces into the Puzzle of Judicial Behavior: A Multi-Country Data Base and Program of Research" (2000) National Science Foundation (SES #9975237) and Stacia L. Haynie, Louisiana State University; C. Neal Tate, University of North Texas; Reginald Sheehan, Michigan State University; Donald Songer, University of South Carolina, "Extending a Multi-Country Data Base and Program of Research" (2002–2006) National Science Foundation (SES #0137055). The High Courts Data Base is available at <<http://artsandsciences.sc.edu/poli/juri/highcts.htm>> (last accessed 20 January 2014).

**39** *Supreme Court Reports Annotated* (Manila: Central Book Supply, Inc., 1970–2000).

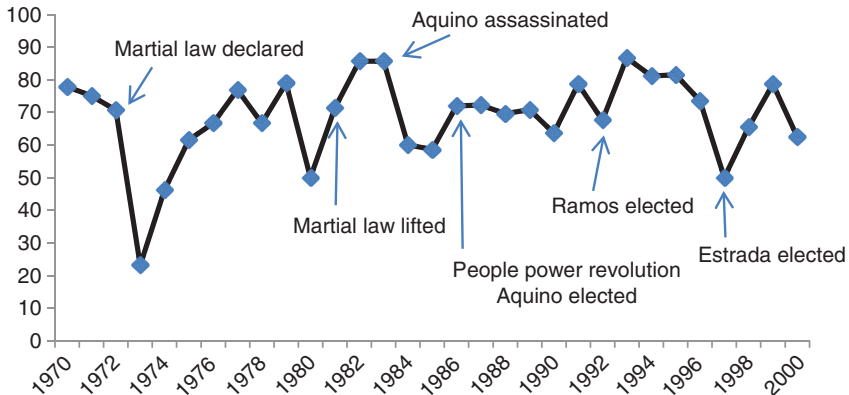
Each decision was coded for a variety of information including the parties to the case, the legal issue at bar, and the outcome. The Philippine Supreme Court sits at the apex of the Philippine judicial system. It enjoys a broad grant of review power under Article VIII, Section 5 of the 1987 *Constitution*, though it enjoyed similarly extensive powers of review under prior *Constitutions*. Its jurisdiction includes review of all decisions of the lower courts as well as a number of specialised courts and quasi-judicial administrative agencies. The Philippine Supreme Court has enjoyed broad power to review criminal and civil cases as well as exercise the power of judicial review of statutes and the actions of governmental actors. Using the decisions of the Court, we calculate the percentage of the decisions in each year that favour the government for all cases (Figure 1), for challenges of criminal defendants as well as challenges in civil rights and liberties cases, (Figure 2) and of cases involving challenges in public law issues such as government regulation of businesses, natural resources, government taxation, disputes over government benefits, and abuse of government authority (Figure 3).



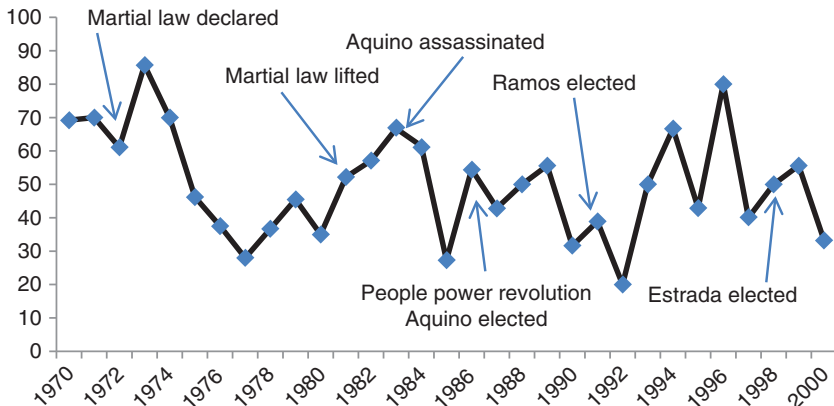
**Figure 1:** Percent of cases favouring the government, 1970–2000

Figure 1 suggests that the Court’s support of the government, the prototypical “have,” is neither consistent over time nor overwhelmingly positive. Indeed, the results suggest that the Court’s support declines significantly over the three decades of the analysis, from the government winning 71% of all cases in which it was either the appellant or the respondent, to only 44% of its cases by 2000. Moreover, the analysis suggests that the Court responds to the rise and fall of the regimes that gain and lose power over the time frame examined.

