

CHAPTER ONE

TO DEFER OR TO DEFY: JUDICIAL CONTROL IN INSECURE ENVIRONMENTS

All judges are politicians, whether they know it or not.
--- **Enrique Petracchi**

1.1 Introduction

When do judges rein in those who reign? In a given polity, the judiciary has the crucial task of rendering verdicts on disputes and social questions fairly; insensible to considerations of power and prestige. The courts are expected to subject even those who rule to the governance of rules (Fuller 1964; Shapiro 1981). However, those who have dominion over the state can employ a variety of weaponry to bend the gavel to their will: They can refuse to implement judicial rulings, cut the court's jurisdiction, reduce the budget allotted to the court, impeach the magistrates or subject the judges to physical harm. These threats are particularly compelling in authoritarian societies where judges do not enjoy the institutional safeguards or the popular support that protect their counterparts in democratic polities. Thus, it becomes most relevant to ask: *When do judges invalidate actions of government? Why do gavels defy the gun?* The objective of this dissertation is to identify the conditions that enable the robe to overturn state action at the risk of incurring the wrath of the sword.

The judicial literature has focused mostly on court behavior within highly developed democracies (Guarnieri and Pederzoli 2002; Koopmans 2003). In these polities, the courts

have emerged as powerful, independent actors in the public policy process. Empirical studies demonstrated that institutional protections like security of tenure and fiscal autonomy, as well as public support, have allowed judiciaries in developed societies to effectively constrain governmental behavior. Judges who are willing to limit state action, and political actors who abide with legal decisions, are the necessary elements for the existence and persistence of the “rule of law” (Segal 1997; Maravall and Przeworski 2003; Vanberg 2005).

If judicial behavior is very much affected by the political context, it can be averred that it is harder for magistrates in authoritarian regimes to keep rulers in check. In this type of system, political and military power is usually concentrated in the hands of one person or organization (e.g. party or military). The monopoly of the apparatuses of coercion enables these rulers to impose their policy views and punish dissenters. Solomon (2006) contended that authoritarian structures and practices tend to “keep courts responsive to powerful interests and prevent judges from acting impartially in all cases” (p. 32). Thus, jurisprudence in these societies may be strategic, informed less by legal standards and more by considerations of the strength and interests of those in power. *The intention of this research is to develop and test a comprehensive theory that can explain how courts are able to constrain those who hold state power in environments that are characterized by institutional insecurity.* Studies of judicial negation in authoritarian polities are sparse (Moustafa 2003; Pereira 2005).

This study seeks to make a contribution in a broader context. The existence of courts that can efficaciously constrain the exercise of state power is often taken as a sign of the existence of the “rule of law” (Neumann 1986; Tamanaha 2004). *Is it possible for the “rule of law” to emerge in the context of authoritarian politics?* It has also been demonstrated that

the economies of countries with independent courts tend to grow three times faster compared to countries with emasculated judiciaries (Scully 1988). This provides a motivation for dictators to grant their judges a “zone of autonomy” within which they can constrain predation by government officials and protect the economic right of investors. Interestingly, it has also been contended that economic growth is positively related to democratization (Lipset 1959; Diamond 1992). *Thus, judicial negation is also relevant to broader questions of economic development and democratic transition.*

1.2 Control, Costs, and Courts: Examining the Literature

The paucity of empirical analyses of authoritarian systems is due to the pervasive belief that concentrated power severely constrains the ability of the courts to engage in countervailing action (Barros 2002, 14; Sartori 1962). “Autocracy cannot operate under a constitution,” said Loewenstein (1946), “and therefore as a rule dispenses with one” (p. 114). Within communist states for example, judicial decisions were expected to reflect the “will of the party” (Smithey and Ishiyama 2000, 8; Hartwig 1992). In the Soviet Union, a ruling against such “will” was usually not tolerated. Judges were checked in advance, and their superiors often contacted court officials as to how they should rule, a phenomenon referred to by Hendley (1996) as “telephone justice” (p. 25).

Judges under dictatorships operate in an environment that is characterized by institutional and personal insecurity. Autocrats have a variety of means, both legal and extra-legal, to bend a judge to their will. Given the monopoly of political and military power in the hands of the autocrat, magistrates are not able to confidently rely on the protections afforded

to them by law. Their jobs are insecure, they can be ignored by the state, and threats to their safety proliferate. Judges can be physically threatened or intercepted on their way to work (Hendley 1996; Vejerano 1999).

Bereft of the institutional protections enjoyed by their counterparts in advanced democracies, it becomes imperative for judicial actors to pay due heed to the preferences of other political players. Cooter and Ginsburg (1996) remarked that under authoritarianism, “politics is as important as the constitution” (p. 296). If judicial behavior is very much affected by its political context, then we would expect courts to behave differently in situations of concentrated power compared to those situations which were characterized by a separation of powers. A steady stream of works associated with the attitudinal model on judicial decision-making in the United States Supreme Court persuasively demonstrated that the institutional protections enjoyed by justices in the American context enable them to vote their sincere policy preferences (Spaeth 1995; Segal and Spaeth 1993, 2002). Segal (1997) provided strong evidence that the justices’ behavior in statutory interpretation cases is minimally affected by the preferences of the legislature.

Thus, Helmke (2002) was to the point when she remarked that, “because such institutional protections are in short supply in many parts of the world, the separation of powers approach should prove particularly compelling for analyzing judicial behavior beyond the American context” (p. 291). However, it is worth noting that the so-called “strategic revolution” in judicial politics also emanated from studies done on developed democracies. Building upon a line of reasoning that was developed by Walter Murphy in *Elements of Judicial Strategy* (1964), Epstein and Knight (1998) developed the argument that judges consider the preferences of other political players. Epstein, Knight and Martin (2001)

provide empirical demonstration that American Supreme Court justices do vote their sincere preferences, *but only under certain conditions*. The results from Bergara, Richman and Spiller (2003) showed that justices are constrained by the possibility of legislative overrides in particular instances, even when one uses the data in Segal (1997). Within the comparative judicial politics subfield, several case studies have provided evidence that judiciaries in developed democracies have engaged in strategic behavior vis-à-vis the other branches of government (Koopmans 2003; Stone Sweet 2000; Vanberg 2005).

*What is currently needed is coherent theorizing about, and cross-national testing of, the variables that enable the courts to go against the preference of those who rule in **non-democratic contexts**.* It is important to determine whether the contentions of the standard models (e.g. the attitudinal, legal, and strategic theories) that emanated from the study of developed democracies can “conceptually travel” to other regime settings. We must assess whether they can provide us with the analytical leverage for understanding judicial behavior in contexts that are characterized by power concentration and institutional insecurity. With their independence and impartiality unprotected by constitutionalism and the rule of law, judiciaries in non-democratic settings are considered to be regime legitimizers; limited to that of settling petty conflicts between individuals (Podgorecki 1986; Newberg 1995).

Toharia (1975) made the contention that authoritarian leaders do not abolish the courts upon their ascent to power, unlike totalitarian rulers. They come to view the courts to be particularly useful in facilitating the return of societal relations to normalcy. Dictators also come to consider the judiciary as a very useful device for generating public acceptance of the new regime. Thus, despots tend to allow the courts to continue to function, while ensuring that they do not pose any challenge to the dictatorship. Autocrats, like Franco in

Spain, simply removed politically important cases from the ordinary courts, and channeled them to military tribunals. Franco allowed judges wide discretion in cases which were not sensitive to regime. Through the curtailment of the scope of the court's jurisdiction, he was able to allow the courts considerable independence while ensuring that it has little power.

Tate's (1993) incisive study of the crisis regimes in the Philippines, India, and Pakistan made apparent why it is useful for the state to preserve the judicial institution.¹ First, it can be used to resolve routine conflict situations in society. Second, the stamp of legality that the courts provide can facilitate the consolidation of the "crisis regime" into stable authoritarianism. However, crisis rulers can only continue to utilize the courts to legitimize their rule if their subjects, as well as foreign observers, believe that they have not compromised the autonomy of the judges.

Thus, similar to what Toharia (1975) found in Franco Spain, Tate showed that crisis rulers do not attack the independence and impartiality of the courts but curtail the scope and depth of their judicial powers. Even more importantly, he noted that given the opportunity to challenge the legitimacy of the crisis regime, the courts in his studies backed down (p. 336). Thus, his study cannot offer any insights on how authoritarian rulers deal with recalcitrant courts. What is apparent is that the threat of punishment from the state seems to inhibit the ability of judges to perform what Almond and Powell (1978) referred to as their *regime limiter/civil rights protector* function. In his three cases, Tate observed that the courts not only failed to protect the rights of people who have been specifically targeted by the regime, but they also timidly acquiesced to the restrictions on their powers (p. 333).

¹ Tate (1993) defined a "crisis regime" as a "political system which is initiated by a sudden seizure of new or drastically expanded executive powers by a political leader for the purpose of coping with the demands of a leader-proclaimed extraordinary crisis (p. 316).

In authoritarian systems, the judiciary can also be employed to harass the state's political opponents. In his analysis of Malaysia and Singapore, Jayasuriya (2000) demonstrated how the state could utilize political trials "to disseminate state practice and routines to the citizenry" (p. 5). The trial in Malaysia of Anwar Ibrahim² for sodomy and corruption as well as the case against the *International Herald Tribune*³ in Singapore were widely disseminated to the public in order to "demonstrate that the executive together with the compliant judiciary will not hesitate to use political standards (rather than legal criteria) to achieve the outcomes desired by the executive" (p.3).

Empirical studies have tended to support the notion of judicial deference in authoritarian systems. Haynie and Tate (1993) indicated that the onset of an authoritarian regime does not lead to the curtailment of the judiciary's conflict resolution function (defined as suits between individuals) but often results to the emaciation of its social control function: the court's criminal docket is limited by the state. Haynie (1994a) evaluated the ability of individual and corporate litigants to find success in courts during periods of authoritarian rule. She found that while the success rate of individuals increased, corporate litigants tend to lose more. Most of the victories by persons came in wage compensation cases, as the state may have allowed these wins by labor in order to establish the court as a maintenance mechanism. The frustrations of workers, who are usually organized and quite militant, are channeled and drained through the judicial institutions. The courts act as "safety valves":

² Anwar Ibrahim was a former deputy minister of Malaysia, and was considered the heir apparent to Prime Minister Mahathir Bin Mohammad, until the two conflicted on economic policy and control within the United Malay Nationalist Organization (UMNO) party. In a bitter struggle for political control, which Mohammad eventually won, Ibrahim was thereafter tried for alleged corruption and sodomy.

³ In this particular case, Philip Bowering of the *Tribune* published an article commenting about what he perceived to be dynastic politics in Singapore. The Court ordered him to pay damages because criticisms of political leaders "undermines their ability to govern" and thus constitute an attack on political stability (*Lee Kwan Yew vs Vinocur* 1995, 491).

dissipating tensions within the system that could otherwise develop into full-blown ferment (Kirchheimer 1961, 259-99; Friedman 1975, 193-223). In the end, this action abets the prolongation of the life of the regime.

Organizations like corporations may be more resistant opponents, but as Das Gupta's study (1978) had shown rather persuasively, control of the state's coercive apparatuses by autocrats enable them to easily overwhelm those who operate outside the formal center of concentrated authority (p. 320). In his study of Pakistan, the Philippines and India, Tate (1993) made the observation that "the judiciary could not resist the coercion of a determined crisis ruler" (p. 319). He noted that an attack on the court's jurisdictional scope and depth eventually left the courts "in the same powerless state as the other political institutions that have been formally dismantled or structurally altered" (p. 336). He averred that future research on court-dictator relations may be able to provide some insights on the conditions under which the judiciary can play more impressive roles than those revealed" in his study (p. 336).

Indeed, some of the most interesting works in comparative judicial politics have re-examined the concept of judicial submission during periods of authoritarianism. Scholarship has focused on how certain political and economic developments can create political openings that will enable the courts to vote its own preferences and play a more impressive role.

Jayasuriya's (2000) work on what he termed "regimes of exception"⁴ tackled how international forces can carve a space for the judiciary to be influential. A regime of exception like Malaysia is characterized by a dual legal structure: "a political sphere

⁴ Jayasuriya defined a "regime of exception" as a system where the sovereign has "the capacity to make decision in terms of its political will rather than be constrained by normative law" (2000, 1. See also Schmitt 1985).

unbounded by any legal parameters” and an “economic order regulated by law” (p. 11). Though Jayasuriya’s main contention is that there is no necessary correlation between a market economy and a democratic government, his study indicates that the demands of capitalism may imply adjustments on how the state treats the judiciary. Since foreign investors often prefer contracts to be quarantined from the arbitrary whims of the state, “there will be strong pressure to see legal reform in a highly-technocratic” state (p. 10).

This study builds upon Fraenkel’s (1960) seminal work on the German totalitarian state. He persuasively demonstrated how despite the arbitrariness and dominion of the state in criminal matters and security issues, the Reich generally allowed the economic area undisturbed. Despite the actuations of the National Socialist Workers’ Party, the German courts were able to follow their own course in economic matters. This is what Fraenkel referred to as a “dual state”. *Within the same polity, arbitrariness and lawfulness coexisted.* In criminal and security matters, the interests of the state can predominate (the “prerogative state”) while the courts can generally follow its internal set of rules and norms in economic cases (the “normative” state).

The same pattern was observed by Moustafa (2003) in Egypt and Solomon (2006) in Tsarist Russia. Despite the strong handed rule of the government, Moustafa noted how Egypt’s Supreme Constitutional Court assertively expanded into economic policymaking (p. 927). He contended that the rulers *allowed* the creation of an autonomous “economic legal space” because it enabled the government to implement politically controversial political policies (p. 913). *Issue type matters.* This was supported by Solomon’s (2006) study of judicial power in Tsarist Russia. He noted that the creation of a “normative state” in economic matters may be related to the need of the power elite to “preserve” itself (p. 7). The

supporters of the Tsar wanted an independent judiciary in order to protect their property rights as well as to encourage foreign sources to finance the building of railroads, metal plants, and munitions factory that the Tsar needs to improve the economy (and increase his wealth). *Thus, judicial assertiveness in economic matters was made necessary by the authoritarian regime's need to preserve itself* (pp. 6-7, 32).

Meanwhile, Barros' (2002) study of the Chilean judiciary focused on the type of political development that may enable the court to go against the preference of the state. He argued that law and constitutionalism should not be exclusively affiliated with democracy. In his formulation, the presence of "limited pluralism" (Linz 1975, 268-70) within authoritarian systems provides the courts with some political space to play a meaningful role. The development of power blocs within the ruling elites as the autocrat ages can grant the court an institutional opening to institute its favored societal policy (pp. 315-25). Additionally, the absence of an overriding state ideology can facilitate the entry and diffusion of new ideas to political players, including judges.

On the other hand, Helmke (2003) contended that judicial independence from the government is brought about not only by *current* political dynamics but also by *future* expectations. Judges are expected to treat the contentions of the current government more negatively if they foresee a turnover in leadership. She averred that when the political opposition is strongly positioned to assume power, "judges face powerful incentives to defect against their own appointers" (2003, 216). If judges possess sufficient information about the preferences of the incoming set of rulers, the *certainty* of the change modifies the incentive structure. Judges bent on career preservation may vote against the government in hopes of ingratiating itself with the new leaders. She referred to this phenomenon as *strategic*

defection (p. 19). Her theory predicted that anti-government decisions should cluster two years before an administration loses power. Her works on Argentina provided empirical support to her contentions (2002, 2005).

Haynie's (2003) work dovetails nicely with the central arguments of Barros and Helmke. Focusing on South Africa, she provides evidence that there is some room of maneuver even in an authoritarian state. The decisions of judges in an authoritarian regime can be affected by certain events (pp. 111-12). In addition, the erosion of party cohesion and the impending end of authoritarianism can provide opportunities to rule against the rulers. "The bulk of the court's decision-making is not indicative of an ideologically-driven, executive minded institution," Haynie argued, "particularly in the *waning* years of apartheid" (p. 110. Emphasis added).

Hilbink's (2003) study of the judiciary in Chile after transition showed that judicial assertiveness vis-à-vis the contentions of the government may be hindered by *legal culture*. The adherence of the judges to what she referred to as "legal formalism" or "positivism" enabled the Chilean courts to produce a steady stream of decisions that generally supported the prerogatives of the state. She expressed exasperation with the excessive deference of the judiciary in Chile where the court has "generally endorsed the legal edifice constructed by the leaders of the authoritarian regime and left largely unchallenged the principles and values embodied therein" (p. 80). This is in line with the contentions of Sutil (1993) who noted that courts in Chile saw their function as one of applying the law "independent from the fact that the law is just or unjust, adequate or inadequate for the present circumstances". The statement of then-Supreme Court Judge Hernan Bravo in 1985 summed it best. When asked

by a journalist whether the Supreme Court should apply the laws even when they were unjust, he replied that “laws that have been duly enacted couldn’t be ‘unjust.’”⁵

While Chile had a timid court despite institutional protections, the high court in Russia was audacious despite its insecure standing. Thomas (1995) expressed surprise about the temerity of the first Russian Constitutional Court (1991-93) to challenge the strongman rule of Boris Yeltsin in politically salient cases despite the lack of political will to provide the necessary constitutional support to protect the courts from retaliation by other bodies. Its abolition in 1992 suggests that the courts could not effectively negate state contentions when there was a strong executive. The Second Constitutional Court seemed to have learned this lesson, for Epstein, Knight and Shvetsova (2001) observed that it generally demurred from ruling on cases where there was substantial disagreement among major political players, waiting for the day “when the Courts themselves have solidified their own place in the constitutional system” (p. 156).

Studies by Moustafa on Egypt (2003) and by Smith (2005) on Chile, Egypt, and the Philippines support Jayasuriya’s (2000) central thrust: that the desire of authoritarian rulers to attract foreign investment or engage in trade necessitates certain instruments for convincing its partners that the state’s commitments are credible. Crafting a court that can credibly rule against the government is one such mechanism, as long as the state shows willingness to let those negative rulings stand (Smith 2005, 16-18). “Commitments to property rights are not credible unless courts have...*real* powers of judicial review” (Moustafa 2005, 38. Emphasis added).

⁵ This statement echoes the famous Hart-Fuller debate as to whether the courts in newly democratic Germany should respect the laws promulgated by Nazi Germany.

While there is indeed a growing interest in the analysis of non-democratic regimes, there is a need to test which of these factors *sufficiently* enables the judiciary to constrain the state. While this could be done through process tracing and discourse analysis, the quantitative examination of judicial negation can allow us to compare the strengths of these variables within a given polity. We can then proceed to apply the same technique to another polity and see whether particular variables maintain their effects. There is paucity in the literature for such type of analysis. This is the theoretical and empirical lacuna that this dissertation seeks to address.

1.3 *Research Design: Paired Comparison, Most Different Systems, Mixed Methodology*

The central question of this study is to explain the variation in the judiciary's treatment of government claims; to understand when and why courts defy under conditions of institutional insecurity. This section tackles the question of how I intend to gain leverage on understanding this political phenomenon. I will discuss below the rationale for the selection of cases and the methodology that will be used to gain theoretical and empirical traction on the puzzle at hand.