We recognise that conflating the “government” with the executive branch, and even more narrowly with its President, is certainly a simplification.



**Figure 2:** Percent pro-government in criminal and civil rights and liberties cases, 1970–2000



**Figure 3:** Percent pro-government in public law cases, 1970–2000

However, the conflation of the two is more reasonable for the Philippines where the executive branch has control over the budgetary process, vast legislatively delegated authority, and significant influence over local governments driven in large part by the President’s patronage power.<sup>40</sup> Indeed, Bolongaita notes that the President’s “substantial executive powers”<sup>41</sup> constrains Congress’s ability to counterbalance the regime. The weak party system also strengthens the

<sup>40</sup> See Emil P. Bolongaita, Jr., “The Philippines in 1999: Balancing Restive Democracy and Recovering Economy” (2000) 40 *Asian Survey* 70 and Jurgen Ruland, “Constitutional Debates in the Philippines: From Presidentialism to Parliamentarianism?” (2003) 13 *Asian Survey* 468.

<sup>41</sup> Bolongaita, *Ibid.* at 70.

president's role, institutionally ensuring him or her a powerful role in Filipino governance. The government is tied inextricably to the executive; however, the judiciary remains as a potential counterbalance.

Ferdinand Marcos, one of the powerful personalities to capitalise on the executive sovereignty available to strong leaders, rose to power in the Philippines as first a member of the House of Representatives and then as Senate President before finally winning the presidential election in 1965. With about 60% of the votes cast, Marcos was elected to a second 4-year term in the “generally peaceful and orderly”<sup>42</sup> 1969 election. Not only was he the first President to achieve a second term in the modern era of the Republic, but he did so winning all ten regions of the country. Despite his impressive second term victory, and his party's equally impressive success in Congress, Marcos' mandate to lead quickly deteriorated. By 1970, Marcos was forced to contend with a series of natural disasters along with increasing violence, including student protests, a declining economy,<sup>43</sup> and the breakdown of negotiations with the Moro National Liberation Front's Muslim separatist movement.<sup>44</sup> The inability to quell the ever growing unrest provided Marcos the necessary rationale for declaring martial law, which he did in 1972. Thompson argues that Marcos' “personalistic” dictatorship enjoyed “considerable legitimacy” initially, but the rise in violence and corruption under the crony capitalism of his regime fueled the opposition<sup>45</sup> that ultimately toppled his monopoly on political power.

Figure 1 shows the precipitous decline in the decisions of the Philippine Supreme Court that favour the government, dropping from a high of 75% in the year before martial law was declared to a low of 37% in 1980, the lowest level of support demonstrated in the Court's decisions across the time frame of analysis. Figure 1 also suggests that Marcos' temporary termination of martial law and the so-called snap election in 1981<sup>46</sup> is accompanied by a concomitant increase in the support for the government. The suspension of his authoritarianism proved to be in name only, and the negative spiral of the economy was further exacerbated by the assassination of Senator Benigno Aquino in 1983, believed to be a serious political rival to Marcos. His assassination triggered immediate political

**42** Jose Veloso Abueva, “The Philippines: Tradition and Change” (1970) 10 *Asian Survey* 62.

**43** See Robert O. Tilman, “The Philippines in 1970: A Difficult Decade Begins” (1971) 11 *Asian Survey* 139 and Charles W. Lindsey, “Economic Crisis in the Philippines” 24 *Asian Survey* 1185.

**44** Lela G. Noble, “Muslim Separatism in the Philippines, 1972-1981: The Making of a Stalemate” (1981) 21 *Asian Survey* 1097.

**45** Mark R. Thompson, “Off the Endangered List: Philippine Democratization in Comparative Perspective” (1996) 28 *Comparative Politics* 182.

**46** William H. Overholt, “The Rise and Fall of Ferdinand Marcos” (1986) 26 *Asian Survey* 1137.

and economic crises.<sup>47</sup> The spike in the Court's support deteriorates quickly as evidenced in Figure 1.