Case selection was guided by the paired comparison, most different systems approach (Tarrow 1999; Lijphart 1975). The selection of a few cases enables the investigator to study the cases in depth. For Frensdreis (1983), the small-n allows the researcher to analyze the cases with multiple instruments and with greater consideration to national and cultural contexts. The danger in the cross-national, statistical strategy is that the cases may dissolve

into mere data points in a regression analysis (Jackman 1985).⁶ The limited cases strategy is particularly useful in those instances where the researcher seeks to elucidate the rudiments of a theory and to identify the mechanisms that link the independent and dependent variables. The small set of cases allows the researcher to investigate the key elements of the theory closely and to examine how they produce their effects across time.⁷

This led Lijphart (1971) to refer to the small-n strategy as *the* “comparative method” (p. 684). However, his usage has fallen out of favor as the term is now used to encompass all the various means for studying politics comparatively. Researches that compare two or more cases are now called “focused comparisons,” or the “comparable cases strategy” (Tarrow 1999, 9-12; Perry and Robertson 2002, 34-37). Compared to descriptive and analytic single case studies, the inclusion of one or more cases grants the researcher points of comparison upon which to track the operation of his theory. When conducted successfully, the results generated by the comparable cases strategy furnishes stronger empirical support to the theory (Meckstroth 1975; Robertson 1984). It also provides a credible reason for the researcher to consider venturing into the enterprise of cross-national testing and see whether his contentions have a far broader application.

⁶ For example, Perry and Robertson (2002) contended that the quantitative, cross-national approach allows the researcher to “draw conclusions about political behavior and institutional patterns with minimal regard to specific national or cultural settings” (p. 37). While this can allow for potentially broad generalizations, the statistical result may turn out to be a statistical artifact, as country characteristics dissolve into single data points and complex societal features are forced into some binary categorization.

⁷ Lijphart also asserts that it is also less prone to “Galton’s Problem,” the absence of the independence of cases, because the investigator is “close enough to (the)...cases to notice immediately” (1975, 171).

1.3.1 Case Selection Strategy

Comparability pertains to the question of control (Sartori 1994, 16). Comparison enables social scientists to match variables and examine their effects in similar or different situations. They are able to identify causation and discern necessary and sufficient conditions (Hopkin 2003, 254-58). Furthermore, the comparative method allows us to determine whether a phenomenon is solely a local pattern or a part of a larger “trend”.⁸ For example, the most similar systems design identifies causation by selecting nations that are similar in variables that are not being investigated. In effect, these variables are controlled in the analysis, enabling us to identify causal linkages among our variables of interest. “Any variance in the dependent variable cannot, according to this approach, be explained by the similarities among the countries, but must be explained by some important variance within one of the independent variables” (Perry and Robertson 2002, 35).

Unfortunately, the most similar systems design suffers from the problem of overdetermination. Przeworski and Teune (1970) contended that even though the differences between the cases may indeed be limited, the tendency is that there will always be more variables than we have countries (p. 34). This type of design is more useful in reducing the number of possible explanatory variables than to provide an explanation of a particular phenomenon (Perry and Robertson 2002, 36). “[E]ven if we assume that some differences can be identified as determinants, the efficiency of this strategy in providing knowledge that can be generalized is relatively limited” (Przeworski and Teune 1970, 34).

Thus, for this research, I adopted the most different systems approach to case selection. In this mode, the researcher chooses cases where the variations in those aspects

⁸ Thus, Lawrence Mayer contended that the goal of comparative politics is “the building of empirically falsifiable, explanatory theory” (1989, 12. Cited in Sartori 1994, 15).

that are not of central interest to the researcher are maximized. The goal is to find a variable or set of variables whose presence explains the variation in the outcome across the cases. That is, to test whether there is a common set of factors whose presence *sufficiently* produces the observed effect (Babbie 2002, 88-89).⁹ For example, in cases as disparate as India and the Philippines, we may find that divided government is related to the courts' willingness to overturn governmental decisions. This provides us with a reason to construct a more comprehensive dataset to assess whether a theory can explain variation in outcomes in other cases as well. For Perry and Robertson (2002), these refinements "afford the scholar a greater likelihood of achieving a general theory" (p. 36). The cross-national comparison strategy is ultimately based on the logic of the most different systems approach of case selection (Jackman 1985; Ravenhill 1980).

Geddes (1990, 2003) contends that the comparable cases strategy is prone to "selection bias" as investigators usually choose cases on the basis of familiarity with certain countries or (even worse) of similar outcomes on the dependent variable, leading to spurious generalizations. Furthermore, the researcher will eventually come across the problem of having more independent variables than countries (Gerring 2001). However, it does provide the researcher the possibility of being able to identify causes whose sufficiency as explanations may be eventually tested through a cross-national systems design.

The cases that will be considered in the dissertation are the Philippines and South Africa. The focus of the dissertation is on judicial decision-making in the Philippine Supreme Court, with the case of the South African Appellate Division employed as the point of comparison to test whether the results generated by the Philippine case have the potential

⁹ A sufficient cause "represents a condition that, if it is present, guarantees the effect in question" (Babbie 2002, 88).

to be generalized into a setting with characteristics that are most disparate to it. Indeed, there is a large variation between these two polities in terms of economic, cultural, and social characteristics.

The Republic of the Philippines lies between the South China Sea and the Philippine Sea. The archipelago is made up of 7,107 islands, with a total land area of 300,000 sq. km., which makes it roughly the same size as Italy (301,000 sq. km.). In 2006, the country has a population of 91.077 million people, who largely reside on the 11 major islands. It has a water area of 1, 830 sq. km. Seas and mountain ranges fragment the country geographically. It has a very tropical climate, and two seasons: wet and dry. The capital of the Philippines is Manila.

The Philippines has a very diverse population on the basis of ethnicity and religion (see Table 1.1). Most of the inhabitants are Christian Malays (91.5%), with the Muslims (4%) and the Chinese (1.5%) comprising the other major groupings. The national language is Filipino but there are around 200 native dialects. The literacy level for the total population is 92.6%. In terms of life expectancy, Filipinos tend to live up to 70.51 years, with the females generally outliving the males (73.55 years for women compared to 67.61 years for men).

Table 1.1 Comparative Features of South Africa and the Philippines

Category	Philippines	South Africa
<i>Location</i>	Southeast Asia	Southern Africa
<i>Population</i>	91.077 M	44.3 M
<i>Area (Land)</i>	300,000 sq. km.	1,219,912 sq.km.
<i>Area (Water)</i>	1,830 sq. km.	0 sq. km.
<i>Major Ethnic Groups</i>	Tagalogs (28.1%) Cebuanos (13%) Ilocanos (9%), Bisaya (7.6%)	Black African (79%), White (9.6%) "Colored" (8.9%) Indian/Asian (2.5%)
<i>Major Religious Groups</i>	Roman Catholic (81%), Evangelicals (3%) Muslim (5%)	Zion Christian (11.1%), Pentecostal (8.2%) Catholic (7.1%), Methodist (6.8%). Dutch Reformed (6.7%)
<i>Languages</i>	Filipino, English	Isi Zulu, Isi Xhosa, Afrikaan, Sepedi, English, Setswana
<i>Literacy (Total Population)</i>	92.6%	86%
<i>Life Expectancy</i>		
<i>Total Population</i>	70.51 yrs.	42.45 yrs.
<i>Male</i>	67.61 yrs.	42.45 yrs.
<i>Female</i>	73.55 yrs.	41.66 yrs.
<i>GDP (Purchasing Power Parity) (2006)</i>	\$449.8 B	\$ 491.4 B
<i>GDP per capita (Purchasing Power Parity)</i>	\$5,000	\$13, 300
<i>Foreign Debt</i>	\$54.06 B	\$55.47 B
<i>Structure of Economy</i>	Services - 53.7% Industry - 32.1% Agriculture – 14.2%	Services – 67.1% Industry – 30.3% Agriculture – 2.6%
<i>Current Account Balance</i>	\$ 4.9 B	\$ -12.69 B
<i>Population Below Poverty Line</i>	50% (2000)	40% (2000)
<i>Current Regime Type</i>	Presidential Democracy	Presidential Democracy
<i>Legal System</i>	Spanish Civil Law, American Common Law	Roman-Dutch Law, English Common Law

Source: CIA World Factbook (2007)

The Philippine economy has remained largely unequal, with a GINI index rating of 46.1 in 2003. Half of the population lives under the poverty line. The economy of the country has now generally developed into a service-oriented sector. However, the growth of the economy is still largely hindered by its rather large foreign debt which totaled \$54.06 B in 2006. The GDP per capita for 2006 was \$5,000. Compared to other states in the Southeast Asian region, that is higher than Indonesia (\$3,900) and Vietnam (\$3,100) but considerably lower than Thailand (\$9,200), Malaysia (\$12,900) and Singapore (\$31,400) (CIA Factbook 2007).

Meanwhile, South Africa is located at the southern tip of the African continent. It has a land area of 1, 219, 912 sq. km. which makes is nearly four times bigger than the Philippines. Unlike the Philippines, the country has three capitals: Pretoria (administrative capital), Cape Town (legislative capital), and Bloemfontein (judicial capital). Similar to the Philippines, South Africa has a very diverse population in terms of ethnicity and religion (See Table 1.1). The literacy level of the population is 86%. In terms of life expectancy, South Africans tend to live shorter than Filipinos (42.45 years compared to 70.51 for Filipinos), with their men slightly outliving the women (42.45 years for men compared to 41.66 years for women).

Like the Philippines, the South African economy has remained largely unequal, with a GINI index rating of 59.3. Forty percent of the population lives under the poverty line. Similar to Manila, the economy of the country has now generally developed into a service-oriented sector. Unlike the Philippines, South Africa has a negative current account balance (\$-12.69 B). However, South Africans tend to be better economically than Filipinos. The GDP per capita for 2006 was \$13, 300, compared to \$5,000 for the Philippines. Compared to

its immediate neighbors, South Africa's GDP per capita is higher than Botswana (\$10,900), Namibia (\$7,600) and Zimbabwe (\$2,100) and Mozambique (\$1,500).

Despite the differences, both countries do share the conditions that are of central interest to this analysis. Historically, both have experienced periods of authoritarianism. Their respective histories under dictatorship will be discussed more extensively in the succeeding chapters. The Philippines lived through the dictatorship of Ferdinand Marcos from 1972-1986, until he was ousted by a military-civilian uprising that has been referred to as the "People Power Revolution" (Timberman 1991, 148-164; Thompson 1995). Meanwhile, South Africa had a much longer history of authoritarianism. The official establishment of the apartheid, the policy of "separate development of the races" exacerbated what has been a historically undemocratic politics in South Africa (Thompson and Prior 1982; Abel 1995). Beginning in 1948, the Nationalist Party (NP) controlled the polity through the use of coercion and legislation and crafted the legal underpinnings of apartheid (Forsyth 1985; Haynie 2003). The date of transition is traditionally set on April 27, 1994, also known as "Freedom Day". This was the day when the election that was mandated by the interim 1993 Constitution was held. The election was won overwhelmingly by the African National Congress (ANC) headed by Nelson Mandela, and effectively signaled a transfer of power to black Africans.

There were two other reasons for the selection of the cases. The yearly reports of the Philippine Supreme Court, the *Supreme Court Reports Annotated* (SCRA), and the *South African Law Review* (SALR) are in English, allowing me to subject the decisions of both courts to jurisprudential analysis.¹⁰ Secondary materials on the history of the judiciary as well as legal theory in both countries are also available in English, and in the Philippine case, in

¹⁰ I am also a native speaker of Filipino, which is most useful in analyzing the Philippine cases.

Filipino. Finally, statistical data are available for both countries. Data for the Philippines were taken from C. Neal Tate's Philippine Supreme Court Database (2004). Data was available for the Philippines from 1961 to 1987. Meanwhile, statistical data for South Africa were taken from Stacia Haynie's South African Appellate Division Database which provided data on the decisions of the country's high court from 1950 to 1990. They are discussed in more detail in the empirical chapters.

1.3.2 Research Methodology

The investigation in this dissertation employed the *sequential mixed method design* (Creswell and Plano Clark 2007, 142-5). I utilized both qualitative and quantitative methods to gain leverage on the political phenomenon of interest. In terms of implementation sequence, the first phase involved qualitative data collection and analysis; followed subsequently by a quantitative phase.¹¹ The objective of the first phase was to identify key variables and to develop a theory that can explain the phenomenon of judicial negation.¹² The emergent theory directed the development and implementation of the quantitative investigation. The purpose of the second phase was *confirmatory*; that is, to test quantitatively whether the theory is able to significantly explain when and why courts defy.

The qualitative phase was carried out in three stages. The first stage involved the extensive review of the relevant historical, theoretical, and empirical materials on the subject of judicial decision-making. In the current literature, the explanation of judicial behavior has been framed within the attitudinal, legal, and strategic approaches. It was most important to distinguish carefully their assumptions, contentions, and predictions (Baum 1997 and Segal, Spaeth, and Benesh 2005 provide excellent reviews). Thereafter, I engaged in a very extensive reading and assessment of the comparative judicial politics literature in order to identify key variables and explanations of judicial behavior in the context of authoritarian politics and new democracies. The product of this stage was the study's theoretical foundations which I will discuss in detail in Chapter Two.

¹¹ Creswell (2003) referred to this type of research design as a “sequential exploratory strategy” (pp. 215-6).

¹² Morgan (1998) contended that the sequential exploratory strategy is best employed for examining the elements of an emergent theory fashioned out of the analysis of the qualitative data.

The next stage entailed historical and jurisprudential analyses of the Philippine and South African cases. Historical inquiry, conducted through archival research, was critical in laying out the context under which the courts operated. They provided qualitative assessments about the behavior of the courts across time. Sources on the legal history of both countries were also crucial in identifying certain trends in the jurisprudence of the judiciary. They assisted in the identification of politically significant cases that warranted much closer reading. For example, Fernandez (1999) provided an assessment of the Philippine Supreme Court during the Martial Law period by examining the key legal challenges that were brought to the court. His thesis was that the Court, through its early jurisprudence, provided the mantle of legality to the dictatorship. However, he emphatically noted that Marcos' decision to allow the establishment of a legislature, the Interim *Batasang Pambansa*, enabled the Court to return to its role of protector of civil liberties (pp. 721-30). These decisions were subjected to close review and scrutiny.

Thereafter, the historical narratives and legal treatises were complemented by a series of interviews with retired judges (Tate and Haynie 1994; Haynie 2003). Fortuitously, the interviews were conducted and gathered on the justices in the Philippines and South Africa before a number of them passed away.¹³ The interviews provided supplemental, albeit personal, views on the operations of the courts. They provided information on the mechanisms through which legal and extra-legal factors come to affect the judicial mind. They also facilitated the identification of crucial variables that have not been considered by the literature.

¹³ The author personally thanks Neal Tate and Stacia Haynie for sharing their interviews with the author.

Even though the views of the justices may not be fully objective, the interviews enable investigators to identify the logic and reasoning behind their actions vis-à-vis the government. These are contentions that could be empirically tested as to their consonance with their actual behavior. Thus, Tate and Haynie (1994) were to the point when they held that even “if the justice’s views will not be unbiased, they should nevertheless be very informative” (p. 210).

Data and findings derived from the first three stages of the study (which constituted the first phase) informed the development of the quantitative phase of the study. The objective of the second phase was to construct and test a multivariate model to explain judicial negation. First, the assumptions and components of the theory were succinctly recapitulated. The concepts were then matched with corresponding indicators. Data for the Philippines and South Africa in this part of the study were primarily derived from the High Courts Judicial Database. Since the dependent variable in this study was dichotomous, the primary method of analysis was logistic regression (Hosmer and Lemeshow 2000; Long 1997). Post-estimation diagnostics were conducted afterwards to test issues related to regression assumptions as well as to identify outlier and influential cases (Kohler and Kreuter 2005, 199-217). The statistical results were interpreted and evaluated in light of the qualitative data and findings which were collected in the first phase.

Finally, the results in both cases were compared in order to determine the existence of a variable/s that *sufficiently* explained judicial negation. If the power and direction of the variable is consistent within contexts that are most different from each other, then we may have identified a promising causal factor whose effects maybe robust across different socio-cultural contexts.

1.4 Plan of the Dissertation

The outline of the dissertation is as follows. Chapter Two imparts the theoretical framework that will inform the subsequent chapters in the dissertation. It contains a detailed discussion of the central concepts and their relationships. The theoretical framework includes a set of contextual, attitudinal, and legal variables to account for when and why judges are emboldened to limit the exercise of governmental power. It also contains succinct statements of the key hypotheses that will be assessed in the subsequent chapters of the dissertation.

Chapter Three provides a theoretical discussion of how dictatorships attempt to inhibit the exercise of judicial negation. If the process judicial negation is seen as a game that is played between the authoritarian rulers and the judges, then this chapter describes how the dictators can “strike back”. In the first part of this chapter, I conceptually distinguish between three types of regimes: democratic, authoritarian, and totalitarian. I argue that between the two general types of dictatorships, judicial negation is more likely in authoritarian systems. Bereft of an overriding ideology, authoritarian leaders are more likely to need the judicial validation and continuing support of the courts to keep themselves in power. In the second part, I discuss the available mechanisms that are available to dictators in order to keep the judiciary in check. I then argue in the last part that the selection of the control mechanisms is related to the duration of the regime.

Chapter Four provides a historical overview of the judiciary in the Philippines as well as an extensive analysis of the decisions of the Supreme Court before Martial Law, as

informed by the theory that was laid down in Chapter Two. The objective of this chapter is to lay down the substantive and procedural underpinnings of the legal system that existed in the Philippines before the period of Martial Law. It begins with a description of indigenous law and how it was applied before the coming of the Hispanic colonizers. It is followed by a discussion of the colonial legal system that was imposed by the Spaniards when they took over the islands after the initial incursion of Ferdinand Magellan in 1521. The focus of the chapter is on the *Audiencia de Manila*, the court that was established by in 1583 that performed the function of (among others) reviewing the decisions rendered by judges on the lower levels of the judicial hierarchy. The chapter then moves into a discussion of the rudiments of the American Occupation and how common law was introduced into the Philippine legal system. This part discusses how judicial review was wielded as an instrument for strengthening colonial rule.

However, the Supreme Court that existed under the American period also laid down the bases for strong judicial review. Its case law on the institutional protections of the courts will serve as the foundations for the judicial control of state actions during the Commonwealth period (1935-1946) and the early years of Philippine independence from the United States. The chapter concludes with an analysis of the key decisions rendered by the Philippine Supreme Court from the administrations of Manuel Roxas (1946-48) to the first and second terms of Ferdinand Marcos (1965-71). The broad picture that emerges from the chapter is one of a high court that was not only able, but also willing, to constrain the exercise of governmental power.

Chapter Five describes the Martial Law period in the Philippines and includes a systematic analysis of the important decisions rendered by the Supreme Court on cases that

challenged the legality of the military regime. This chapter provides jurisprudential, game theoretic, and qualitative analysis of Supreme Court decision-making during the Martial Law period. The chapter portrays a court that boldly took jurisdiction of those cases that challenged the validity of the proclamation of Martial Law, but thereafter largely supported authoritarian rule. However, case law analyses suggest that the formation of the *Batasang Pambansa* in 1981 enabled the court to take back some of its role as defender of civil liberties. Furthermore, the court appeared to treat state claims more negatively in the waning years of the Martial Law regime (Fernandez 1999).

In Chapter Six I conduct an empirical examination of the judicial decisions rendered by the Philippine Supreme Court from 1972-1986. The aim is to test whether court's treatment of state claims were indeed affected by the various political and economic factors which were identified in Chapter Two. I find that if a case is economic in nature, the Supreme Court was more willing to invalidate the actions of government. I argue that this was part of the Court's strategy to "manufacture legitimacy" and obtain support from the general population since it was widely perceived to be a compliant tool of the regime. The results also showed that the entry of foreign investors generally allowed the Supreme Court to go against the dictatorship as capital flight seriously threatened Marcos' goal of maximizing wealth accumulation for himself and his supporters.