Marcos' control of "his partymen" in Congress allowed him to determine "the substance of public policy,"<sup>48</sup> particularly in his self-declared system of "constitutional authoritarianism."<sup>49</sup> If Marcos staffed the Court, was responsible for the articulation of public policy and controlled the bureaucracies responsible for its application, per Shapiro and Galanter, we would expect more consistent success. What the data reveal is a Court whose support for the regime declines along with that of the Filipino people.

The government's success rate rebounds quickly to almost 70% following the largely peaceful People Power Revolution of 1986 and the subsequent election of Senator Aquino's wife, Cory Aquino. Brillantes argues that Aquino will be remembered as a "transition" President whose popularity grew as the alternative to the Marcos dictatorship and as the catalyst to restore the formal "structures and processes" for democratic governance.<sup>50</sup> Thompson argues that Aquino's regime was reduced to a largely symbolic one that provided "moral capital" in the destruction of Marcos's authoritarianism, allowing her to reign but not rule,<sup>51</sup> and Brillantes refers to the Aquino administration as a "corruption-ridden post dictatorship polity."<sup>52</sup> Her regime was plagued by a continuation of the breakdown of law and order and multiple attempted coups. She was criticised frequently for being "weak and ineffective."<sup>53</sup> Moreover, by the end of 1990, the economy was suffering under the weight of multiple natural disasters, increasing world oil prices, and the country's debilitating debt.<sup>54</sup> The human rights abuses the People Power Revolution sought to end were met with an unwillingness or inability on the part of the government to address them.<sup>55</sup> As evidenced in Figure 1, President Aquino enjoys initial support from the Court winning 54% of its cases in 1987 and increasing to 69% by 1989, but she never

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<sup>47</sup> Lindsey, *supra* note 43.

<sup>48</sup> *Supra* note 42 at 61.

<sup>49</sup> See Jose Veloso Abueva, "Filipino Democracy and the American Legacy" (1976) 428 *Annals of the American Academy of Political Science* 114 and Stacia L. Haynie, "Politicization of the Judiciary: The Philippines Supreme Court and the Post Marcos Era" (1998) 22 *Asian Studies Review* 459.

<sup>50</sup> Alex B. Brillantes Jr., "The Philippines in 1992: Ready for Take Off?" (1993) 33 *Asian Survey* 224.

<sup>51</sup> Mark R. Thompson, "Presidentas and People Power in Comparative Asian Perspective" (2007) 28 *Philippine Political Science Journal* 1.

<sup>52</sup> *Supra* note 50 at 225.

<sup>53</sup> C. Neal Tate, "The Judicialization of Politics in the Philippines and Southeast Asia" (1994) 15 *International Political Science Review* 191.

<sup>54</sup> David G. Timberman, "The Philippines in 1990: On Shaky Ground" (1991) 31 *Asian Survey* 153.

<sup>55</sup> *Ibid.* at 158.

regains that level of support. The Aquino government's success rate before the Philippine Supreme Court declines to 47% in the year Ramos is elected.

Again, Galanter's thesis would have predicted greater success for Aquino's government. After all, she successfully obtained the resignation of every member of the Court and then had the privilege of selecting everyone who would be reappointed or newly appointed to it.<sup>56</sup> She then oversaw the passage of a new *Constitution*. Despite such control over both the rules and those who interpreted them, she was unable to regain predictable support, though during her tenure the government on average was more likely to win than not. Still, not exactly the results either Shapiro or Galanter predict.

Fidel Ramos was elected in 1992 with only 23% of the popular vote, defeating half a dozen candidates vying for the office. Some speculated that the minimal plurality that gave Ramos the victory limited his ability to address the political and economic problems facing the country.<sup>57</sup> Despite such skepticism, Ramos brought charges against a number of public officials, most prominent among them was Imelda Marcos.<sup>58</sup> He also took some steps to liberalise the economy by deregulating some critical sectors such as telecommunications.<sup>59</sup> As exhibited in Figure 1, Ramos too appears to have had a honeymoon of sorts before the Court with success rates climbing to 65% in 1993 and 67% in 1994. At the beginning of his presidency, he was succeeding in almost one of every three cases, but by the end of his term the success rate of the government when challenged by or challenging a litigant before the Supreme Court fell to 36%. The government's success rate fell from winning one in every three cases to losing almost two of every three. Clearly frustrated by the Court's behaviour, Ramos called for constitutional amendments to curb the power of the judiciary after rulings failed to provide support for his economic deregulation.<sup>60</sup>

While there is a brief increase in government support in 1998, the year Estrada is elected, the declining support for the government parallels the rapidly declining support the Estrada administration faced across the country that ultimately ended in Estrada's impeachment.<sup>61</sup> However, pro-Estrada Senators withheld crucial evidence; absent the evidence, the impeachment trial collapsed. The popular uprising that followed combined with the defection of the

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<sup>56</sup> *Supra* note 24.