Chapter Seven applies the theoretical framework to the study of the judicial behavior of the South African Appellate Division under authoritarianism. It is composed of three parts. The first part provides a concise account of the historical development of the South African polity, focusing on the role played by law and legal institutions in the exercise of political power. Then, it examines key decisions of the Appellate Division vis-à-vis the

government in political and economic issues, especially cases that involved race relations. Its jurisprudence revealed a court that is most supportive of the government in politically important cases.

Finally, Chapter Eight summarizes the key theoretical and empirical results that emanated of the study. Here, the dissertation's findings are situated within the broader contexts of constitutionalism, democratization, and economic development. It concludes with a discussion of the areas where the dissertation can be extended, and how the design of the study can be further applied and refined.

CHAPTER TWO

RESTRAINING THE STATE: THEORIZING JUDICIAL NEGATION

“The rule of law is not secure when the body for its enforcement is composed of judges who either fear challenging the government or are already predisposed toward declaring its deeds legal.”

---**Christopher Larkins** (1998, 608)

When do judges defy dictators? The concentration of power in the hands of one person, clique, or party limits the field of discretion available to the judiciary. Small ruling coalitions are more able to respond to threats expeditiously and mobilize the coercive apparatuses of the state to protect their interests (Bueno de Mesquita et al. 2003; Shepsle and Bonchek 1997, 49-56). This makes the decision to challenge the position of government costly to the courts. Judiciaries have no armies; magistrates have no munitions. In the words of former Philippine Chief Justice Querube Makalintal, “if a new government gains authority and dominance through force, it can be effectively challenged only by a stronger force; no judicial dictum can prevail against it” (cited in Del Carmen 1979, 99). In this chapter, I develop a theoretical framework that includes a set of contextual, attitudinal, and legal variables to account for why and when judges are emboldened to limit the exercise of governmental power under conditions of concentrated power.

2.1 Conceptual Definitions

Judicial negation is defined in this paper as the process in which courts rule against the government's position in litigation. In a case involving the government with a single issue, the courts have several options: to refuse to take the case¹⁴, to defer to the government's position ("affirm"), or to invalidate the government's action ("negate").¹⁵ The "government gorilla" (Kritzer 2004, 342) has almost limitless resources to fight for its position; and its control of fiscal and coercive apparatuses enables it to make credible threats. It can censure or impeach judges from their position, restrict their jurisdiction, slash their remuneration, or threaten them with physical coercion. "Judicial opposition to the state position usually stands only when the political actors are convinced that it is in their own interest to tolerate the courts" (Whittington 2003, 448).

Thus, those instances where the courts negate the position of the government in litigation are usually taken to represent judicial independence in the comparative judicial politics literature (Herron and Randazzo 2003; Smithey and Ishiyama 2000; Becker 1970). Judicial negation can reflect the confidence of the court, as an institution, to stand up to the administration, or at the very least, survive possible retaliation. However, courts that seldom negate are not necessarily dependent. Stephen (1985) asserted that a judiciary that "recognizes and supports the legitimate actions of the executive, legislature, and bureaucracy" demonstrates independence (p. 529). In theory, affirmations of government actions can be handed down by independent courts. Furthermore, the bench can also develop

¹⁴ The court can refuse to take on the case on the grounds that the plaintiff has no legal standing, or that the case is not "ripe" for adjudication, what Bickel (1962), has referred to as the instruments of the "passive virtue" (pp. 111-83). In these instances, the status quo prevails.

¹⁵ In cases involving multiple issues, another option is possible to the court, to give a "split decision" (where the government wins in one issue, while its adversary wins on the other).

a reputation for independence, and its preferences and rulings are taken seriously by the other branches. Since the executive and the legislature anticipate the court's reactions, their policies are usually upheld by the judiciary (Rogers 2001). Here, it will be a mistake to infer that a court's rather small number of negative decisions means that it is dependent.

Indeed, to assess judicial independence one should consider not only the number of negations issued by the magistrates but the *saliency* of the cases to the government. A court may strike down only a limited number of state actions, but it may do so on cases that matter to the government. Such a tribunal may in fact be more independent than one that strikes down a large number of insignificant cases.

I will make the argument that in authoritarian societies the invalidation of state actions can reasonably reflect court independence. When institutional protections are undeveloped, and the threat of physical violence very real, we expect judges to defer largely to the governments' position (Thomas 1995; VonDoepp 2005). In contexts characterized by institutional insecurity, siding against the state is costly; and even more so when it involves going against the government in politically important cases.¹⁶

The aims of the next section are to identify and predict the conditions under which courts are able to strike down state action; that is, to identify when and why they defy. The framework includes a set of contextual, attitudinal, and case variables to account for when and why judges are emboldened to limit the exercise of governmental power.

¹⁶ In addition, post-transition courts have yet to generate the "reputation" needed to compel respect from the other branches.

2.2 Theorizing Judicial Negation

To file a case is to beseech the bench to subject a dispute to the governance of rules. The court is a third party mechanism that can be invoked by persons to hear and rule on their competing claims. The very existence of the judiciary as a societal institution is founded on this triadic logic (Shapiro 1981; Stone Sweet 2000). Courts render decisions on a lot of cases, of various types, every year; from the mundane to the memorable. The central tasks of the scientific study of the courts are the description and explanation of these decisions.

Description involves the collection of information about a single variable or case. In the judicial politics literature, this can take the form of a detailed account of the issues, players, strategies, and outcome of particular cases. Excellent examples of these are Ogletree's *All Deliberate Speed on Brown vs. Board of Education* (2004) and Hull and Hoffer's account of *Roe vs. Wade* (2001). For Gerring (2001), description is most crucial in getting the facts right. There is inherent value in knowing the perpetrators in the murders of John F. Kennedy and Martin Luther King Jr. "*whether or not* such knowledge helps us to predict future assassinations or explain the course of the Vietnam War and the civil rights movement" (p. 122). Descriptive studies are also valuable for laying down the field of meaning of that social world, enabling us to understand the behavior of political players (Geertz 1973; Scott 1985).

However, scholars of judicial politics also seek to *explain*. While it is indeed valuable to know what transpired, it is also crucial to know why it happened and when it can happen again. We can explain an event by constructing a causal account. This is done through the identification of one or a set of temporally prior factors that correlate highly and

non-spuriously with a certain outcome (Kenny 1979, 3-12). We can then carefully abstract the variables from their original context and apply them to another setting in order to determine whether the relationships among the variables persist. Indeed, an explanation becomes more credible if it can be generalized to a larger set of cases. It makes us more confident that the relationship that we are observing is not a coincidence (Ray 1995, 153).

Explanations are facilitated by theories. A theory is a set of coherent propositions designed to explain particular classes of events that is empirically falsifiable (Bueno de Mesquita 2006, 53-55). It begins from a set of axioms and assumptions and a detailed description of the propositions that flow from them. Theories also identify the mechanisms that help the researcher explain how the independent variables are able to produce their purported effects (George and Bennett 2004; Little 1991). Thus, explanations are related to predictions. Strong causal accounts are able to provide insights as to how things may develop in the future (McClendon 1994, 1-19).

2.2.1 Decision-Making Theories and Judicial Negation

Theories enable scholars to navigate through the complexities of the real world. They allow investigators to set aside certain aspects of the real world to focus on some variables that purportedly explain the phenomenon under consideration. Social scientists refer to these simplified versions of reality as *models*. Theories assist us in the identification of the key factors that will drive the model. In general, models attempt to explain a particular phenomenon through the identification of the most important variables. Social scientists seek to construct models that are “parsimonious”. For Ray (2003), parsimony means *effective simplicity*. It is a “characteristic of models shorn of complexity that is unnecessary to accomplish the explanatory task at hand” (p. 235).

But parsimony means more than simplicity. For King, Keohane, Verba (1994), the proper test of a model is not only the number of variables that it has but the degree of *leverage* that it gives over the problem at hand. The leverage of a model refers to its capacity to explain a political phenomenon. “If we can accurately explain what at first appears to be a complicated effect with a single causal variable or a few variables, the leverage we have over a problem is very high” (p. 29).

Thus, a parsimonious model is one that is effectively simple and yet gives the researcher tremendous leverage. It is *simple* but is not *simplistic*. Simplistic models employ a small set of variables to account for a phenomenon, yet also explain very little. Parsimonious models are “as simple as possible while still accomplishing the explanatory task at hand” (Ray 2003, 236).

In the judicial politics literature, the main approaches to judicial decision-making are conveniently referred as the legal, attitudinal and strategic models. I will consider the first two briefly and focus on the last approach, which will be employed rather extensively in the subsequent sections.

2.2.1.1 THE LEGAL MODEL

The legal model is founded on the assumption that the law is an autopoietic or self-contained system (Luhmann 1989). This does not mean that the legal system is impervious to political and cultural events. But the contention is that when ruling on cases, courts refer *primarily* to their own set of codes, rituals, and processes, rather than to some external reference like the views of other political branches or the public's opinion. Epstein and Kobylka (1992) referred to it as the “robes on” theory of judicial decision-making: When judges put on their robes, they are shielding themselves from any other influence, except for legal rules and standards (p. 11).

In essence, the legal model represents the traditional way of understanding how case facts are mapped with outcomes through the use of several interpretive mechanisms. In statutory interpretation, judges can discern the meaning of the law through plain meaning or legislative intent. In constitutional cases, another method is the examination of the Framers' intent. In legalism's extreme form, judicial determination is a mechanistic process. For Justice Owen Roberts, the “judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former” (*United States v. Butler*, 297 U.S. 1 [1936], 62).

In common law systems, these interpretations as well as their applications, are usually taken as binding to succeeding cases because of the principle of precedent or *stare decisis*. As long as the facts of cases A (the “source” case) and B (the “target” case) are similar, we can derive the law from Case A and use it to predict how Case B will be resolved. The continuity gives the law a sense of stability. Justice Scalia (1997) contended that “without such a principle, common law courts would not be making any ‘law’, they would just be resolving the dispute before them” (p. 7).

For the legal model, what motivates judges to side against the state? Its proponents contend that a court will inflict the government a loss in litigation when the *facts* and the *applicable law* are against it (Coffin 1994, 174-185; Schauer 1987). For legalists, judges cannot “make law”. Facts and the existing rules determine a judge’s decision, not considerations of power. “All cases”, said Judge Frank Coffin, “ought to be determined by the application of relevant authorities to facts properly determined” (1994, 176). When judges strike down the contentions of the government they are in effect saying that the state’s actions are contrary to “a precedent which *must* be followed; an analogy from which there is *no* escape; a public policy from which it would be *unthinkable* to depart” (Levy 1938, 85. Emphasis in text).

The legal model has been criticized on several grounds. The facts of the case do not speak by themselves. They are usually given form by the judge in order to support a conclusion that he has reached on other grounds (e.g. ideology). He selects and orders the information “so that they tell the story his way” (Levy 1938, 84). Justice Cardozo (1928) remarked that when judges come to write an opinion:

We gather our principles and precedents and analogies, *even at times our fictions*, and summon them to yield an energy that will best attain the jural end. If our wand has the divining touch, it will seldom knock in vain (p. 86. Emphasis added).

Critics also questioned the contention that judges are guided by plain meaning and stare decisis. They contend that judges “do not so much *follow* them as *use* them” (Levy 1938, 86; Llewelyn 1960). Consider for example, the instrument of plain meaning. In *Freytag v. Commissioner of Internal Revenue* (501 U.S. 868 [1991]), the Justices of the U.S. Supreme Court declared that “when we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances” (p. 776). However, language, by its very nature, is constantly changing and slippery. For example, in *Sullivan vs. Stroop* (496 U.S. 478 [1990]), the U.S. Supreme Court interpreted the term “child support” differently in two separate provisions in a single law. This was because in the first instance, it was defined using *Webster’s Dictionary*, while the second followed *Black’s Law Dictionary* (See Segal, Spaeth, and Benesh 2005, 24). Furthermore, recourse to legislative intent can also be problematic because the lawmakers could have purposely left a term vague in order to sidestep the law’s political ramifications, leaving it to the court to figure it out.¹⁷

Meanwhile, empirical examinations of stare decisis, at least in the U.S. Supreme Court, have not been supportive of the legal model. If precedents are controlling, argued Segal and Spaeth (1999), then those who have dissented from landmark decisions would vote with the majority in succeeding cases (or progenies). Using a sample of cases from the Warren Court up to the 1992 term, they found that justices very rarely do so. Out of the 148 dissenting votes in the previous case, only 15 (or 10 percent) acceded to the precedent in the

¹⁷ It also allows the legislature to see where public opinion stands. In case of an uproar over the way a statute has been interpreted, lawmakers can say, “That’s not what we meant!”

progenies. Subsequent analysis made by Segal, Spaeth and Benesh (2005) produced similar findings. They found that only 12 percent of the votes appeared to have been affected by *stare decisis*. Precedents do not seem to change the justices' minds or their behaviors (pp. 313-18).

Most recently, Friedman (2006) implored scholars of judicial politics to “take the law seriously”. He suggested that researchers examine not only the decisions on the merits but also the content of judicial opinions. Judges are socialized as lawyers, and the law is their common language. Thus, while jurists may have varying interpretations of the law, “to the extent that they take it seriously, the law shapes their decisions” (Epstein and Kobylka 1992, 12). However, given the limitations of the legal model, scholars have developed alternative theories to explain judicial decision-making.

2.2.1.2 THE ATTITUDINAL MODEL

The attitudinal model was founded on the theory of American legal realism. The realists expressed skepticism about the characterization of the adjudicative process as simply the process of squaring the facts with the relevant law. Judges have discretion, contended the realists, and subjective factors play key roles on the way cases will be disposed (Frank 1930; Llewelyn 1960). Attitudinalists adopted the realists' basic view of the legal opinion as the rationalization of a decision that has been decided on subjective grounds.

The central contention of the model is that court decisions can be predicted by juxtaposing the facts of a case and the judges' attitudes. Similar to the legalists, attitudinal modelers believe that case facts matter (Segal 1984; Segal and Reedy 1988). However, they differ on the manner in which the facts are mapped with outcomes. Legalists believe that

cases are determined by the application of interpretive mechanisms (e.g. plain meaning, *stare decisis*) to case facts; attitudinalists maintain that judges dispose of cases based on the interaction of the given facts of the case and the policy preferences of the judges.

Spaeth (1995) defined attitudes as “a set of interrelated beliefs about at least one attitude object and the situation in which it is encountered” (p. 307). The objects are the type of litigants that appear before the court (e.g. minorities, labor, insurance companies). The situation is the issue context in which the object found itself to be (e.g. gender discrimination, torts).

The model does not specify how the attitudes are produced. They may be the result of a judge’s upbringing, work experience or genetics. However, the attitude and values of a judge provides a reasonably coherent template for selecting the object who should win in certain type of situations. Thus, in the American context, criminal defendants are more likely to win in a court that is dominated by liberals rather than by conservatives. For the attitudinalists, the law does not control the manner in which the cases are disposed; the law is marshaled to justify a result that has been reached on some extra-legal basis.

For the attitudinal model what motivates judges to side against the state? Its supporters would argue that judges will go against the government in a certain case if he or she is ideologically partial towards an object in a given issue area. Courts with a liberal median judge will support the position of the defendant in criminal cases; while conservative tribunals will strike down government actions that enhance the rights of labor in economic cases. Judges are not limited by precedents and analogies. *They will use precedents and analogies to support the result that they favor.* “Repeatedly, when one is beset”, said Justice

Cardozo (1928), “there are principles and precedents and analogies which may be pressed into the service of justice if one has the perceiving eye to use them” (p. 59).

Attitudinalists pushed for a systematic examination of the law based not on the judges’ words, but on their behavior. This is another influence of the legal realists who admonished lawyers and scholars to go beyond what the judges say. Oliphant (1928) contended that “[a] study with more stress on their *non-vocal behavior*, i.e., what the judges actually do when stimulated by the facts of the case before them, is the approach indispensable to exploiting scientifically the wealth of materials in the cases” (pp. 161-2). The rise of the behavioral movement in political science provided the impetus, as well as the technology, for students of judicial politics to study the actions of judges in a scientific manner (Schubert 1965; Rohde and Spaeth 1976).

Empirical studies of judicial behavior in the American context have demonstrated rather strong support for the contentions of the attitudinal model. The influence of judges’ preferences on case outcomes have tended to be robust even in the presence of other explanatory variables (Baum 1997; Howard and Segal 2002; Segal 1997). Thus, any plausible model of judicial behavior in a comparative context is expected to incorporate some measure of the courts’ policy preferences.

2.2.1.3 THE STRATEGIC MODEL

The strategic approach asserts that judicial decision-making is not simply a function of determining how the facts of the case square with the law or the ideological predisposition of the judges. It maintains that the positions of the other political actors, and the political environment, affect the way courts dispose of a case.

The model derives most of its assumptions and contentions from the theory of rational choice (Ordershook 1992, 1-11; Shepsle and Bonchek 1997, 15-35). Its starting point is the assumption that a judge possesses particular goals. Among these are to move the law closer to his viewpoint, to be promoted to a higher court, or to develop an excellent reputation among colleagues (Helmke and Sanders 2006). Whatever it may be, these objectives are pursued through interaction with other relevant actors who have their own goals and preferences. These interactions are governed by rules, both formal and informal. Judges maximize their objectives by choosing a course of action that secures the largest payoff given the strategies of other actors and the given set of constraints. These are the central contentions of the strategic approach to judicial decision-making (Epstein and Knight 1998, 1-21; Maltzman, Spriggs, and Wahlbeck 2000).

Scholarly works that adopt the strategic perspective can be roughly divided into three categories: 1) those that examine how justices deal with one another (the “collegial game”); 2) those that focus on the relationships between the lower and higher courts; and 3) those that scrutinize the behavior of the judiciary vis-à-vis other relevant political forces (e.g. the executive, legislature). I will focus my discussion on the third type of research which is also referred to as the “separation of powers” (SOP) model. Its five key components are discussed below.

2.2.1.3.1 JUDICIAL MOTIVATIONS

The first component of the strategic model deals with the question of the goals that judges value. Strategic accounts in the American context often assume that the ends that magistrates pursue are ideological. They are considered to be single-minded seekers of legal

policy; they are “legislators in robes” (Shepsle and Bonchek 1997, 418). It is quite possible for judges to pursue other goals. The rationality assumption only presumes that the actors can rank-order their preferences; that they follow the principle of *transitivity*: if a person prefers *a* to *b*, and *b* to *c*, then she prefers *a* to *c* (Elster 1986, 2). This condition enables strategic theory to deduce consequences for the collectivity on the basis of the order of preferences held by the individuals involved.

However, in authoritarian systems, the judges’ goals may be as basic as personal survival or job security. It is severely difficult (though still possible) for judges who are ideologically opposed to the government to vote their sincere preferences during a dictatorship. Dissent under concentrated power is costly (Fraenkel 1960; Toharia 1975). The prospects of being harmed (or their families being hurt) are quite considerable. A judge can also be forced to resign. Thus, physical and job security may only be achieved at the cost of acquiescing to the dictatorship in the interim, and striking against it when its demise is imminent.

Judges can also come to deeply value the continued existence of the judiciary as an *institution*. Judges usually come to affiliate themselves with the court and exhibit concern for its maintenance. “Officials tend to develop a sense of personal affiliation and stewardship for the institutions in which they serve” (Smithey 2004, 6).

Jurists can also be concerned with how history is going to judge them. They become motivated with leaving a record of objectivity and integrity. There is ample evidence to support the contention that judges care very much about their reputation and legacy (Posner 1990; Schauer 2000).

2.2.1.3.2 INTERDEPENDENT DECISION-MAKING

A situation demanding choice among various alternatives is only considered strategic when at least two players are involved. “Game theory models individual decision making when people’s fates are interdependent, when people are aware of their interdependence” (Ordershook 1992, 9). Unlike the legal and attitudinal perspectives, the strategic model sees judging as an activity that is *constrained* by other actors. For legalists, facts are mapped to outcomes through recourse to some interpretive standard, whether it is *stare decisis* or legislative intent. In its extreme form, adjudication is viewed as a mechanistic process that is immune from subjective or political influences (Pannick 1987, 141-69). Meanwhile, attitudinalists contend that facts are mapped to outcomes through the judges’ ideology. Judges vote their preferences sincerely, quite impervious to the positions of other actors. Rational choice theory contend that judging is best analyzed as a game, defined as “any rule-governed situation with a well-defined outcome characterized by strategic interdependence” (Gardner 2003, 3).

In separation of power models (SOP), the game of judicial review is usually played by the court with the executive, the legislature, or both. We can consider these bodies as unitary actors, capable of being represented by the median judges or lawmaker. The assumption is that the judiciary considers the preferences and capabilities of other relevant actors before making a selection. Given the information about the other players, the court chooses the course of action that maximizes its payoffs (Marks 1988; Shepsle and Bonchek 1997, 422-31).

2.2.1.3.3 RULE-GOVERNED SITUATIONS

The interactions of the players in the strategic model are governed by a system of rules. Ostrom (1986) defined rules as “prescriptions commonly known and used by a set of participants to order repetitive, interdependent relationships. Prescriptions permit which actions (or states of the world) are *required, prohibited* or *permitted*” (p. 5). Rules structure the strategies that a set of actors may choose. They identify the players, the range of permissible actions, and the sequence of moves. Combining the assumptions on human nature with the action parameters enables the strategic approach to identify the equilibrium, or the state where the actors cannot change their strategy without losing some type of pay-off (Ordershook 1992, 114-9).

The rules may be formal or informal. Formal rules are explicit and predefined prescriptions. Examples of these are constitutional and statutory laws. These rules are amenable to modeling because they are common knowledge. We can assume that participants are aware of who they have to deal with, what they can do, and when it is their turn to move. Meanwhile, North (1990) contended that the calculations of political actors are also affected by informal rules which he defined as routines or habits that are derived from custom, culture or tradition (p. 83). His concept is most relevant to the study of judicial decision-making in the context of authoritarian regimes or new democracies. In these types of polities, explicit protections to judges (e.g. security of tenure, fiscal independence) may exist but its effects may be attenuated by other factors (e.g. ethnic relationship, dictator’s willingness to use violence).

In SOP models, the courts have to deal with the executive, the legislature, or both. The judiciary is considered the weaker branch in these games because it does not have the

final move. For example, under the 1987 Philippine Constitution, a bill approved by both legislative Houses becomes a law when signed by the President. However, it may be challenged before the Supreme Court, on grounds of incompatibility with the Constitution, which explicitly grants the Supreme Court the power to “determine whether or not there has been a grave abuse of discretion” on the part of any branch of government (Article VIII, Section 1). When the court takes its turn, it may choose to affirm or to invalidate. While this disposes of the case at hand, the legislature and the executive can retaliate by stripping the court’s jurisdiction, freezing its budget, or reducing the court’s size.

2.2.1.3.4 COURTS AS SANCTION AVERSE

Judges play the separation of powers game in a context characterized by interdependence and a predefined set of rules. The “real action” in game theoretic models, said Levi (1997) “does not...come from the internal considerations of the actor but from the constraints on her behavior” (p. 25). However, the next assumption separates the strategic approach from the other models of decision-making: courts are sanction averse.

The legal model contends that courts dispose of the case according to what the law demands regardless of the position of the other branches. In the pure attitudinal model, cases are generally determined by the court’s ideological predisposition on the object and its situation, regardless of the position of the other branches. For the strategic model, the court is affected by the political environment, and will generally choose the course of action that allows it to choose the case outcome closest to its own preferences, while entailing the least risk to its legitimacy and continuity as an institution. Thus, in cases involving statutory interpretation, courts are expected to select the options that avoid legislative overrides or

counter-attacks from the legislature, like jurisdiction stripping (Ferejohn and Weingast 1992; McNollgast 1995).

For the strategic model, when do judges side against the state? Proponents of this decision-making theory would argue that judges, in general, will be supportive of the rulers (Helmke 2003; Scribner 2003). Magistrates whose goals conflict with those of the government will wait for political opportunities to ripen before they strike against the state. Empirical evidence exists to support the contention that the possibility of reversal causes the court to select a path of action that is different from what it would have chosen if it had the prerogative to decide alone (Epstein, Knight and Shvetsova 2001; Ginsburg 2003). Judges are sensitive to their political environment. They may invalidate state action only when it is *viable* to do so; when they believe that they can withstand a political assault. If such mechanisms are absent, they are likely to uphold the state's position or refuse to take on the case. "Courts act strategically...*vis-à-vis* political bodies, calculating the political context in which they operate so as to avoid provoking a response which will close all access, remove jurisdictional authority, or reverse their decisions" (Alter 2001, 46).

For example, the judiciary that operated during the Martial Law period in the Philippines was heavily criticized afterwards for not standing up to the Marcos regime. However, a justice retorted that in a Martial Law regime, such temerity is equivalent to institutional suicide:

What the critics would want is to have a frontal clash with Mr. Marcos. In a Martial Law regime that's not practical, 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 it would have been abolished (Haynie 1994a, 758. Emphasis added).

2.2.1.3.5 EXTENT OF INFORMATION

Strategic models consider judicial decision-making as an activity that is constrained by the preferences and capabilities of other political actors. Most of these models assume that the courts possess perfect information. This means that the judiciary, through various instrumentalities (e.g. media, legislative records, briefs) is able to procure clear and detailed information about what the legislature or the executive prefers. This allows the model to produce predictions as to how the court will dispose of a case. In reality, much of the information obtained by the judges is full of noise. If courts are sanction-averse, they will seek to obtain as much information as they can about the preferences of the other players.

2.3 *Domesticating Power*: Modeling Judicial Negation

The general model that I develop below includes a set of contextual, attitudinal, and case variables to account for when and why judges limit the exercise of state power. Most of the assumptions and contentions of the model of judicial negation that is employed in this dissertation are derived from the attitudinal and strategic models of decision-making. I contend that courts duly consider the configuration of the political environment when ruling on social disputes, particularly those that involve the government. The model centers on the *political risk* that is involved in judicial decision-making.

In dictatorial systems, rulers have two instruments at their disposal to bend the judiciary to their will: *sanction* and *selection* (Dahl 1957; Murphy 1964). In the first instrument, the state reacts to an unfavorable decision by punishing the judiciary. It can impose institutional or personal punishments (Ginsburg 2003, 77-81). Institutional sanctions may take the form of reducing the court's jurisdiction, freezing its budget, or impeaching the magistrates. Informal sanctions include physical threats and intimidation. The government can also simply refuse to comply with the court's ruling altogether.

The second method that can be employed by the rulers to control the judicial branch is the appointment process. By staffing the court with people who are aligned ideologically with the government, adjudication becomes a principal-agent relation. For the state, control through selection is a less costly way to keep the court in lockstep with its will. The state is relieved of the need to constantly monitor the court and to mobilize its resources to respond to a court decision that it dislikes. The judiciary is employed as a legitimation tool; to stamp

the action of government with the veneer of legality. Ferdinand Marcos locked Congress upon the imposition of Martial Law but kept the Supreme Court open. He then filled the bench with supporters, including his law school classmates. He then countered criticisms of his dictatorial rule by saying:

The power of the president is not absolute...I submitted myself to the Supreme Court, not once but several times. *I would like to know if any dictator would do that* (cited in Muego 1988, 101. Emphasis added).

I contend that courts are able to negate the contentions of the government in litigation when political and economic developments weaken the ability of the state to sanction the judiciary or make the existing incentive structure more favorable to negation. Political opportunities to negate may be brought about by the emergence of divisions within the power elite or the entry of foreign investors. Exogenous shocks can also change the distribution of incentives and make the courts change their strategy toward the current government. For example, the judiciary can begin to treat the contentions of the existing government more negatively when it begins to lose power (see Helmke 2000, 2002, 2004). Rulers can also signal to the court that it is willing to be bound in certain type of cases (e.g. economic cases).

2.3.1 Attenuating Sanction

2.3.1.1 GOVERNMENT FRAGMENTATION

Courts are emboldened to rein in the power of the state when structures that dilute the government's capability to sanction the court emerge. For example, the development of factions within the authoritarian leadership makes it more difficult for the rulers to coordinate their actions to respond to an unfavorable decision from the bench. The fragmentation opens up opportunities for the judiciary to go against the state's contentions in litigation as the possibility of an attack from the rulers, whether legal or extra-legal, becomes less likely. In authoritarian polities, judges can also view the internal divisions as signs of weakening support to the existing system of rule. I will refer to institutions that embolden courts to limit the exercise of governmental power as "influence enabling structures".

Strategic theory posits that in settings where power is unified in the hands of one person or party, courts are less likely to negate. This model was first formally developed by Brian Marks (1988) and has been referred to as the "Marksist" model (Segal 1997). For heuristic purposes, we consider a game with three actors, a Court (**C**), a Legislature (**L**), and an Executive (**E**). For this example, I take the assumptions that are usually made in the separation of power models:

1. *Political actors have preferences.* In SOP models, the preferences are usually mapped in an ideological continuum. For heuristic purposes, we take a left (liberal) and right (conservative) ideological spectrum. The preferences of the

actors are single-peaked. This means that the further away is a point from their ideal or bliss point, the lesser they like it;

2. *There are at least two players.* For our purposes, we will consider them as unitary actors. This means that their ideological positions can be represented by the median judge or legislator;
3. *Courts are sanction averse;*
4. *The government has the last move;*
5. *Actors have perfect information.*

Let us consider a case that asks the court asking to review an action that was made by an executive body that handles labor issues. This is known as a request for statutory judicial review. The two other branches of government are controlled by a single party, a situation usually referred to as unified government (**L/E**). In authoritarian systems, both executive and legislative power is often fused in the dictator. Let **Q** represent the status quo. This represents the action that was made by an executive agent.

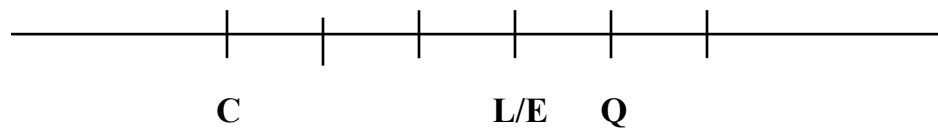


Figure 2.1 Judicial Negation under Unified Government

If the court makes a decision at point **C** (its ideal point), the government is most likely to pass a law that overturns the court's interpretation at point **L/E**. This is because the government's utility at point **C** is less compared to its ideal point (Assumption 1). In this type

of situation, strategic theory predicts that the court will decide the case at point **L/E**, even though that is quite distant from its bliss point. This is because courts are sanction-averse (Assumption 3). It knows that if it negates at **C**, it is not difficult for the government to simply pass a new law to override its interpretation (Assumption 5). Even worse, overruling at **C** can open the court to punishment by **L/E** through removal of its jurisdiction to decide on labor cases.

However, the injection of an exogenous shock provides the actors with the opportunity to change their strategies. For example, let us consider the possible effect of an opposition victory in the presidential elections, while a second party retains control of the legislature. The assent of both branches is required before a law is passed.

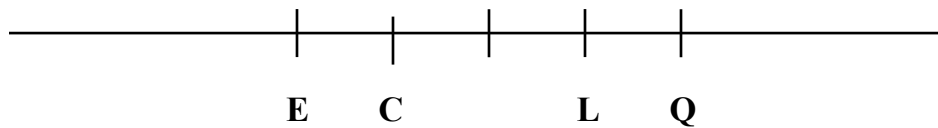


Figure 2.2 Judicial Negation under Divided Government

The division among the rulers provides the court with the opportunity to implement its ideal point, **C** (Assumption 1). This is because the possibility of a government override or retaliation against the court is low due to the fragmentation of the national government. In this instance, an attempt by **L** to pass a law overturning **C**'s interpretation may be vetoed by **E**. The coordination problem produced by the development of division within the government allows the court to invalidate the action of the agency at **C**. In comparative politics, there is some support in the literature for the contention that fragmented power equates to more aggressive courts (Rios-Figueroa 2004; Chavez 2004).

Power fragmentation can exist in an authoritarian regime. According to Linz and Stepan (1986, 38) two central qualities distinguish this type of polity: “limited political pluralism” and “distinctive mentalities”. Powers in authoritarian polities are not distributed in a monocratic manner. They are usually divided into cliques or blocs that interact within ill-defined but predictable ways. These groups are not united by some overriding doctrinal system because an “exclusive ideology would break the equilibrium among the diverse support groups” (Barros 2002, 26).¹⁸ They don’t have coherent ideational systems, but mentalities: “ways of thinking that are more emotional than rational, that provide noncodified ways of reacting to different situations” (Linz 2000, 162).

In their influential analysis, O’Donnell and Schmitter (1986) asserted that the transition to democratic rule is usually facilitated by the division of the ruling coalition into “hard liners” and “soft liners” (pp. 15-21). Both groups may share similar perspectives on the initial years of authoritarian rule, but differ on the manner of retaining their grip on power. The first group carries the belief that the continuation of authoritarian rule is not only desirable but *possible*, even in the face of increasing domestic opposition to its rule and international pressure for liberalization. Meanwhile, the soft liners believe that the government’s hold on power must eventually be based on some form of popular legitimacy. They advocate for the creation of some form of popular assembly, and greater restraint on the use of state violence against the opposition. To placate this faction within the ruling coalition, elected assemblies are usually established within the context of authoritarian rule.

To illustrate the effects of limited pluralism on the judicial negation, let us consider a situation where the authoritarian rulers have broken up into factions (Faction 1 [F_1] and

¹⁸ For Linz, this is the main difference between authoritarian and totalitarian regimes. The latter have a leadership structure that is united and committed to enacting an elaborate and guiding ideology (1975, 268-70).

Faction 2 [F_2]). The second faction believes that the regime should begin to demonstrate greater respect for human rights in order to blunt domestic and international criticism. Faction 1 believes that regime opponents must not be treated softly as it may send signal to other groups that the regime is weakening.

A case has been filed invoking the right of the writ of habeas corpus. If the court (C) knows that Faction 2 is to its left (Assumption 5), and Faction 1 and the status quo (Q) is to its right, it is able to decide at its bliss point of C . Thus, even though the government has the last move (Assumption 4), the development of “limited pluralism” produces a coordination problem that allows the court the opportunity to decide at C .

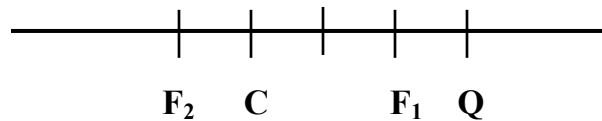


Figure 2.3 Judicial Negation under “Limited Pluralism”

Without a firmly formed ideology to mobilize support for itself, authoritarian leaders usually rely on some other means to maintain themselves in power, like employing a subservient court to legitimize its actions and try political opponents (Shapiro 1981; Schmitt 1985). The emergence of new power blocs, or the heightening of differences in their mentalities, can fragment the leadership and constrain the ability of the government to retaliate. Thus, I hypothesize that:

H_1 : *When the government fragments, courts are more likely to negate the government’s position in litigation.*

2.3.1.2 ADVERSE EXTERNAL RESPONSE

The literature on “credible commitments” demonstrated that when domestic leaders decide to open their polities to the global economy, the response of other states as well as other investors is often one of skepticism, unless the state can convince them that it will protect property rights and will not renege on its promises (Leeds 1999; Barros 2002). Moustafa (2003) and Smith (2005) made the observation that the international context can provide courts with the capacity to negate by imposing a cost on state retaliation.

Increasing flows of foreign direct investments deter state reprisal on the judiciary because it may send a negative signal to investors, who may respond to such an attack by pulling out. This is the logic that explains how investments can facilitate state self-binding. To keep investments in the polity, governments are forced to become more tolerant of the courts. Thus, Maveety and Grosskopf (2004) contended that “international pressures, while constraining courts, can thus free them from national constraints while allowing them to imprint their own vision” (p. 463).

The imposition of a cost to retaliation provides the court with the opportunity to rule against the government with greater confidence. It creates a “tolerance range” within which the government permits unfavorable court decisions. Consider a statutory review case with three actors, an investor (**I**), a court (**C**) and a parliament (**P**). Let **Q** represent the status quo. The entry of the investor allows the court to move the policy from **Q** to **I**. It creates the

tolerance range $I + P$. The government is deterred from sanctioning the court due to fear of capital flight.¹⁹

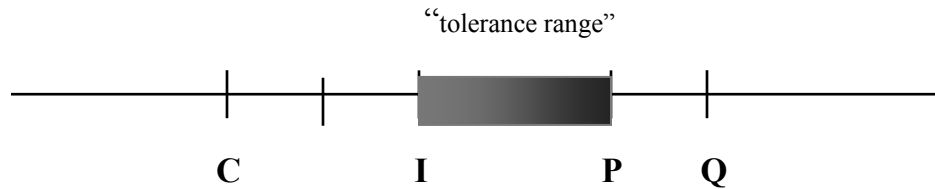


Figure 2.4 The Effect of Foreign Investments to Judicial Negation

The court cannot invalidate the government action at C because I 's bliss point is closer to P than C . Thus, it knows that if it overshoots, it will be overridden by P by passing a new legislation at I . It is more likely that C will decide at I (in this model, Point I is a stable equilibrium). It stands because the government perceives that attacking the court will result to adverse consequences. "By honoring adverse judicial decisions in controversial cases," asserted Daniel Farber (2002), "the governing coalition shows that it has the self-control to maintain a long-term strategy of adherence to the rule of law even under political pressure" (p. 93). The greater the amount that it can lose, the more restrained is the state. Thus, I hypothesize that:

H_2 : *When foreign investments increases, courts are more likely to negate the position of the government in litigation.*

¹⁹ For this to occur, the investor is assumed to be have a reputation for keeping it word (its commitments are credible).

2.3.2 *Overcoming Selection*

Governments can also control the judicial branch by *selection*, that is, through the appointment process (Dahl 1957; Ramseyer and Rasmusen 2003). Dictators can bring the judiciary in line by filling it with people who share their views. In new democracies, dominant parties obtain maximum flexibility in their policies by packing the bench with their supporters. Thus, I contend that negation is more likely at the beginning of a new regime, when the new leaders are confronted by judges who are not personally beholden to them. The rate of negation eventually drops when the government begins to remake the composition of the court through appointments. However, selection may be overcome by sanction. Dictatorships can collapse. Dominant parties in new democracies can lose elections. When political turnover becomes imminent, the threat of sanction comes not from the present regime but from the incoming one. This provides an incentive to the court to go against the current government (Helmke 2005).

2.3.2.1 *SINCERE NEGATION*

If judges are viewed as political actors with political preferences, then the rate of negation should be higher at the beginning of a new regime. When autocrats come to power, they usually seek to employ the court as a governance tool. If they close the judiciary or summarily change its membership, rulers lose the opportunity to gain some semblance of legitimacy in the eyes of the domestic population or the international community. They can keep the courts functioning and control it through the threat of sanction. They seek to eventually bring the court in step with their interests through incremental replacement (see Tate 1993).

Two mechanisms enable the courts to remain relatively independent of the government at the onset of authoritarianism. First, judges may consider the situation as a temporary phenomenon. In fact, the court may be able to weaken the political standing of the government by deciding against it when its rule is challenged (Bernas 1990; Schatz 1998). Second, the opposing judges have the power of numbers. Rulers are usually reluctant to challenge a decision that has been delivered by a unified court. Decisions that have been rendered by divided courts are readily employed by authoritarian leaders to augment their political standing.