<sup>57</sup> *Supra* note 50 at 225.

<sup>58</sup> Jeffrey Riedinger, "The Philippines in 1993: Halting Steps Toward Liberalization" (1993) 34 *Asian Survey* 142.

<sup>59</sup> *Ibid.* at 144.

<sup>60</sup> Ruland, *supra* note 40 at 466.

<sup>61</sup> *Ibid.*

military to topple Estrada. Vice-President Gloria Macapagal Arroyo was sworn in as President in January of 2001.<sup>62</sup> While there are only 3 years of the Estrada administration in the analysis, the Court's support for the government declines in each of the 2 years following his election.

Figure 2 includes the percentage of cases annually in which the government succeeds before the Philippine Supreme Court in criminal and civil rights and liberties cases. These cases are predominately prisoner petitions challenging due process violations and challenging their punishments, but also included are a number of challenges involving issues of equal protection, speech, press, assembly, petition, religious freedom, and access to public information. The government faces a precipitous decline in its success in these types of cases immediately following the declaration of martial law and another substantial decline following the assassination of Senator Aquino. Nonetheless, the government fares much better in these challenges than it does in its docket overall. The government can expect to win more often than not, especially in the post-Marcos years. Only in 1998 does the government's success rate fall to 50%. The majority of the issues in Figure 2 are petitions by those accused or convicted of crimes, prototypical OSs presumed least likely to succeed. The overall success rate across the entire series of these petitioners is 31%. The overall success rate of litigants seeking redress in civil rights and liberties petitions in the 31 years of the analysis is 38%, slightly higher. The Court seems most protective of the regime in these types of conflicts. The Court's sympathies may be driven by the continued difficulties of each of these regimes to establish law and order and deal effectively with violent crimes.

The government appears least successful in cases involving government regulation. Figure 3 provides the overall success rates each year for the government in challenges before the Supreme Court to government regulation, as well as challenges to government action related to public employment and public benefits. The trend is fairly consistent; regimes do better in the beginning of their terms and then the Court's support wanes over their tenure, with one exception – President Ramos. For the Ramos administration, the government's success rate begins at 39% in 1991, declines to 20% in 1992, but then increases to an impressive 80% success rate by 1996, though a precipitous decline occurs as the 1998 presidential election looms. Among the presidencies examined in this analysis, Ramos is considered the strongest of the four, and the only one to see sustained economic gains over much of his tenure<sup>63</sup> as well as demonstrable

<sup>62</sup> Ben Reid, "The Philippine Democratic Uprising and the Contradictions of Neoliberalism: EDSA II" (2001) 22 *Third World Quarterly* 785.

<sup>63</sup> Gabriella R. Montinola, "The Philippines in 1998: Opportunity Amid Crisis" (1999) 39 *Asian Survey* 64.



efforts to achieve peace with insurgents.<sup>64</sup> Ramos also initiates efforts to decentralise power locally to encourage development and democratisation through the 1991 *Local Government Code*.<sup>65</sup> However, by 1997 the economy was stalled and in September of 1997 over 600,000 citizens filled the streets of Manila to protest efforts to lift the single 6-year term of the president. Many saw the proposed efforts to revise the *Constitution* as a power grab by Ramos and more than a little reminiscent of Marcos's constitutional machinations. The Court's support for the government falls precipitously in the last year of his administration. Estrada followed Ramos' lead and called for constitutional amendments, but restricts his efforts to limiting the Court's jurisdiction over economic issues.<sup>66</sup> While Estrada did not propose a constitutional change to the term-limited nature of the presidency, many feared that a constitutional convention could facilitate such an outcome.<sup>67</sup> Ultimately, the Court's support for the government, and the public's support for Estrada, declines very quickly.