In the case of the Philippines, a clear example is the case of *Javellana vs Executive Secretary* (50 SCRA 30 [1973]). The case involved the legitimacy of the 1973 Constitution upon which the dictatorship has founded its legitimacy. The charter, which was completed by a constitutional convention under the exigencies of Martial Law, allowed Ferdinand Marcos to continue as president and granted him broad discretion in the exercise of military powers. The issue at bar was whether the ratification of the charter through citizen's assemblies, instead of a formal referendum, was valid. The court asserted its right to review the case, but it was hopelessly divided. No opinion obtained the six votes necessary to become controlling law. Because of the incapability of the court to make up its mind, the 1973 Constitution was considered to be "in force and in effect". The Marcos regime wasted no time in utilizing *Javellana* to defend its rule in both domestic courts and before the international community (Vejerano 1999, 54-64; Tate 1992, 115-8).

After a transition to authoritarianism, despots inherit a court composed of magistrates who are not personally beholden to them, and thus are more likely to *oppose* their policies. In the attitudinal explanation, negations should tend to cluster at the onset of authoritarian

rule. In this view, the court comes to represent the interest of the previous holders of political power. The bench becomes a bastion for defending the interests of the old rulers. Hirshl (2003) referred to this phenomenon as “hegemonic preservation”. In the long run however, rulers are expected to have the opportunity to appoint departing members of the bench and to craft the court closer to their own image. Negations should steadily decline when the current government begins to have its own Justices.

H₃: *Courts that are ideologically opposed to the government are more likely to rule against the government’s position in litigation.*

2.3.2.2 POLITICAL TURNOVER

Under the traditional strategic model of judicial decision-making, the threat of sanction to the judiciary comes from the *current* government (Eskridge 1991; Marks 1988). Since judges are considered risk-averse, they are likely to jettison their sincere preferences when the rulers have the capability to overturn their decision or to sanction them through court-curbing measures. Ideologically-opposed courts are constrained in the short-term by the threat of sanction, and controlled in the long-term by selection.

Helmke (2005) made the compelling contention that under certain conditions, sanction can overcome selection. One such situation is when the current government is seen to be on the verge of losing control. The threat to the court now comes from the *incoming* government. “To the extent that the preferences of the outgoing and incoming government diverge, judges who wish to avoid sanctions will face an incentive to begin ruling against the

government as long as it begins to lose power” (2000, 19). This is the core contention of her theory of strategic defection.

Under the attitudinal explanation, the rate of negation should decline monotonically when the number of judges who are negatively predisposed ideologically to the government diminishes. Institutional protections (e.g. security of tenure, fiscal independence) make judges impervious to changes at the beginning or end of regimes. *However, Helmke’s theory makes theoretical sense in situations where these protections are fragile or absent.* Courts rule against current dictators or dominant parties not because they disagree with the views of the current government, but because they fear sanctions from future rulers. This theory has the virtue of being able to explain how negation can occur even when majority of the judges in the court were appointed by the current rulers. Thus:

H₄: *When political turnover is imminent, courts are more likely to rule against the government’s position in litigation.*

2.3.3 State Consent to Constraint: “Manufactured Activism” and Economic Cases

Fraenkel (1960) developed the argument that courts in dictatorial systems tend to follow their own set of norms and rules in economic issues. He described the phenomenon as the “dual state”. In criminal and security matters, the government operate with maximum discretion (the “prerogative state”) while the courts tend to look and follow its own set of precepts and rules in economic cases (the “normative” state). His contention has been

supported in the works of Jayasuriya (2000) on Malaysia and Singapore, and by Moustafa (2003) on Egypt.

The judiciary may come to aggressively invalidate the position of the state in litigation because the government allowed itself to be limited. The government consents to be bound in certain type of cases because it obtains some benefit from the court's negative exercise of judicial review (Maravall and Przeworski 2003) For example, the dictatorship may refrain from attacking the court in response to invalidations of actions by its agencies in economic cases (e.g. property expropriation) because the rulers can then point to those negative decisions as evidence of the operation of the "rule of law" (Jayasuriya 2000; Moustafa 2003).

On the other hand, the judiciary may come to aggressively negate the contentions of the government in economic cases because it is seeking to generate support and trust from the public. Courts that are predominantly staffed by judges who are appointed by dictators can "manufacture" legitimacy by consciously granting certiorari on economic cases and then assertively dealing the government with losses in those cases. In so doing, the Court develops a public perception of independence by virtue of its "activism" in economic cases. The government may relent to such "activism" in economic cases because it can facilitate regime stability. When the judiciary comes to be considered by aggrieved groups as a viable institutional site for interest advancement, litigation can become the preferred method to obtain redress for grievance rather than violence.

For example, organized labor has been usually identified by military regimes as the primary source of dissent to its political and economic policies, and is thus usually physically targeted by the state (Mason and Krane 1986; Pion-Berlin and Lopez 1991). The court may

champion the interests of organized labor or individual workers in economic cases to channel their grievances into regularize channels. Adjudication facilitates regime stability by being a credible “final resort” for those who have lost or have been marginalized by the political process (Kirchheimer 1961, 259-99; Friedman 1975, 193-223). The worker is allowed to bring and to win against the government to court because it makes him less willing to bear arms (Holmes 2003). I refer to this as the “safety valve” theory of judicial decision-making.

Tate and Sittiwong (1986, 16-17) provided some evidence that the Supreme Court in the Philippines has ruled against the government in compensation and benefits cases in the early years of Martial Law (1972-81). The dictatorship permitted this even though the greatest opposition to the dictatorship stemmed from organized labor. In fact, some of the unions acted as fronts for the Communist Party of the Philippines (CPP). However, the court largely treated the position of the Compensation Commission in wage-related cases negatively. “In ruling against the Commission’s denials in every instance it chose to hear, the court was actually acting quite consistently with the desires of the Marcos administration” (Tate and Sittiwong 1986, 17).

Herron and Randazzo (2003) argued that even in societies that have made the transition to democracy, we should see the same pattern: the courts should also be more active in restraining the government in *economic* issues (p. 431). The bench will be less willing to defer to the government in cases that allege violations of property rights as a reaction to the employment of expropriation as political punishment during the authoritarian regime (Teitel 2001). Democratic leaders inadvertently overstep legal bounds in their zeal to turn around the floundering economies that dictators have bequeathed to them. New leaders permit the development of an independent court in economic matters because it sends

positive signals to the domestic population and potential investors of its willingness to abide with the “rule of law” (Farber 2002, 91-94). In their study of the post-communist constitutional courts, Herron and Randazzo provided some evidence that the judiciary was indeed more likely to overrule the government’s economic policies after the collapse of authoritarianism (2003, 433).

H₅: *In economic cases, courts are more likely to negate the position of the government in litigation.*

2.3.4 Interaction Relationship

Viewed from a strategic perspective, an action is the result of the interaction between willingness and opportunity (Cioffi-Revilla and Starr 1995). “Willingness” is the position taken by a decision-maker among different alternatives after calculations of cost and benefit. Meanwhile, the term “opportunity” refers to the possibilities that exist in an environment given a set of constraints (Most and Starr 1989, 23-35).

The effects of court’s political preference may not be monotonic. Courts with members who are not beholden to the dictator and politically predisposed against the dictator may fear violent repercussions from the state in case of negation. Thus, they wait for the development of opportunities that will allow them to carry out their preferred policy position (Scribner 2003; Iaryczower et al. 2002). There is support within the comparative politics literature contends that an interactive relationship exists between court’s political preferences and political fragmentation (Barros 2002; Rios-Figueroa 2004). Justices who do not owe any

loyalty to the dictator may choose to negate only when they have seen division among the ruling elite.

H₆: *Courts that are politically opposed to the dictatorship are more likely to negate the government's position in litigation when there is political fragmentation.*

Judges and their audiences are both “apt to forget”, said Cohen (1935), “the social forces which mold the law, and the social ideals by which the law is to be judged” (p. 812). The purpose of the model that has been presented in this chapter is to identify the social forces that mold the decisions of the courts to either jettison or advance their interests. This brings the model squarely within the ambit of the strategic vision of judicial decision-making. Levy (1938) expressed the view that a judge “works upon the social stuff that is there and ‘brings it nearer to his heart’s desire’”. The contention of this dissertation is that the court’s ability to bring the law closer to what it desires will often involve astute calculation of the political risks that is involved when it makes its decision, as well as the potential rewards.

CHAPTER THREE

REGIME TYPE, DURATION, AND MECHANISM SELECTION: HOW DICTATORS INHIBIT JUDICIAL NEGATION

*If you must break the law, do it only to seize power:
in all other cases observe it.*

--**Julius Caesar** (cited in Guterman 1966, 83)

3.1 Introduction

Judicial negation is best characterized as a political game that is played by dictators and the courts. In Chapter Two, I developed a general theory that explains how negation becomes possible even in situations of concentrated power. In this chapter, I develop the argument that the possibilities for judicial negation vary according to the type of dictatorship and duration of the regime. These two variables strongly influence the mechanisms that will be adopted by the regime to keep the courts in check. If judicial negation is indeed a game, it is important to understand how dictators strike back.²⁰

This chapter is composed of three major sections. In the first part, I conceptually distinguish between three types of political orders: democratic, authoritarian, and totalitarian regimes. Among dictatorships, there is greater potential for courts to constrain the state under authoritarianism. Bereft of an overriding ideology to justify its rule, authoritarian leaders seek to legitimize their power through legal validation by the judiciary. This is one of the

²⁰ I thank Bernie Grofman for this suggestion.

reasons why the court system and its personnel usually survive at the onset of authoritarian rule (Shklar 1986; Pereira 2005).

However, in order for the law to act as an instrument of legitimation, it must be dispensed by relatively autonomous courts (Tate 1993; Moustafa 2003). The challenge for dictatorships is to obtain and maintain legality while curbing the policy influence of the judiciary. Thus, in the second part of this chapter, I identify the mechanisms that are available to dictatorships to maintain their control over the judicial institutions.

Finally, I develop a diachronic model to explain the relationship between mechanism selection and regime duration. The contention is that the game of judicial negation is played in a political field that changes over time, and is shaped largely by the challenge that is being confronted by the regime and the mechanism that it has chosen to control the judiciary. Within those constraints, courts seek to keep the state within the bounds of law. Their continued relevance and utility, to the ruler and to the ruled, will ultimately depend on their ability to establish and maintain a level of autonomy from both.

3.2 Key Terms and Concept

3.2.1 *Political Regimes: A Heuristic Categorization*

The term “political regime” is defined as the set of rules that regulate the repeated interactions of political actors (Tilly 2006, 19). It determines “who has access to power and how those who are in power deal with those who are not” (Fishman 1990, 428; Tilly 2006, 19). Political scientists have divided modern political regimes into three types: democratic, authoritarian, and totalitarian systems (Friedrich and Brzezinski 1956; Linz 1975; Perlmutter 1981). They are distinguished from one another according to the extent of pluralism within the governing elite, and the extent of participation among the ruled population (Linz 1970, 298; Munck 1998, 26-31).

Democracies are polities where leaders are chosen through contested elections. In the minimalist formulation, a political regime is considered democratic if government leaders are selected through contested elections where a significant proportion of the adult population is allowed to participate (Schumpeter 1947; Dahl 1971; Huntington 1990). The greater the percentage of the adult population that is denied the right of suffrage, the less democratic is the regime. Thus, despite the fact that there were contested elections in South Africa from 1910-1994,²¹ it was not considered a democracy because they were contested only among the whites. Almost eighty percent of its adult population (the blacks) was deprived of the right of suffrage (Thompson and Prior 1982, 77-79).

²¹ Africans were allowed to vote in the Cape in from 1910-1936 as part of the compromise to allow the suffrage laws in the four colonies to remain in force after the Union (Hahlo and Kahn 1962, 164-66). African voters were excised from the rolls of voters in the Cape in 1936.

In democracies, political power is contested by a plurality of actors (See Table 3.1 below). The political process is open to numerous groups and social forces (Linz 2000, 161). Following Przeworski et al. (1997, 16-18), an election is considered “contested” if the following conditions apply:

- 1) *Ex ante uncertainty*. This means that there exists some positive probability that those who are currently holding the reins of government can lose. Thus, one-party systems are by definition, undemocratic.
- 2) *Ex post irreversibility*. After the elections, the winners are permitted to take over the government;
- 3) *Repeatability*. Leaders are chosen through routine elections. Victorious persons or parties are unable to use state power to prevent their adversaries from obtaining or reclaiming future control of government. Essentially, democracy is “institutionalized contingency”: all results are temporary.

Table 3.1 Classification of Regimes

REGIME TYPE	RULERS: EXTENT OF PLURALISM	SUBJECTS: EXTENT OF PARTICIPATION
<i>Democratic</i>	Nearly unlimited	Voluntary and Open
<i>Authoritarian</i>	Restricted to certain groups (limited pluralism)	Discouraged; Subjects are depoliticized
<i>Totalitarian</i>	Monistic	Mandatory; Subjects are intensely and continuously mobilized

Sources: Brooker (2000), Linz (2000), Munck (1993)

For the purposes of this dissertation, regimes where leaders are not chosen or removed through contested elections and where a significant portion of the population is denied the right to participate in those elections will be considered *dictatorships*. Dictators can gain and/or lose power through extra-legal means.²² The term dictatorship has gained wide currency in contemporary scholarship for denoting all political systems that are not democratic. This was largely due to the efforts of cross-national comparativists, international relations scholars, and public choice scholars who adopted minimalist approaches to

²²In contrast, democratic regimes possess legal mechanisms for punishing or removing those who are in power. Besides contested elections, leaders can also be censured or impeached. These accountability instruments enable democracies to reprimand or remove government leaders without fostering regime instability. The purging of the incompetent and the unpopular becomes part of the social routine (Przeworski et al. 2000, 18-35).

distinguish regimes (Przeworski et al. 1997; Bueno de Mesquita 2003). Without contested elections, Wintrobe (1998, 106) mentioned four ways through which non-democratic leaders are usually deposed:

1. by a cabal of associates, including those closest to the leader;
2. through the loss of support of powerful bureaucracies, especially the army;
3. by a revolt of the mob;
4. through the intervention of foreign powers.

However, I will maintain the distinction between two types of dictatorships: authoritarian and totalitarian. The maintenance of these categorizations is analytically important for understanding why certain dictatorships value the legal validation of their actions and allow the continuation of relatively autonomous courts.

3.2.2 Distinguishing Dictatorships

Dictatorships can be delineated through the use of two dimensions: the extent of pluralism within the governing elite, and the extent of participation among the ruled population (Linz 1970, 298; Munck 1998, 26-31). The term totalitarian regimes will be reserved to systems where leadership is concentrated in the hands of one person or party and where absolute control of their subjects is sought through obligatory participation and repression.

Russia under Stalin, Nazi Germany under Hitler, and China under Mao most closely approximate totalitarian rule. This type of polity is considered *monistic*: Power emanates

from a single source, and all other structures of power obtain their authority from it. Competing social forces are emaciated. Regime opponents are contained, incarcerated and terminated. Alternative viewpoints are suppressed (Brooker 2000, 129-53). The ideological and coercive apparatuses of the state are run from a power locus to the exclusion of other political players.

The goal of totalitarianism is the transformation of societal structures and the psychological disposition of its inhabitants; the domination of a person's *public* actions and his or her *private* morality (Schapiro 1972; Hazard 1984). The regime legitimates itself through the espousal of a comprehensive ideological system which is portrayed as the only valid way of approaching reality. It directs subjects on matters such as how to distinguish truth (epistemology) as well as the reason for things (teleology). The official ideology is not merely an enumeration of projects and programs, but claims to provide subjects with "some ultimate meaning, sense of historical purpose, and interpretation of social reality" (Linz 2000, 70).

Under totalitarian regimes, participation by subjects is demanded and channeled through the party or other auxiliary institutions. Children are organized and indoctrinated through training programs. Adults are shepherded into rallies and "education programs". Media systems (e.g. radio, television) espouse the political beliefs of the ruling elite. The government effaces the spaces for independent evaluation and critical reflection. "Passive obedience and apathy, retreat into the roles of 'parochials' and 'subjects', characteristic of many authoritarian regimes, are considered undesirable by the rulers" (Linz 2000, 70).

Public actions are regulated by a complex system of intelligence and espionage. Military and paramilitary forces are ruthlessly used to suppress defectors. Thus, Friedrich and

Brzezinski (1961, 9) contended that for “total politicization” to occur, this type of regime needs six essential structures:

1. a single party, usually led by one person;
2. an official ideology;
3. a terroristic police;
4. a communications monopoly;
5. a weapons monopoly;
6. a centrally-directed economy.

Only a very small number of political systems have been considered totalitarian. In fact, historical research demonstrated that even in those which were considered the “classic” cases (e.g. Hitler’s Germany, Stalin’s Russia), the rulers did not really achieve the level of domination that have been initially attributed to them. Getty (1985) and Kershaw (1983) persuasively demonstrated that both Hitler and Stalin were not able to maximally control their subjects or other institutions. For example, Finer (1956) contended in private economic and torts cases, the courts were able to adjudicate rather independently in the former Soviet Union. However, he acknowledged that in matters vital to the regime, such as the operation of the economy or security issues, the gavel yielded to the rifle (p. 485. See also Hazard 1960).

Authoritarian systems are distinguished from totalitarian ones by the absence of an official ideology that is propagated through intense and continuous political mobilizations (See Table 3.1 above). Their rulers attempt to restrict the public behavior of its subjects but

allow a area of *private* morality. Repression is employed to *depoliticize* their subjects; to keep them passive. Authoritarian leaders, like totalitarian rulers, seek a monopoly of the instruments of violence. Coercion is heavily employed at the beginning of the regime, but loyalty is often maintained through a system of rent and side payments. This type of regime has four distinguishing characteristics:

1. *Presence of limited political pluralism.* For Linz, power in authoritarianism systems is not monistic. It is fragmented. Factions within the military may exist (Barros 2002). During the regime of Ferdinand Marcos, the Catholic Church held considerable political influence (Casper 1995, 55-86). In South Africa, differences existed among the whites on the machineries of apartheid. Different parties among the white population competed among themselves (Thompson and Prior 1982, 99-106; Clark and Worger 2004, 11-31).

2. *Absence of an overriding political ideology.* For Linz, this is the reason why the public and private domains do not conflate in the authoritarian system. The rulers do not have a coherent system of thought that is forced upon their subjects to be internalized and applied in *every* aspect of their lives. Authoritarian leaders usually have “mentalities,” disparate thoughts about ideas and issues, and seek to appeal more to emotion rather than reason. These mentalities offer utopias and goals rather than a set of core assumptions from which the present conditions can be analyzed and a plan of action formulated (Linz 2000, 162-5).

3. *Absence of intensive mobilization.* At the beginning of their rule, authoritarian leaders may consider it of most import to stage spectacles to demonstrate to the rest of their domestic population as well as to international allies and enemies that the regime enjoys some measure of popular support (Brooker 2000, 100-4). However, authoritarian rulers eventually establish their legitimacy not around public show of supports but on its effectiveness in accomplishing a difficult task, like stabilizing a society that is near anarchy or facilitating economic development (Alagappa 1995, 61).

4. *Rulers govern in seemingly ill-defined, but actually predictable ways.* Compared to absolute monarchs or totalitarian dictators, who function with very limited restraint on their actions, authoritarian leaders tend to formulate and abide by a set of rules. In the words of Przeworski et al. (1997): “Even if the legislature is rubber stamp, or the chief executive obeys the dictates of the single party, there must exist some rules allocating functions and specifying procedures” (p. 32). The set of rules is a commitment device that can make members accountable on certain tasks. This is a most efficient way to keep order among the members of the governing coalition. For Fraenkel (1960), dictators may even allow autonomous areas on the law, especially on economic matters, to emerge. It enables their subjects to transact and make commitments to each other. Subjects can plan and invest if they know that their properties are protected; secure from the caprices and whims of those who govern.

3.3 The Role of Law and the Rule of Law in Dictatorships

3.3.1 *Dictatorships and Rule Justification*

The mechanism for justifying the government's exercise of political power varies according to regime type. Leaders in democracies base their leadership on the consent of the governed. Political power in this type of regime is bestowed and removed through the use of elections (Dahl 1971; Huntington 1990). Meanwhile, dictators rationalize their grip on the apparatus of the state through ideology, heredity, or necessity. Totalitarian rulers ground their rule on a comprehensive system of beliefs. Power is amassed and employed in order to facilitate the transformation of society (Chehabi and Linz 1998, 23-5).

On the other hand, authoritarian leaders do not espouse a coherent system of beliefs. They defend their right to rule on the basis of heredity or by necessity. Traditional monarchies and patrimonial systems fall into this category (Eisenstadt 1973; Bratton and Van de Walle 1997). For example, Saudi Arabia has been under the rule of the Al Saud dynasty since its creation. Jean-Claude Duvalier became "president for life" in Haiti in 1971 as the successor of his father, Francois Duvalier (Nicholls 1998, 153-81). Reza Shah dominated Iranian politics in 1933-41 and his son, Mohammed Reza continued the Pahlavi's grip on the state from 1963-77 (Katouzian 1998, 182-205).

Authoritarian rule is also defended on grounds of necessity. Civilians or militaries can expand their power or seize the state in order to "save" their societies from political chaos and economic disaster (Linz 1975, 186-7; Tate 1993, 316-7). For example, the armed forces in Brazil overthrew the president, Joao Goulart, in order to prevent the country from

falling into industrial anarchy that was fomented by the labor movement's alleged embrace of the communist ideology (Skidmore 1967; Horowitz 1970). In 1973, the military in Uruguay forced the president to resign and took over the government on grounds that politicians were supporting the activities of the Tupamaros, an urban guerilla group. In Argentina, the armed forces removed Isabel Peron from power amidst intensifying violence brought about by staggering inflation and the impending bankruptcy of the government (Lewis 2001, 214).

3.3.2 The Utility of Legality for Authoritarian Regimes

The goal of authoritarian leaders is to transform their power into authority. They cannot rule by repression alone. While ruling through coercion can be effective, it is not necessarily efficient or sustainable. Dictators can invest considerable resources in the daily tracking of both their supporters and subjects, or what McCubbins and Schwartz (1984) referred to as governance through "police patrols". But these activities can extensively drain their budgetary resources (money which they would rather keep), given the sheer volume of people that they will need to monitor; it is costly to assemble and maintain effective apparatuses of surveillance and terror (Wintrobe 1998, 24-5). In addition, fear can sustain a regime for only so long. "Anyone in position of responsibility, one who must kill or die to defend a regime," remarked Linz (1973), "must ultimately ask questions about why he should do so and whether he should obey in a crisis situation" (p. 240).

Ultimately, dictators have to wage and win not only the physical, but also the "discursive" battle, the struggle for their subject's minds (Munck 1998, 12-16). They must be able to persuade their subjects, as well as relevant external forces that their seizure of

political power is necessary and legitimate; that they are in power not only because of might but also because of right. I define legitimacy as the capacity of the rulers to engender general acceptance of their claim to exercise governmental power as appropriate and valid (Lipset 1963; Beetham 1991, 35).

One way for dictators to strengthen their control of political power is to elicit judicial validation of their actions and rule. Devoid of the mechanisms of popular consent or of an official ideology, legality becomes a valuable legitimation tool (Lobban 1996, 8). The approval of the court can be utilized by regime leaders to convince their subjects that their seizure of power has a factual basis and was made in accordance with fundamental rules. Court trials and procedures have a ritualistic dimension that often gives the sense that the output was objectively and judiciously produced (Shklar 1986, 146-8). Legality can obviate the need for coercion, and facilitate regime stabilization.

Legality can also be employed as a political device for countering the criticisms of regime opponents and increase the cost of dissent (Kirchheimer 1961; Shklar 1986). Armed with a favorable court ruling, they can frame the struggle for political power as a struggle between *authorities* and *outlaws*. This is a powerful framing that enables dictators to denote opposition to their rule as felonious and to bring their enemies to court as criminals. By accusing and trying individuals for an ordinary offense, the regime “individualize[s] collective conflicts...turning broad questions of political morality into objective cases of guilt and innocence” (Pereira 2005, 33).

Legality is also political capital that can be used to obtain the support, political or financial, of external actors. Dictators often cite judgments in favor of their rule to deflect criticisms from other nations. For example, in a worldwide press conference in 1974,

Marcos contended that he was not a dictator. “I submitted myself to the Supreme Court, not only once but several times. I would like to know if any dictator would do that” (cited in Muego 1988, 101). The National Party in South Africa also often referred to the negative decisions of the Appellate Division as evidence that the “rule of law” exists despite the regime’s discriminatory policies and repression (Abel 1995; Mathews 1972). The Department of Foreign Affairs proudly declared that the “South African judicial system and officers of the court are held in the highest esteem throughout the world by those acquainted with the legal profession and legal activity in South Africa” (1968, 34).

Domestic judicial validation of authoritarian rule has important ramifications under international law. A favorable judgment means that the dictator’s rule over the territory and its inhabitants is not only *de facto* but also *de jure* (Malanczuk 1997, 81-90). This is a powerful argument that can be used to procure the support of other states, to deter intervention by third parties, and to attract new economic partners. It is a valuable instrument in the games of public relations that are played by political leaders.

In her study of regimes that have emerged from revolutions, Skocpol (1979) contended that “what matters most is always the support and acquiescence...of the politically powerful and mobilized groups, invariably including the regime’s own cadres” (p. 32). In order for the state to consolidate, it is not the support from below that matter for Skocpol, but the *cohesion* of those who intend to govern. In polities that have made the transition to authoritarianism, I argue that legality is a political device that can be used to increase the *cohesiveness* of the ruling coalition. The court’s stamp of approval can convince the undecided and put the wavering member at ease (See Pereira 2005; 35-6).

3.3.3 Authoritarian Mechanisms for Controlling Courts

When dictators permit courts to exist, they envision a strict principal-agent relationship. They want the courts to stabilize their rule by providing their policies with the stamp of legality (Das Gupta 1978; Hendley 1996). However, legality becomes a credible legitimation mechanism only when it is bestowed upon by a court that has been perceived to possess at least some degree of autonomy from those who rule. The regime has very little to gain from a favorable judgment rendered by a rubber stamp court. “The essential precondition for the effectiveness of law, in its function as ideology”, argued Thompson (1975), “is that it shall display an independence from gross manipulation”. He emphatically noted that without such condition, the actions of the judiciary “will mask nothing, legitimize nothing” (p. 265).

For authoritarian leaders, allowing the courts to have broad discretion on cases where their actions are being challenged has its risks. A judicial proceeding has its own language, procedures, and requirements (Lempert and Sanders 1986, 408-9; Luhmann 1989). In choosing to seek validation of autonomous courts, the regime has to enter the judicial field where it has to fight with facts and logic. Regime lawyers have to present a claim that is based on evidence and jurisprudence. If not, the Justices, who are socialized as lawyers, may come to the conclusion that the legal process requires the production of a result that denies the claims of the state. This is why “judicial institutions almost never advance the interests of authoritarian rulers in an unambiguous and straightforward manner” (Moustafa 2005, 38).

Thus, authoritarian leaders are faced with a difficult paradox: *how do they maintain relatively autonomous courts while restricting the likelihood that judicial decisions will compromise their survival or the realization of their goals?* There are individual and

institutional mechanisms that are available to the state. The state can threaten the Justices with personal harm (*coercion*), entice them with side payments (*redistribution*), summarily discharge all of them (*sanction*), or replace them incrementally with regime supporters (*selection*). However, the use of such blatant methods against the courts cast doubt on the regime's goal of acting within the bounds of law.

Authoritarian systems are more likely to control the judiciary through *institutional* mechanisms. The dictatorship can restrict the *scope* of the court's jurisdiction. It can limit the range of subject areas over which the judiciary has the authority to decide. Regime leaders can issue decrees removing from the courts the power to rule on cases that involves crimes like rebellion, sedition, and other crimes against national security. A second method is to attenuate a court's *depth* of decision-making, its ability to "question and perhaps invalidate the rules it is asked to apply in specific cases" (Tate 1993, 314). For example, the rulers may allow the judicial review of government actions except those acts or orders that are directly related to the quelling of actions that are inimical to the survival of the state.

A third method is the construction of a *bifurcated judicial system* (Toharia 1975; Zaverucha 1999). In this scheme, the regime establishes a court system that runs parallel to the ordinary courts. For example, authoritarian leaders can establish military tribunals to try civilians. Cases that are salient to the regime are then channeled to this parallel tribunal. For example, after declaring Martial Law throughout Spain, Franco established military tribunals to try his political opponents (Pereira 2005, 178-9). This was also the method selected by the military regime which was headed by Antonio Salazar in Portugal. By fragmenting the court system, the dictatorship kept tight control on salient cases while providing broad discretion to the regular court system.

In his study of Arab states in the Gulf, Brown (1999) noted that, “the harshness of the military courts, in this sense, has made possible the independence of the rest of the judiciary” (p. 116). By keeping the judiciary bifurcated, dictators can point to their losses in the regular courts as proof of the independence of the judiciary and their embrace of the principle of the rule of law. The regime highlights the relative autonomy of the regular courts while channeling the cases vital to the regime to parallel tribunals. For example, Marcos was able to deflect international criticisms of his regime by pointing out that he has allowed challenges against his actions in the Philippine Supreme Court. His regime tried and convicted his arch-nemesis, Benigno Aquino Jr., through a military commission (Fernandez 1977, 1-2).

A fourth mechanism is the restriction of litigant *access* to the judicial system. For example, challenges to actions by government may be limited to only those who are “directly injured”. The regime can also place additional burdens, in terms of fees to be paid and forms to be submitted, to those who are seeking appeals to the court. If judicial review is *diffused*, the dictatorship may *centralize* it to a single institution. In a diffused system, judicial review can be exercised anywhere within the judicial hierarchy. By concentrating judicial review into a single body (e.g. a Supreme Court), the regime can effectively limit the number of judges that it needs to persuade, pay, or threaten (Moustafa 2005).

3.3.4 *Regime Duration and Mechanism Selection*

I contend that selection of one or another of the mechanism just described is substantially influenced by the duration of the regime. Table 3.2 below lays out the expected relationship between mechanism selection and regime duration. At the beginning of their rule, authoritarian regimes face the challenge of *justification*. Dictators must be able to defend the basis for their seizure of power in order to gain the acquiescence of their domestic subjects as well as foreign states. At this stage, authoritarian systems are likely to seek the legitimacy that is provided by legality.

However, there is a risk to the regime that is involved in appealing for support from the regular judiciary at the beginning of authoritarian rule. Its hold on power is tenuous; it has yet to consolidate its control. It can be overpowered and replaced by an opposing coalition. It can also unravel from within: infighting among its cadres of supporters may lead to its collapse. *This context of regime insecurity can make recourse to the judiciary for regime validation perilous.* Justices who think that the regime is unlikely to survive have the incentive to vote against the dictator. Judges who are ideologically predisposed against the new rulers may actually believe that a negative decision emanating from the court can facilitate the beginning of authoritarian breakdown.

Table 3.2 Regime Duration and Mechanism Selection

AUTHORITARIAN PHASE	REGIME'S CENTRAL CHALLENGE	CONTROL MECHANISM
<i>Emergence</i>	Justification	Institutional
<i>Consolidation</i>	Institutionalization	Selection
<i>Decay</i>	Retention	Sanction

Thus, the authoritarian leadership is more likely to control the judiciary at the beginning of their rule through *institutional* means. Instead of closing the judiciary, dismissing the Justices or threatening them with physical harm, dictators are more likely to restrict the scope and depth of the judiciary's decision-making. For example, at the beginning of Martial Law, Ferdinand Marcos had maximum prerogative in the appointment of only three justices (Makasiar, Esguerra, and Antonio). These were the only members of the high tribunal that he was able to appoint while his party also controlled Congress and the Committee on Appointments. However, dismissing all the Justices and replacing them with loyalists would betray his insistence that his regime was a dictatorship which was welded to the rule of law (Del Carmen 1979, 87; Noble 1986, 85). Thus, he kept the judiciary open and retained all the sitting Justices. However, he removed from the judiciary the power to try and

decide on cases that involve the legality of his actions, as well as crimes against national security (Rosenberg 1979, 244).

Several signals can be interpreted to mean that the regime has entered a *consolidation* phase. Foremost among these is the regime's elimination, or at the very least, containment of its armed opponents. Another important benchmark is the increased willingness of foreign states to enter into diplomatic or economic relations with the new regime. A third benchmark is the formulation and adoption of the fundamental rules of the new political order (e.g. a new constitution).

As the regime enters the consolidation phase, it faces the challenge of *institutionalization* (See Table 4.2). Leaders must be able to "transform the newly created institutional rules into rules that are accepted and routinely used by all major political forces--the clearest sign of consolidation of the governing elites' power" (Munck 1998, 9). The predominant mechanism of choice in the consolidation phase is *selection*: the political makeover of the judicial branch through the appointment process. With their hold on power more secure, dictators can remove judges from their positions more easily compared to the emergence phase.

In the consolidation phase, authoritarian leaders maintain their power less on legality but on performance or patronage. If they are managing the economy well, recalcitrant judges can be removed on grounds that they are obstructing the regime's reform program. With the judicial system dominated by their supporters, rulers may find lesser need for parallel judicial structures. Splitting the judiciary becomes unnecessary when the courts are dominated by regime loyalists.

In addition, authoritarian leaders can utilize a more political mechanism source to maintain or increase their legitimacy: *popular referendums* (Chehabi and Linz 1998, 18-19). By bringing their policies to the people for their approval, dictators hope to manufacture an image of public approval to their chosen course of action. They “cherish the illusion that they can combine the prerogatives of absolute power with the moral authority that comes from popular assent” (Tocqueville 1955, 45). With the legitimacy provided by these “elections”, dictatorships are able to reconstitute the composition of the judiciary more easily. During the period of Martial Law in the Philippines, Justice Antonio Barredo contended that the courts should take “judicial notice” of such exercises:

...when we talk of the rule of law nowadays, our frame of reference should not necessarily be the Constitution but the outcomes of referendums called from time to time by the President. The sooner we imbibe this vital concept the more intelligent will our perspective be in giving our support and loyalty to the existing government. *What is more, the clearer it will be that except for the fact that all the powers of government are being exercised by the President, we do not in reality have a dictatorship but an experimental type of direct democracy* (cited in Vejerano 1999, 70).

In order to consolidate, authoritarian rulers use the courts to rein in the actions of their own personnel. Dictators, despite their vast powers, are usually unable to know what their own agents are doing. Without a free press and watchdog groups, authoritarian leaders find it difficult to supervise their own agencies and institutions. Meanwhile, subjects acquiesce to policies of dictators and fear their very presence. Thus, autocrats have problems obtaining reliable information. They do not know whether their orders are being executed or circumvented. This is the classic principal-agent dilemma. This problem is exacerbated in

authoritarian systems because of the suppression of transparency mechanisms that are usually available in democratic systems.

To deal with this problem, dictators can invest in developing a comprehensive system of surveillance and supervision, or what McCubbins and Schwartz (1984) referred to as governance through “police patrols”. However, maintaining such a system can drain the state’s coffers considerably when the public sector is expanded to meet the increasing needs of regime’s subjects. A second way for the regime to keep their agents from abusing their power is to allow the public to challenge those actions that are made by state entities in the courts. The courts serve as “fire alarms” that enable subjects to call their attention to certain political actions or events (Ayubi 1980; Rosberg 1995). “Accurate information on bureaucratic misdeeds is even more difficult for authoritarian regimes to collect because the typical mechanisms for discovery, such as a free press or interest group monitoring of government agencies, are suppressed to varying degrees by authoritarian rulers (Moustafa 2005, 16).

When people bring cases to the court, regime leaders obtain information on whether their directives are being carried out, as well as *how* their policies are being implemented by its agencies. This is the reason why judicial activism in authoritarian systems usually begins in administrative law (Rosberg 1995; Solomon 2006).

While the dictatorship has obtained legitimation through the reconstitution of political order, its dominance can be eroded by challenges raised in the court by its political adversaries. Ironically, the new institutional arrangement must be able to give due course to these demands. There must be a way in the system to dissipate subject discontent and frustrations (Kirchheimer 1961, 259-99; Friedman 1975, 193-223). If not, these emotions

and contentions may be harnessed into *principled opposition* to the regime by political entrepreneurs (Munck 1998, 15). Subjects may then seek extra-constitutional means to obtain redress, a development that is not conducive to regime institutionalization.

But the regime cannot allow the judiciary to become the focal point for confronting the prerogatives of the state. Losses in cases that are salient to the regime can embolden the opposition. The courts then become arenas of contestation where results and events can spiral out of the government's control. In addition, support to the judiciary by law groups, professional organizations, entrepreneurs, or foreign investors can make it difficult for the regime to take back the judicial independence that it has given and allowed to expand. Litigation, instead of mass demonstrations, becomes the primary mode for contesting the actions of government. This is the mechanism that allows judicial power to expand even within authoritarian regimes.

This was persuasively demonstrated by Moustafa (2003) in his study of the Supreme Constitutional Court (SCC) in Egypt. He noted how the high tribunal used the autonomy that it had on less politically salient cases in order to obtain the trust and support of civil society groups (e.g. human rights groups, legal professional associations) which he referred to as "judicial support structures" (p. 895). These groups came to consider the court as the most favorable avenue for challenging state policies and legislation. When regime leaders sought to curtail the court's discretion, the network defended the tribunal and made it difficult for the authoritarian leaders to take the Court's powers away. "A tacit partnership was built on the common interest of both defending and expanding the mandate of the SCC" (p. 903).

Thus, regime institutionalization will depend on the ability of the political order to allow the articulation and redress of societal grievance against the state in the courts while

ensuring that the judiciary does not develop into a focal point for collective action. One of the ways that dictators have done to accomplish such objective was to allow the judiciary to control and negate its policies, as long they are “contained” to non-sensitive issue areas, like administrative law. However, the case of the Supreme Constitutional Court in Egypt demonstrated that they must also make sure to prevent the development of judicial support networks around the high court. Moustafa (2005) contended that the weakness of the courts in authoritarian societies is not only “the result of the direct constraints that the executive imposes upon the courts; it is also related to the characteristic weakness of civil society in authoritarian states” (p. 51). Dictators can prevent the development of support networks to the courts by intimidation, suppression, and active monitoring.

When the regime begins to decay, the leaders face the challenge of *retention*. Usually, authoritarian breakdown “represents but the most extreme failure of a governing elite’s effort to institutionalize a political order” (Munck 1998, 19). Dictators can choose to shore up their rule either through increased repression or by continuing to hold state-managed referenda or elections (Wurfel 1988; Wintrobe 1998).

During this period when a turnover in leadership becomes imminent, there is an incentive for judges to rule aggressively against the positions of the authoritarian government. In the short-term, a magistrate may believe that the decaying leadership, weakened by its struggles against its opponents, may not have the will or the capacity to sanction the court. In the long-run, voting against authoritarian rule can bring benefits to the judge from the future set of rulers (e.g. retention of his job on the court). The political context provides an opportunity for the court to strike against the current regime (Helmke 2002; 2005).