While this analysis provides empirical insight into the Court's decision-making, multivariate models allow for more confidence in the findings. To more comprehensively analyse the Court's decision-making, we employ logistic regression analysis to assess the likelihood of a particular outcome, in this case the government succeeding.<sup>68</sup> To determine the government's ability to prevail, we utilise two dependent variables. In the first model, the dependent variable is coded 1 if the Court rules in favour of the government and 0 otherwise. In the second model, the dependent variable is coded 1 if the Court rules in favour of the government and 0 if the Court rules against the government or at least partially rules against the government. The first model is a stronger indication of the Court's willingness to rule against the government. The second model provides insight into the Court's willingness to challenge the government or at least do so in some aspects of the case. Positive and significant independent variables are associated with a greater likelihood of the government winning; negative and significant independent variables are indicative of a greater likelihood of the government losing. We include independent variables for the identity of the appellant. If Galanter and Shapiro are correct, the government

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64 Carolina G. Hernandez, "The Philippines in 1995: Growth Amid Challenges" (1995) 36 *Asian Survey* 142.

65 *Ibid.* at 145.

66 Bolongaita, *supra* note 40 at 68.

67 *Ibid.* at 68–69.

68 Logistic regression analysis assumes that observations are independent of one another. One concern with the data in this analysis is that attributes of each year may create dependence among the observations, resulting in a correlation among the error terms. To control for any potential estimation bias, we generate robust standard errors, clustering on the year.

should fare better than would other litigant categories, particularly individuals. We include variables for whether or not the appellant is the government, a business, an organisation or a fiduciary. We then compare the effect of these parties to the excluded category of the individual.

We also include variables to control for the legal issue of the case. Among these are cases involving criminal issues, cases involving civil rights and liberties issues, public employment and benefits and government tort cases. Most critically, we include variables that assess the increase or decrease in the success of the government during the presidencies of Marcos, Aquino and Ramos. These interventions, coded 1 during the regime and 0 otherwise, measure whether or not there is an immediate and significant shift in the Court's support for the government. We also include counter variables coded 1 in the first year of the administration, 2 in year 2, etc. for each president. The counter variable estimates the increase or decrease in the support for the administration over time. Given the very short time frame for President Estrada, we do not include him in the analysis. We hypothesise that the regimes will enjoy immediate support from the Court, but as the external political support wanes, the Court's support will decline as well. The resulting coefficients and robust standard errors are presented in Table 1 below.

**Table 1:** Logistic regression coefficients for pro-government decisions

Variable	Partial losses excluded		Partial losses included	
	<i>B</i>	Robust S. E.	<i>B</i>	Robust S.E.
Appellant is business	0.300	0.261	0.202	0.212
Appellant is government	-0.010	0.226	0.334	0.202*
Appellant is organization	0.108	0.582	0.103	0.493
Appellant is fiduciary	-1.063	1.277	-0.355	1.344
Criminal	0.522	0.170**	0.599	0.213**
Civil rights and liberties	0.500	0.311	0.544	0.311*
Employment and benefits	-1.094	0.276**	-0.665	0.296*
Government tort	-1.296	1.28	-0.556	1.408
Marcos	0.023	0.332	0.923	0.302**
Marcos counter	-0.025	0.022	-0.048	0.030
Aquino	-0.111	0.281	0.104	0.224
Aquino counter	-0.021	0.036	0.042	0.024*
Ramos	0.620	0.791	0.521	0.494
Ramos counter	-0.187	0.151	-0.112	0.094*
Constant	0.560	0.292*	-0.596	0.249**

\* =  $p < 0.05$ , one-tailed test

\*\* $p < 0.01$ , one-tailed test

$N = 1,304$

Log PseudoLHD = -817.13  
Wald Chi-square = 80.68\*\*

$N = 1,597$

Log PseudoLHD = -1,070.26  
Wald Chi-square = 59.16\*\*

For the first model which excludes cases in which the government partially loses, none of the appellant categories has a greater likelihood of success than the individual. When compared to the excluded category of individual appellants, the government is not more likely to win, nor are businesses who appeal their losses or organisations or fiduciaries. Galanter argues that RPs, such as the government, businesses and even some organisations can play for the rules and thus appeal those cases they are more likely to win and which serve their long-term interests. The results suggest that these RPs fare no better than individuals. Despite the advantages Galanter asserts should flow to the government and businesses in particular, they do not seem at a particular advantage in their appeals. Shapiro's structural advantages do not appear to benefit the government either. For the second model, which assesses the likelihood of the Court favouring the government as opposed to ruling against it or at least partially ruling against the government, the government is in fact *more* likely to win when compared to individual appellants. Organisations, businesses and fiduciaries are not more likely to win than individuals.