However, I contend that the phase of regime decay is most dangerous for judicial dissent. Confronted by challenges on multiple fronts, and losing legitimacy from foreign states, regime rulers may strike back by resorting to increased coercion. Using a formal model, Wintrobe (1998) contended that the proper way for a tinpot dictator to deal with deteriorating economic and political conditions is to intensify his use of the apparatuses of terror (p. 55). *Thus, sanction becomes the weapon of choice to control the judiciary.* Dictators simply close “uncooperative” judiciaries or purge opposing judges from the courts. Thus, even though there is a structural incentive for judges to defect, such decision can be costly.

An apt example was the reaction of the government of Peruvian dictator Alberto Fujimori vis-à-vis the three judges of the Constitutional Tribunal who voted to deny him the opportunity to run for a third term as president in 1997. Congress, which was controlled by Fujimori’s party, dismissed the judges from their positions. The van of one of the judges, Delia Revoredo, was burned, and her driver was abducted. She was forced to seek asylum in Costa Rica. A second judge, Ricardo Nugent, was targeted for assassination (Landa 2001, 3-4).

The diachronic approach that was developed in this chapter enables us to explain the complex relationship between dictators and judges. *The regime’s need for legal validation as well its mechanism selection depends on the life stage of the regime.* The judiciary’s approval of their actions is a potent weapon that dictators can wield to gain acquiescence from their subjects, maintain supporters, and attract new adherents at the beginning of their rule. Thus, dictators are more likely to employ institutional means to control the courts at the beginning of its rule. It preserves the image of a regime that is willing to abide by the rule of

law while making sure that the cases sensitive to the regime are channeled to more “reliable” structures.

However, regime consolidation demands that subjects and institutions accept and routinely follow the new rules. In order to avert the development of crises that can retard institutionalization, dictators usually employ selection methods, reconstituting the judiciary through the appointment process. Regime legitimacy is then founded on more political mechanisms like plebiscites and referenda.

Finally, when the regimes begin to break down, it faces the challenge of retention. I argued in Chapter Two, that the impending demise of authoritarian rule provides incentives for judges to defect from the ruling government in anticipation of a new set of rulers. However, this can be a costly enterprise. Dictators can respond to regime threats by sanction and repression. But at the period of breakdown, judges can no longer salve their conscience “by neatly separating legal duty from moral judgment” (Kirchheimer 1969, 411). Defection has its risks and rewards; and judges must make the choice. We now turn to the study of the choices made by the Justices in the Philippine Supreme Court under *before* and *during* the difficult period of Martial Law.

CHAPTER FOUR

CULTIVATING JUDICIAL POWER: JUDICIAL NEGATION IN THE PHILIPPINE SUPREME COURT BEFORE MARTIAL LAW

4.1 Introduction

The Supreme Court of the Philippines has drawn interest from legal historians and political scientists due to the very active role that it has played in the development of the political system (Samonte 1969; Tate 1971; Agabin 1989; Fernandez 1999). Two views have emerged on the role that the Court has played in the early political history of the country. There are those who lauded the Court for facilitating the acceptance of its incipient democratic institutions in the country after nearly three centuries of colonial domination by Spain and nearly five decades under the Americans (Malcolm 1957; Araneta and Carroll 1968).

In an often cited quote, the political scientist Jean Grossholtz (1964) remarked that the Supreme Court was the “most important legitimizing institution in the Philippines” (p. 27). The Court was praised for its boldness to resolve inter-branch conflicts that threatened to rip the country’s political fabric. Dean Vicente Abad Santos (1966) of College of Law of the University of the Philippines lauded the court for its willingness to rule on those issues which were “decisive to the whole political system” (p. 571). Popular accounts of the court shared these positive assessments. For example, the journalist Yen Makabenta (1968) contended that the Court remained as a solemn symbol of hope despite the failings and the

wrangling in the other branches of government: “there remains somehow that curious faith in the high Court and its glorious power as a source of remedy for the problems of society and the citizen” (p. 18).

Not everybody shared that assessment of the Court and its “glorious” power. Agabin (1989) contended that judicial review in the history of the Philippines has been used as a “political weapon” to serve the interests of the rulers and the dominant class. The Court has been a conservative force that has “stood fast against social change” (pp. 188, 189). This conservatism has been attributed to the recruitment process that produced a court from the same class; the same ruling elite in the Philippines (Vejerano 1999, 7-8). The timidity of the Court vis-à-vis the government has also been attributed to the Filipino’s system of values, notably *utang na loob* (debt of gratitude) and *hiya* (sense of shame). Thus, Justices are generally deferent to those who appoint them. “Exceptions to timidity only occur”, Agabin averred, “after a change in administration, or when the President has been deposed” (1989, 188). The Court has been most severely criticized for its behavior during the period of Martial Law (Muego 1988, 91-101; Bernas 1988, 10-19; Celozza 1997, 39-72).

The objective of this section is to provide a concise description of the development of judicial institutions in the Philippines prior to the declaration of Martial Law in the Philippines in 1972. It presents a brief description of Philippine legal development from the time of the indigenous communities, to the Hispanic and American colonial periods, up to the establishment of a politically independent and democratic Philippines. The focus is on the evolution of judicial institutions and their interaction with those who held the reins of power. It contends that judicial decision-making in the Philippines has been initially conservative, primarily due to the civil law system of analysis and interpretation, and the use of judicial

review during the American period as a “brake on Philippine democracy” (Mason 1965, 15). However, the Court’s embrace of a philosophy of social justice, diffuse support from the public, and political divisions in government opened opportunities for the Supreme Court of the Philippines to develop its power and control the way the executive and legislative branches run the affairs of government.

4.2 Indigenous Communities and Customary Laws

Indigenous cultural communities that inhabited the islands had effective legal systems and judicial structures. They were based on the traditions and customs of the different sovereign communities called *barangays*. The word “barangay” was the name of the boats that were used by indigenous Filipinos in their daily lives. The term eventually came to refer to a settlement that is composed of around thirty to a hundred families, that is headed by a *datu* (chief).

The *barangays* were politically and economically independent from each other, but inter-*barangay* cooperation was common. When four or more *barangays* decided to come together, they formed a *bayan* (town), and the paramount head was called *Rajah* or *Lakan*. However, while the *Rajah* exercised some power over the *datu*s, he did not have direct control over the lives of the *datu*s’ subjects or settlements (Blair and Robertson 1903; Scott 1991).

The authority of the *datu* was based on bloodline, but his power was amplified by his courage in battle, wisdom, wealth, and number of his subjects. He was expected to provide several services to the community, such as to protect the *barangay* from its enemies, and to lead it into war. He was also expected to resolve disputes and quarrels within the community.

He served as the judge (*hukom*) in both criminal and civil trials, sometimes with the assistance of a council of elders (Jocano 1975; Scott 1991). Most of the cases which are referred to the *datu* and the elders ended with a compromise agreement. There is also evidence that trial by ordeal was resorted to when the *datu* and the elders were unable to figure out the perpetrator of the offense (Gupit and Martinez 1993).

The system of justice that existed in the indigenous communities was decentralized. There was no overriding judicial authority to which a decision by a *datu* or *rajah* could be appealed. When a dispute involved two *datu*s from different *barangays*, an arbiter from another settlement was usually brought in to resolve the rift. The arbiters were old men who had developed a reputation among the *barangays* for their wisdom and judiciousness.

It is unfortunate that the forefathers of the Filipinos wrote their laws, decisions and rules in highly perishable materials like goatskin, bamboo, and palm leaves. Currently, the material evidence to corroborate the writings of Spanish and local historiographers are very scant. Many of these writings were also destroyed by the Spaniards at the onset of colonization. However, from what we know, the forefathers of the Filipinos seemed to have dispensed justice fairly and expeditiously (Blair and Robertson 1903; Jocano 1975; Morga 1962). The system was “very simple and crude but it was speedy...and the judges were persons who knew the usages, customs and language of the locality” (Morga 1962, 277). Fajardo contended that “our forefathers persuasively demonstrated that justice can flow even from primitive trial procedures that implement unsophisticated laws” (1999, 43).

The Filipino aversion to the use of adjudication as a dispute settlement mechanism is probably rooted to the tradition of conciliation and mediation that developed in the indigenous Filipino communities. In fact, under the current Local Government Code

(Republic Act 7160), residents of *barangays* in the same city or of adjacent *barangays* in several cities or municipalities are required to go through the conciliation mechanism of *barangay* officials before any case is brought to the courts (Gupit and Mendoza 1993). The fact that Philippine society is not very litigious is probably due not only to economic reasons (i.e. the steep cost involved in filing a case in court) but also due to its long tradition of resorting to compromise.

4.3 Hispanic Colonialism and the Civil Law System

The Spanish attempt to control the Philippine archipelago begun in 1521, but it was not until 1565, under the leadership of Miguel Lopez de Legaspi, that the Spaniards were able to effectively counteract native resistance and consolidate their military and political control (Corpuz 1989, 57-78). The colonizers brought to the new colony the same set of legal precepts and structures that they applied to all the other territories that they occupied. The islands were governed primarily through laws issued in the name of the King, with the precepts of Roman law serving as an auxiliary source (Elliott 1917; Francisco 1951).

The stated objective of Spanish colonialism was to evangelize the natives to the Catholic faith. Felipe II sternly remarked that: “For the conversion of the inhabitants of the Philippines, I will gladly spend the treasuries of the Indies --- and even my own treasures” (Guarina 1999a, 49). Legally, indigenous rights within the Spanish colonies were protected by the *Leyes de Burgos* which were promulgated on 1512. It held that the indigenous population should be treated as beings capable of reason. Thus, they may be required to render manual labor in service of the King, but only under humane conditions. For example,

they must be paid for their service, and given days of rest. Indeed, the respect for indigenous rights was well-established in letters, but the conditions on the ground were very different.

On the ground, the Spaniards were much more pragmatic. The lofty words of the *Leyes* gave way to the need to consolidate Spanish domination over the natives. The islands were primarily governed by statutory laws crafted specifically for the colonies, and the administrators enjoyed wide discretion on when and how they were to be applied (Blair and Robertson 1903, 203-4). The Spaniards sought to extirpate the indigenous legal principles and structures, destroying native writings and other cultural expressions. The Hispanic legal system, essentially a civil law regime, was transplanted to the Philippines (Guarina 1999a, 56-65).

The governor-general was the head of the colonial judicial structure, with the power to resolve disputes among and between Spaniards and the indigenous population. He held the authority to delegate judicial power to other officials. In the Philippines, these powers were granted to heads of the provinces and districts, the *alcalde ordinarios* and *mayors*. They were given the power to resolve disputes within the areas that they control.

The problem with the colonial set-up was that these people often did not have any formal training in law. They were not *letrados* (jurists). Thus, trials were mostly travesties: they were held in secret, and fines very disproportionate to the transgressions were levied (Blair and Robertson 1903, 203-4). Without a system of collection, the fines eventually ended up in the pockets of the *alcalde ordinarios*. Even worse, petitioners against the *alcaldes* were astounded to find out that the same person they were complaining about would hear and decide on their grievance.

The recourse in such instances was to appeal the decision of the lower official to the governor-general who had the power to review, modify, or annul all legal decisions. His decisions were final within the colony, and could only be overturned by the King of Spain. But given the inaccessibility of the governor-general, the rulings made by local officials were, *de facto*, final. Cases brought against the bureaucrats rarely prospered in the colonial judiciary. Corruption was tolerated by colonial authorities. It was rationalized as a means to augment the low salary of the bureaucrats (Cunningham 1919, 363-4).

Making the governor-general the final court of appeal also effectively deprived the Filipinos of a way to obtain redress for their grievances against the abuses committed by the governor's appointees. Complaints made by the local population against the actions of the governor's agents were largely ignored. Martin Enriquez, the Viceroy of Mexico, in his letter to the King of Spain, summed up the situation in the archipelago succinctly: the "chief deficiency of that land is justice; and without justice, there is no safety" (Blair and Robertson 1903, 209-10).

The cause for justice in the colony eventually found a champion in Domingo de Salazar, the first Bishop of the Philippines. Appalled with the way the local populations had been treated, he wrote a letter to the King and a memorial to the court in Madrid requesting that a court of appeal, an *Audiencia*, be constituted in the Philippines. On 5 May 1583, a royal edict was issued establishing the *Audiencia Territorial de Manila*, the first central judicial institution in the Philippines. It was composed of the governor-general as president, three *oidores* (jurists) and a fiscal.

The Audiencia de Manila was essentially a review court. It had jurisdiction on almost all appeals on decisions made by lower magistrates.²³ It was tasked to ensure that the judgments made by lower magistrates had some legal basis. It had supervisory power over all judges and provided detailed instructions on Spanish jurisprudence (Pano 1988, 3-4). Statutes specific to the colony were given the highest consideration. When legal guidance was not provided by a specific statute, civil and criminal cases were resolved in consonance with the laws as they existed in Spain, in particular the *Leyes de Toro*. The *Leyes de Toro* were a collection of laws and expert commentaries that governed the evaluation and disposition of a case. The reliance on statutes and the writings of jurists are the bedrock features of a civil law system (Gupit and Martinez 1993, 43-7).

In addition to being a court of review, the Audiencia performed other tasks. The *oidores* advised the governor when their opinions were sought. They also granted licenses, supervised the prices of commodities, and issued ordinances. Eventually, the governors did not appreciate the constraints on their discretion that was brought by the creation of *Audiencia* and they sought its abolition (Zaide 1966). Meanwhile, bureaucrats derided the court as an unnecessary drain on the treasury. They contended that the resources of the treasury were better spent on armaments than on the salaries of men of letters. In addition, they also made the accusation that the formal procedures of the tribunal “tyrannized” the natives, who were largely ignorant of Spanish civil law. The Audiencia was abolished by the King in 1589. All appeals were to be forwarded again to the court in Mexico.

The King restored the Audiencia on November 26, 1595 to mitigate the docket of its Mexican counterpart. The stated rationale was that the King wanted the governor to focus on

²³ The exceptions were *casos del corte* and criminal cases that were committed within five leagues of the *Audiencia's* office (Guarina 1999b, 90-1).

administration and war, and not on judicial activities. However, it is also possible that the court was restored because official investigation showed that the complaints that the *oidores* were “tyrannizing” the natives were largely unfounded. They also concluded that constraints on the governor were necessary (Guarina 1999a, 103).

The governor’s role within the court was attenuated. The office of the Regent was created in 1776 and replaced the governor as president of the court in 1861. The Audiencia became a purely judicial body in 1861, and was given the jurisdiction to hear and decide on complaints lodged against the governor’s actions and by his appointees.

The Audiencia was only open to *peninsulares*, or Spaniards who were born in Spain until it was opened to native-born Filipinos and *mestizos* in the 1890’s. It was the training ground of some important Filipino jurists in the legal infrastructure that was established by the United States when they took over the Philippines in 1898 (Gupit and Martinez 1993; Pascual 1954).

Hispanic colonial rule left two significant legacies to the Philippine legal system. The first was a set of detailed penal and civil codes, most of which have persisted and survived into the modern period. Thus, even up to now, legal education in the Philippines demands mastery of statutory analysis and lawyers who have mastery of the Spanish language still enjoy some advantage in litigation. During the American period, Justice George A. Malcolm declared that “the foundation of the substantive law is the Civil Law” (cited in Gupit and Martinez 1993, 97).²⁴

The second legacy of Spanish colonialism was a centralized system of justice with the power to check the actions of all agents of government. The Audiencia in the Philippines was

²⁴ However, Justice Malcolm changed his mind in *In Re Shoop* (41 Phil 216 [1920]), where he stated that the Philippine system now followed English Common Law.

established to hear complaints against abuses committed by government officials. Politicians were able to successfully lobby for its abolition in 1589, but it was restored six years later because the Spanish government came to the conclusion that the power of the governor-general has to be restrained. *Judicial power can be used to curb injustice and state power.* This was probably not lost on the Filipino intellectuals who were allowed to sit on the highest court in the Philippines in the 1890's.

4.4 American Colonial Rule and the Common Law System

In 1898, Spanish colonial rule collapsed due to the twin forces of the Philippine Revolution and its war with the United States. Spain was forced to cede the colony to the United States in the Treaty of Paris.²⁵ However, Filipino revolutionaries fought the Americans for control over the islands until 1902.

American rule in the Philippines can be divided into three phases: the military, civilian, and Commonwealth periods. Two questions are most germane to the purposes of this study: First, what became of the Spanish civil legal system that existed in the Philippines? Second, how was justice dispensed?

As early as May 1898, the American legal policy, enunciated through General Wesley Merritt, was that all existing municipal laws were to be considered valid “until they are suspended or superseded by the occupying belligerent”. In effect, it was a system of selective annulment. Existing laws were considered “in force” until challenged in the courts and declared inconsistent with the legal principles of the United States. This meant that much of Spanish substantive law, civil and criminal, remained on the books. However, much of the Spanish body of legal procedure was abolished and patterned after American common law. For example, the inquisitorial system of litigating criminal cases was replaced by the adversarial system, though juries were not introduced in the Philippines (Hayden 1942; Nitafan and Guarina 1999, 358).

²⁵ The nature of this cession has been intensely debated. With most of the Philippine archipelago under the hands of the Filipinos (except Manila, Iloilo, and Cebu), the Spaniards had no effective control. Spain could not cede what it did not have (Guarina 1999a, 267).

At the onset of American Occupation, the military governor exercised all powers of government in the islands. The new occupiers allowed the Audiencia and other courts to function but stripped them of the power to rule on criminal matters, which were given to military commissions. Holdover judges from the Hispanic regime were allowed to administer the laws in the Philippines only if “they accept the authority of the United States” (*U.S. v. Tubig*, 3 Phil 244 [1904]). On January 30, 1899, the military governor stripped the courts of civil jurisdiction as well.

However, on May 29, 1899, the Audiencia and all the other courts were re-established, with the power to rule on all cases, civil and criminal. The Audiencia was staffed by Filipino judges who served under Spanish rule, but expressed willingness to serve under the new colonizers. Besides Cayetano Arellano, who was the chief justice, there were five other Filipinos in the Audiencia, and three Americans. The appointments were a masterstroke. It sent a signal to the Filipinos that the Americans were willing to train and to accommodate the most talented among the locals. The policy of accommodation may have also have triggered a split within the supporters of the Philippine Republic under Emilio Aguinaldo, who were then resisting the Americans (Agabin 1989).

On July 4, 1901, the formulation of colonial policy was transferred from the military government to the Philippine Commission, whose Chairman acted as the Civil Governor of the colony. It signaled the demise of military rule in the Philippines and the beginning of civilian government. In 1902, the Commission was made to share legislative power with an all-Filipino body called the Philippine Assembly.

The Judiciary Act of 1901 officially extirpated the Spanish civil law system, and replaced it with one that was patterned after the American common law model. The old

judicial structures, including the *Audiencia* and other courts of first instance, were eliminated. A considerable number of Filipino judges in all courts were also summarily removed as part of the plan of William Taft, the first civil governor, to “Americanize” the court. In the opinion of Taft, the Filipinos had a lot to learn about governance and the American legal system. The new tutelary relationship was reflected in the changes in Supreme Court. Its membership was reduced from nine to seven, and four seats reserved to the Americans. In effect, it transferred the fulcrum of power from the Filipinos to the Americans. Cayetano Arellano remained as Chief Justice, but two well-respected Filipino jurists, Manuel Araullo, and Gregorio Araneta, were removed from the court.

Taft stated that the objective of the judicial reorganization was to create a system that can effectively “balance” the need for a stable administration of justice and the education of Filipinos on law and government. However, the real issue was political control. Only certain decisions of the Philippine Supreme Court can be challenged before the United States Supreme Court.²⁶ Taft feared that the Filipino-dominated Supreme Court might render a decision that he could not appeal. “If an American interpretation of the laws were to be possible *within the Philippines*, it was essential to maintain an American majority in the court” (Tate 1971, 33).