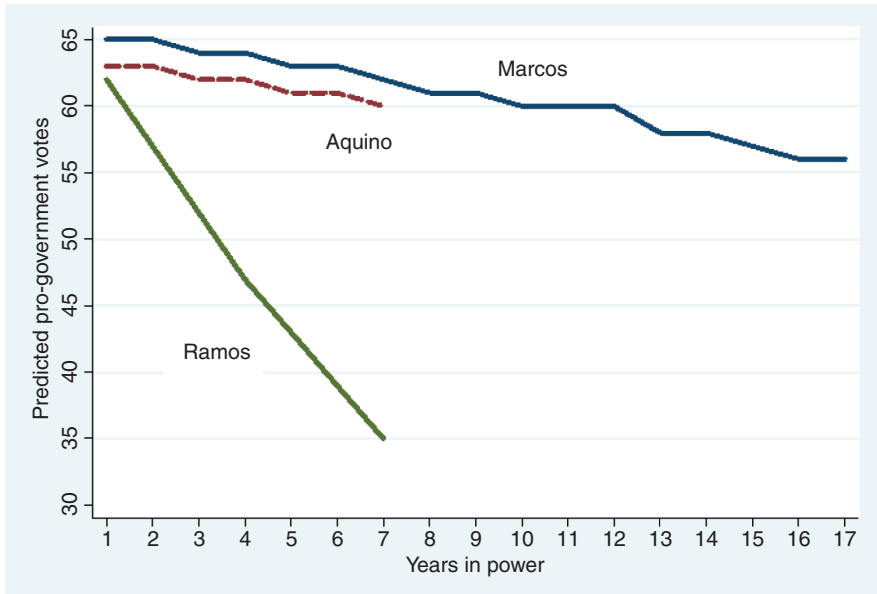
The regression analysis confirms that the government is significantly more likely to win in cases involving criminal issues in both models, and civil rights and liberties cases in the second model. However, the government is significantly disadvantaged in cases involving public employment or public benefits in both models. These results are consistent with Haynie's findings that the Court is sympathetic to the "have-nots" in these types of issues.<sup>69</sup>

The interventions in the analysis measure the significant increase or decrease in the likelihood of the government winning for each regime. None of the interventions are significant in the first model which excludes decisions in which the Court affirmed in part and reversed in part. In the second model, which includes those cases in which the Court ruled at least partially against the government, only the Marcos regime has a statistically significant increase; however, the counter variable indicates that the support for Marcos declines over time. While neither Aquino nor Ramos enjoys statistically significant increases as they gain power, both coefficients are positive. Ramos is the only other President who experiences statistically significant decline in support over time; Aquino experiences increasing support over her tenure when one includes cases in which the government loses at least in part.

To further explicate the Court's decision-making over time, we generate predicted probabilities for the government's likelihood of winning in each subsequent year of the Marcos, Aquino and Ramos regimes. For each of the regime

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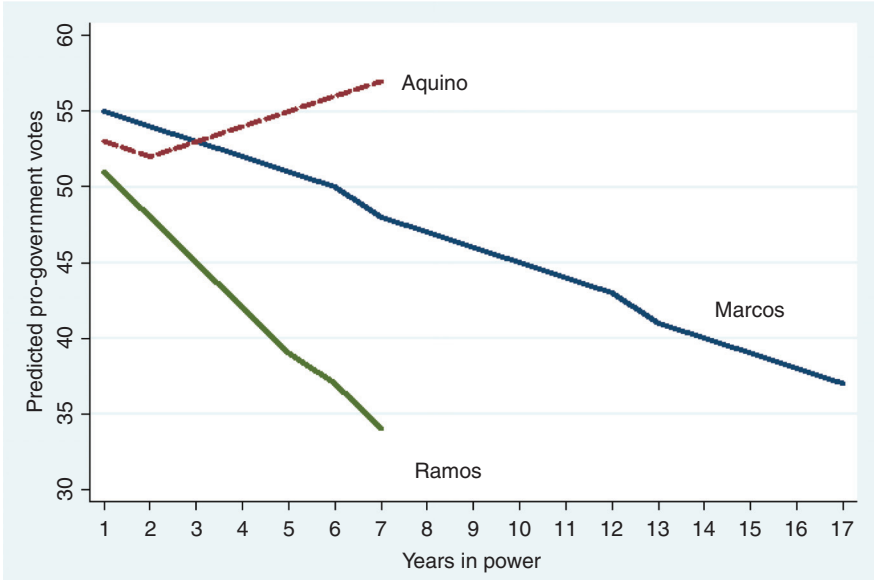
<sup>69</sup> *Supra* note 29 and *supra* note 33.



**Figure 4:** Probability of government success with partial losses excluded

counter variables, we generate a predicted probability of the government's success for each year of the President's term, holding all other values in the model constant at their means. As is evident in Figure 4, the probability of the government winning consistently declines over the Marcos regime. When the government is a party to litigation, its probability of success is 65% in the first year of President Marcos' rule. By the time President Marcos is ousted in the People Power Revolution, the likelihood of the government winning has declined by almost 10%. President Aquino also sees a decline in success before the Court, though it is not as steep as President Marcos (moving from 63% success in the first year of her presidency to 60% by the last year). For the Ramos presidency, the government has a 62% chance of winning in the first year of his administration which declines dramatically to just better than a one in three chance of success by the end of the Ramos term.

In Figure 5, we graph the probability of success when partial losses, those cases in which the government won in part and lost in part, are included. The Court appears less willing to rule completely against the regime, but more willing to rule at least partially against it. The likelihood of at least a partial affirmance or partial reversal that favours the government decreases in the Marcos regime by almost 20 percentage points. For President Ramos, the



**Figure 5:** Probability of government success with partial losses included

government enjoys a 51% probability of success before the Court in the initial year of his regime, but that probability declines sharply to 34% by the last year he is in power. Only under President Aquino does the government enjoy an increasing likelihood of success before the Court though the increase is not a dramatic one. The government's probability of winning or winning partially before the Philippine Supreme Court increases from just over 50% in the first year of her presidency to 57% by the last year of her term. The likelihood of the government having some success before the Philippine Supreme Court is lower for the Marcos and Ramos regimes than it is for the Aquino regime.

The analysis provides limited support for Galanter's thesis; the government is statistically more likely to prevail in criminal and civil rights and liberties cases. Overall, the government does not enjoy a statistically significant advantage except for the initial years of the series for the Marcos regime when partial wins are included. The beginning of the analysis coincides with Marcos's consolidation of power and sees the Court providing support. However, as the regime's authoritarian nature is revealed and its popularity deteriorates, so does its success before the Court. The government under Aquino and Ramos does not have a statistical advantage, and indeed, the government is statistically less likely to win over time under the Ramos regime.

## IV. DISCUSSION

Under Shapiro's structural argument, the collapse of the triad of conflict should benefit the regime. According to Galanter's thesis, RPs such as the government and businesses should experience notable success when compared to OSs such as individuals. The government, as the proto-typical RP, should especially reap the benefits of its theoretically endless resources, its ability to staff the Court, and its responsibility for constructing the law and oversight of its implementation. Moreover, if Galanter is correct, one would expect the government to prevail more consistently over the entirety of the series, but especially during the Marcos regime when Marcos was responsible for appointing every member of the Court by the end of his tenure. Aquino too should have been particularly advantaged before a Court she essentially shaped from whole cloth. At a minimum, one would presume that the government would not be at a statistical *disadvantage* in litigation outcomes before its highest appellate court. The results suggest that over time, the Court's support for Marcos and Ramos successively waned. Neither Shapiro nor Galanter provide convincing theoretical arguments that can explain litigation outcomes for the Philippine context.

One response to the analysis could be simply that the facts in each case supported the outcome reached by the Court, a strictly legal perspective of judging. To be sure, each case involved specific sets of facts over which two parties were in dispute. The Court's responsibility was to apply the law to those facts, which they did. The decisions of the Court were adhered to if not respected, and its ability to resolve the disputes was not questioned. However, it is difficult to interpret the trends evidenced in these data absent the political context within which the Court existed. In addition, the types of highly salient disputes that the Court's very broad jurisdiction encompasses, inevitably politicised the Court.<sup>70</sup> The mechanistic character of judging has been rejected by scholars as too simplistic in its explanatory power.<sup>71</sup> These results suggest that a legal perspective alone is insufficient in the Philippine setting.

Another alternative is proffered by Helmke<sup>72</sup> who argues that the government is vulnerable to losses before appellate courts as the external political and social context changes. Judges foresee the waning political fortunes of the incumbent

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<sup>70</sup> See C. Neal Tate & Torbjorn Vallinder, *The Global Expansion of Judicial Power* (New York: New York University Press, 1995) and Haynie, *supra* note 49.

<sup>71</sup> Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 2002).

<sup>72</sup> Gretchen Helmke, "Jurisprudential Regimes in Supreme Court Decision Making" (2002) 96 *American Political Science Review* 305 and Gretchen Helmke, *Courts under Constraints. Judges, Generals, and Presidents in Argentina* (New York: Cambridge University Press, 2004).

regime and defect to preserve themselves and their institution. By ruling against the failing regime, the court seeks the favour of the incoming regime. The cycle then repeats. However, Helmke's theory is problematic except for the Marcos government because the 1987 *Constitution* limited the term of the presidency to 6 years. The Court does not have to assess the administration's strength and then determine whether or not it is time to defect. The Court *knows* when the regime change will occur.

Moreover, given the predictable cycle of change, the Court is less likely to fear retribution, though with the recent impeachment of Chief Justice Renato Corona, judges may disagree.<sup>73</sup> The post-1987 members of the Court are more likely to survive the transition than other politicians whose tenure often depends on the personality driving the politics of the presidency.<sup>74</sup> Support is motivated by the individualistic narratives of the candidates, and the promises associated with them. When the narrative fails to achieve its potential, the interest in and support for the regime fails as well. Rightly or wrongly, leaders are held responsible for the failures of policy and politics. The Court, it seems, similarly judges the government.

We argue, and the empirical findings suggest, that the decisions of courts can and do reflect their political context. As Haynie<sup>75</sup> notes, the Philippine Supreme Court seeks to preserve its integrity and legitimacy in Filipino society. That challenge has only increased in recent years as the Court's respect and reputation has declined.<sup>76</sup> In societies where the independence of courts relative to the other political branches is either weak or not well established their decision-making must balance the interests of the population generally with that of the dominant powers. In particular, their support for the government in the aggregate of their cases will mirror the general will and sentiment of the people. This is not merely an argument that judges behave strategically, or that judges' decisions are singularly motivated by self-preservation or self-interest. Nor is it an argument that the decisions of judges are mere reflections of public opinion.<sup>77</sup> Courts are political

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73 Sarah Lou Ysmael Arriola & Dan Kevin C. Mandocdoc, "Defining the Parameters of Judicial Independence and Accountability in Light of Chief Justice Corona's Impeachment: An Examination of the Violation of the New Code of Judicial Conduct as a Ground for Betrayal of Public Trust" (2012) 56 *Ateneo Law Journal* 761.

74 Abueva, *supra* note 49 at 114.

75 *Supra* note 29 and *supra* note 33.

76 Haynie, *supra* note 49.

77 See William Mishler & Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decision" (1993) 87 *American Political Science Review* 87; William Mishler & Reginald S. Sheehan, "Public Opinion, the Attitudinal Model and Supreme Court Decision Making: A Micro-Analytic Perspective" (1996) 58 *Journal of Politics* 169; and Roy B. Flemming & B. Dan Wood, "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods" (1997) 41 *American Journal of Political Science* 468.

institutions seeking to preserve their legitimacy, and their decisions, over time, will reflect their deference to the populations they serve.

While courts may possess constitutional powers to serve as a countermajoritarian threat to the will of the sovereign, these findings suggest that courts, and the decisions of their judges, are fundamentally tied to the political, social and economic context from which they emerge and in which they persist. Like other institutions, in the long term the decisions of the judges about who gets what, when and how will ultimately reflect the ebb and flow of politics.

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