The Philippine Autonomy Act of 1916, also known as the Jones Law, expressed the intent of the Americans to grant independence to the Philippines upon manifest evidence of the Filipino capacity for self-government. To further the “education” of the locals, they were given full control over the lawmaking bodies: the Senate and the House of Representatives. While the civil governor could veto a statute, the veto could be overridden

²⁶ The United States Supreme Court could only review judgments by the Philippine Supreme Court in which the Constitution, or any statute, treaty, title, or privilege of the United States was involved, or in which the value in the controversy was in excess of \$25,000 (Gupit and Mendoza 1993, 51).

by the legislature. However, legislation could be challenged in the Supreme Court where the Americans held the majority (Guarina 1999b, 354). *It was the colonial trump card: the ultimate protector of American interests was judicial review.*

For example, in 1927, Governor Leonard Wood decided to return to his office sole responsibility over government stocks.²⁷ This was challenged by Filipino politicians before the Philippine Supreme Court, which ruled against them. The native leaders appealed to the United States Supreme Court, where once again they lost. True to Taft's intent, the high tribunal kept the colonial government in control. In numerous instances, it upheld the decisions of the American governor general on cases that involved the suspension of the privilege of the writ of habeas corpus (*Barcelon vs Baker*, 5 Phil 87 [1905]), the deportation of aliens (*In Re Allen* 2 Phil. 630 [1903]), the control of currency (*U.S. vs Lin Su Fan* 10 Phil. 580 [1905]) and the immunity of the executive from damages in civil cases that may arise from the fulfillment of official duty (*Chuoco Tiaco v. Fores* 16 Phil. 534 [1910]).

However, an empirical study by Tate (1971) on non-unanimous decisions by the Philippine Supreme Court demonstrated that greater cohesion among the Filipino justices actually frustrated the intent of the Americans to employ the power of judicial review in service of the colonial agenda. The Filipino judges tended to resolve cases in similar direction, much more than their foreign colleagues. Oftentimes, they only needed the support of one American to transform their view into controlling law.

Interestingly, the need for a judiciary that is autonomous from those who govern flowed from the pen of an American, Justice George A. Malcolm. In *Borromeo v. Mariano* (41 Phil 329 [1921]), Malcolm held that judges could not be moved from one district to

²⁷The existing arrangement, negotiated during the term of the previous governor, Frances Harrison, lodged voting control over government stocks to a Board of Control, composed of the civil governor, Senate president, and Speaker of the House.

another without their consent. He contended that doing so would enable the executive to unduly influence the dispensation of justice. The threat of movement might lead judges to defer to the governor general. Justice Malcolm averred that the judiciary must be secured from “corrupting or perverting influences” (Guarina 1999b, 361).

To undercut the decision that was penned by Malcolm, the Philippine legislature passed a law that required judges in all courts of first instance to move to a different district every five years through a lottery system. Malcolm’s *ponencia* in *Concepcion v. Paredes* (42 Phil 599 [1921]) overruled the Assembly, contending that it contravened the organic laws that governed the colony. Under existing law, judges were appointed by the governor to certain districts. To move judges through a system of lottery is to shift the appointive power from the governor to luck, a principle that the court could not allow. Through these pronouncements, Malcolm demonstrated the importance of judicial review in preventing the arbitrary exercise of state power. It was a principle that he would drive home to a new generation of Filipino lawyers later as Dean of the College of Law of the University of the Philippines.

Through Public Act No. 127, the Tydings-McDuffie Law, the United States Congress called for the creation of a transitional government to be referred to as the Philippine Commonwealth. It enunciated several benchmarks that the Filipinos needed to satisfy so that full control of government may be turned over to the Filipinos in ten years. One such benchmark was the drafting and ratification of a new charter. On February 19, 1935, a constitution was drafted by the Filipinos through a constitutional convention. It was taken as a “proof” of their capacity to govern (Mendoza 1978, 21-2; Dolan 2003, 59-60).

The 1935 constitution established a presidential form of government characterized by the separation of powers among the executive, legislative, and judicial branches. Under Article VIII, Section 1, judicial power was vested in “one Supreme Court” and other courts established by statute. The Supreme Court was to be composed of a Chief Justice and ten Associate Justices. In Article VIII, Section 2, it was expressly vested with the power of judicial review. This power of the courts was challenged in the case of *Angara vs. Electoral Commission* (63 Phil 139 [1936]), in which Justice Jose P. Laurel wrote an elegant, much cited defense of the power of the courts to inquire into the validity of government action:

...when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of legislature but only asserts the solemn and sacred obligation assigned to it by the constitution to determine conflicting claims of authority under the constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. *This is in truth all that is involved in what is termed as “judicial supremacy” which properly is the power of judicial review under the constitution* (pp. 157-58. Emphasis added).

The 1935 Charter was also notable for the provisions that it contained to insulate judges from the influence of the other branches. First, it raised Justice Malcolm’s *Borromeo* decision into a constitutional principle. Article VIII, Section 5 of the constitution held that “no judge appointed for a particular district shall be designated or transferred to another district without the approval of the Supreme Court.” Second, the judges were explicitly provided security of tenure. Under Article VIII, Section 9, “the Members of the Supreme Court and all judges of inferior courts shall hold office during good behavior until they reach the age of seventy years, or become incapacitated to discharge the duties of their office.” This was in direct opposition to the law of 1901 which gave the power to the governor to hire and fire judges. Third, the same section held that judges’ compensation “shall not be

diminished during their continuance in office”. The objective was to deny the legislature to use the power of the purse to exact revenge against judges who ruled against it.

After the ratification of the new constitution on May 14, 1935, the National Assembly through Commonwealth Act No. 3, reduced the membership of the Supreme Court from eleven to seven. The reduction could have become a full-blown political controversy if not for the decisions of five American court members to resign their posts. The all-Filipino judiciary now had the task of restraining President Manuel Luis Quezon, the dominant figure of Philippine Commonwealth politics.

Unfortunately, the judiciary provided timid resistance to Quezon. The president sought to influence the judiciary through his public pronouncements as well as discreet maneuverings. A good example is the 1938 case of *Cuervo vs. Barretto* (65 Phil. 290 [1938]). The issue at bar was whether an employer was liable to pay damages to the heirs of an employee who drowned when ordered to retrieve a piece of log in the river by the employer’s foreman. The Court of Instance ruled that no liability existed due to the negligence of the employee to ensure that he would not drown. The decision was affirmed by the Court of Appeals.

Quezon lambasted the court rulings as one that was made by “seventeenth century judges interpreting twentieth century laws” (Guevarra 1999, 451). The public pronouncement was made before the Supreme Court rendered its decision on the highly-publicized case. The Supreme Court did reverse the decisions of the lower courts, but Justice Laurel strongly rebuked the president’s antics during and after the *Cuervo* case.

Quezon had his way with the Court in a lot of cases. In his memoirs, Justice Malcolm (1957) commented that Quezon “had his prerogatives confirmed by the Supreme Court” (p.

131). Justice Isagani Cruz and Cynthia Datu (2000, 89) remarked that during the period “executive intervention was so widely known.” Quezon almost always had his way with the Court. It was said that “Ozaeta (Quezon’s Attorney-General) never won in the Supreme Court, but Quezon never lost” (Ibid., 90).

The legal-historical account of the early years of the Supreme Court indicated that the gavel relented when confronted by power. During the American military and civil governments, the Supreme Court kept the government in command. It was a potent weapon in the service of colonization (Vejerano 1999, 8). Control of the high tribunal was facilitated largely by the instrument of selection. To ensure their hold on the judicial branch, Taft modified its composition to ensure that majority of the Justices were Americans. Perhaps as importantly, given the tendency of the Filipino justices to stick together, Taft also made sure to choose the “right” kind of Filipino Justice: “We can select the men who will be as orthodox in matters of importance as we are” (cited in Pringle 1939, 170).

At the onset of the Commonwealth regime, the bench had to deal with the powerful personality of President Manuel Luis Quezon. Historical accounts evinced that he was very much able to persuade the Supreme Court to support his point of view. Whether it was through formal pronouncements or informal pressure, the government was able to almost always bring the court in line with its policy view (Guarina 1999b, 406-9; Cruz and Datu 2000, 89-90). The voices of judicial independence, like those of Justice Jose P. Laurel, seemed at times, to be pointless protests in the wilderness. However, they were words that would be cited with a vengeance when the Supreme Court began to assert its power in the turbulent politics of an independent Philippines.

4.5 *Judging under the Bayonet:* The Supreme Court and the Japanese Occupation

The track to independence was disrupted by the onset of the Second World War. On January 2, 1942, Japanese military forces took political power in the Philippines as part of their campaign to establish a Greater East Asia Co-Prosperity Sphere. Japan's plan was to "emancipate" Asian countries from their Western occupiers, and then organize them into a federation under Nippon leadership. Masaharu Homma, the Japanese commander-in-chief, stressed the theme of "liberation" once his army was able to secure Manila. He exclaimed that "the purpose of the Japanese expedition is nothing but emancipating you from the oppressive domination of the U.S.A, letting you to establish [sic] 'the Philippines for Filipinos' as a member of the Co-Prosperity Sphere in the Greater East Asia and making you enjoy prosperity and culture" (1 *Official Gazette* [O.G.] No. 1, 8 [1942]).

The Japanese believed that Asians would be more amenable to their occupation if they framed their "expedition" in terms of abetting the struggle of local forces for their own state (Dolan 2003, 60). In reality of course, it was the mere replacement of a Western colonizer by an Asian one. All state decisions came under the rubric of Japanese martial rule (Mendoza 1978, 32). Thus, even though a Filipino civil government named the Philippine Executive Commission was established in the Philippines on January 23, 1942, it was explicitly placed under the orders of the commander-in-chief of the Imperial Japanese forces.

The judicial system under the Japanese Occupation was governed under a similar political motif. The civil government was allowed to play a role in the reconstitution of the courts and the selection of its personnel, but it was made clear that the Japanese commander-in-chief "shall exercise jurisdiction over judicial courts" (Guarina 1999c, 428). Supervision

over the courts was given to the Department of Justice, unless the action by the judges affected the operations of the Imperial Forces. The dispensation of justice was placed under severe constraint by the bayonet.

The strict control over the courts was probably necessitated by two things. First, in the context of war, the Japanese wanted to deal with regime adversaries in the most expeditious manner, and in their own terms (Buenafe 1950, 88). Their wariness of the Filipino judges may also have been due to the determined stance of Jose Abad Santos, Chief Justice under Quezon, and one of the Philippines' most esteemed jurists, against Japanese collaboration. Abad Santos was executed for his refusal to render his political support to the new occupiers (Aquino 1967).

Under the Japanese, the structure of the judicial hierarchy under the Commonwealth was retained. However, the membership of the Supreme Court was reduced from seven to five. The chief Justice was named by the head of the Executive Commission, while the associate justices were chosen based on the recommendation of the chief justice and the approval of the Japanese commander-in-chief (1 O.G. No. 2, 41-47). Former Senator Jose Yulo was named Chief Justice under the Japanese Occupation. Completing the court were Associate Justices Jorge Bocobo, Manuel Moran, Roman Ozaeta, and Ricardo Paras.

Bocobo was the only newcomer to the high tribunal. Moran, Ozaeta and Paras had been appointed by Quezon to serve in the Supreme Court during the Commonwealth regime. Occasionally, a member of the Court of Appeals was designated temporarily to the high court to assist in the resolution of cases. There was nothing novel about this practice, as it was also done in the Commonwealth period (Guarina 1999c, 430). Jorge Generoso, Jose Hontiveros and Domingo Imperial were named at various occasions to resolve a number of cases.

In 1943, the Japanese gathered their Filipino supporters to announce plans to move forward with the process of establishing an “independent” Filipino republic. It was facilitated by the establishment of the *Kapisanan sa Paglilingkod sa Bayang Pilipinas* (Kalibapi), a political party headed by the head of the civil government, but directly supervised by the Japanese commander-in-chief. The Kalibapi formed a preparatory commission, headed by Jose P. Laurel, to draft a new constitution for the Philippines. The committee presented the draft on September 4, 1943 and it was ratified by the Kalibapi two days later. Jose P. Laurel was elected president of the Second Philippine Republic and inaugurated on October 14, 1943 (Mendoza 1978, 32-33).

There were minimal structural changes to the judicial hierarchy under the new Republic. Judicial power remained in the hands of the Supreme Court and the lower courts established by law. The new legislature, the National Assembly, was given the power to determine the extent of jurisdiction of the court, but was deprived of the power to deny the Supreme Court its original jurisdiction to review the validity of any executive order and legislation, and to resolve appeals on decisions of the lower courts as long as they involved questions of law (Guarina 1999c, 441). The membership of the Supreme Court was increased from five to seven. However, only Antonio Horrilleno was named to join Chief Justice Yulo and associate Justices Moran, Bacobo, Ozaeta and Paras. Until the collapse of the Japanese regime, the Supreme Court had only six members (1 O.G. No. 5, 462 [1944]).

Historical accounts of the judiciary under the Japanese Occupation suggest that while the courts were able to fulfill their duties in resolving private disputes, they were not able to constrain the action of the government in criminal and administrative issues (Guarina 1999c; Mendoza 1978). In 1944, the Supreme Court was deprived of appellate jurisdiction over all

criminal cases. Lower courts were required to decide on criminal cases under a set of guidelines made by the Justice Minister and they were final and immediately executable (42 O.G. No. 4 [1946]).

Unfortunately, empirical analysis of judicial decision-making during the Japanese period is hampered by the fact that many documents and materials were lost during the war. Manila was considered by General Dwight Eisenhower as the second most damaged city in the aftermath of the Second World War after Warsaw (Guevarra 1999, 447). It is most interesting to assess whether the impending collapse of the Japanese regime enabled the justices to rule against the Japanese-controlled civilian government. As to their legal status, the decisions of the Yulo court were not rescinded after the war. They were considered part of Philippine jurisprudence, and were declared generally valid and applicable, except for those decisions which were considered political in nature (Tingson 1955, 347).

4.6 “*That Eloquent Reminder of the Rule of Law*”: The Post-Independence Supreme Court before Martial Rule

When do weak courts become assertive? The legal history of the Philippine Supreme Court from 1945 to 1972 has been framed as a romantic narrative; an account of the transformation of a weak regime supporter into a powerful political player (Cruz and Datu 2000; Guevarra 1999; Vejerano 1999). While rich descriptions of the court’s legal opinions under post-independence politics exist, the factors which were responsible for the growth of judicial power have not been clearly identified and explained. This section argues that the fragmentation in government and the ideological composition of the judges enabled the Philippine Supreme Court to stand up to the state.

The return of General Douglas MacArthur in Leyte on October 23, 1944 started the excision of the Japanese Occupation of the Philippines by force. The Commonwealth government was re-established on February 27, 1945 under the leadership of Sergio Osmeña. Exercising plenary powers under the 1941 Emergency Powers Act, he issued Executive Order No. 40 which enlarged the membership of the high tribunal from five to eleven. Interestingly, he first named eight associate justices. They were largely untainted by any links with the Japanese regime. Osmeña made sure that the nationalist wing of the Nacionalista Party (NP) was satisfied.

Afterwards, Osmeña named to the court three people who served under the Japanese regime, Manuel Moran, who was named Chief Justice; Roman Ozaeta, and Ricardo Paras. Osmeña defended his re-appointment of the three on the grounds that they were all originally named to the high court by Manuel Quezon, a Nacionalista. However, he may have done it to gain the support of that segment of his party who were linked with the Japanese. Securing that segment became important for Osmeña because these people were moving their support to Manuel Roxas, who would challenge him in the 1946 elections (Constantino and Constantino 1978). Roxas broke off from the NP and founded the Liberal Party (LP) as his electoral vehicle (Vejerano 1999, 8-9).

As it turned out, Roxas defeated Osmeña in the elections which were held on April 23, 1946. He was inaugurated as the first president of the Third Philippine Republic on July 4, 1946 when the American government ceded control over the archipelago to the people of the Philippines. His term as president was to be dominated by two issues: what to do with people who were regarded as Japanese collaborationists; and how to secure the continued support of the United States.

4.6.1 “Afraid to Displease the Powerful”: Unified Government and the Court’s Political Questions Doctrine

As president, Roxas had to deal with a Supreme Court that was dominated by justices who were appointed by the Nacionalistas. However, he had a trump card: his LP gained control of both the Senate and the House of Representatives. Roxas was at the helm of a unified government. His party controlled 16 out of 24 seats in the Senate and 49 out of 98 seats in the House of Representatives. He and his party mates could easily overturn a statutory interpretation of the high tribunal or threaten the justices with impeachment under Article IX, Section 1 of the 1935 Constitution.

Confronted with a united government, the Supreme Court generally refused to directly challenge the positions of the Roxas Administration. The post-independence court was noteworthy largely because of its refusal to decide. The court made full use of the “political questions” doctrine to avoid ruling on controversial and politically-sensitive cases.

In *Vera v. Avelino* (77 Phil 192 [1946]), a resolution by the LP-dominated Senate denied three Nacionalista candidates their seats because their victories were being challenged in the Commission of Elections. The three candidates, Ramon Diokno, Jose Romero, and Jose Vera went to the Supreme Court, praying that the resolution be rescinded to allow them to occupy their seats in the Senate. They averred that if they were not allowed to assume their posts, the Senate would proceed to consider, and possibly approve, measures which were of utmost importance to the nation. Among these was the Bell Trade Act, which allowed the duty-free entry of United States goods to the Philippines for the next eight years.

The Court ruled against contentions of the three. It held that among the many wrongs from which it is unable to provide relief are those that they have deemed to be “political questions”. The high tribunal claimed that it has no power to “revise even the most arbitrary and unfair action of the legislative department, or either house thereof, taken in pursuance of the power committed exclusively to that department by the constitution” (p. 205).

The court tended to view a case that involved the executive or the legislature as a political thicket. The case of *Mabanag v. Lopez Vito* (78 Phil. 1 [1947]) involved the Parity Amendment to the 1935 Constitution. The existing law restricted the development of the Philippines’ natural resources to entities where Filipinos held at least 60 percent of the capital (Article XII, Section 1). The objective of the Parity Amendment was to give American citizens and businesses residing in the Philippines equal rights with Filipinos in the exploitation of the country’s natural resources.

The Constitution required a three fourths vote of all the Members of the Senate and of the House of Representatives, voting separately, to propose amendments to the Constitution. Legislators who supported the Amendment blocked three Senators and eight Representatives from assuming their seats on grounds that their victories were being challenged. If they were allowed to vote, both houses might not have been able to muster the required three fourths votes to push the amendment through (Mendoza 1978, 37). The chambers expected that the Supreme Court would not intervene, since it had not done so in *Vera*.

The Supreme Court did not disappoint. It refused to take the case, holding that “it is a doctrine too well established to need citation of authorities that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions have been conferred upon the courts by express constitutional or statutory

provision” (78 Phil. 1, at 4). However, the more important question was the standard upon which a question becomes political. The Court held that “the difficulty lies in determining what matters fall within the meaning of political questions, and precedents and authorities are not always in full harmony as to the scope of the restrictions, on this ground” (p. 5). It was an admission that the Court had broad discretion in this regard, a point that was stressed by Justice Gregorio Perfecto in his dissent: “To allow the existence of such an arbitrary power and to permit its exercise unchecked is to make of democracy a mockery” (cited in Vejerano 1999, 15).

Tate (1992b) contended that the justices may have opted not to intervene in the case because the “majority justices feared the economic consequences of letting parity be defeated” (p. 112). Indeed, the political ramification of the Justices’ non-decision was to allow the proposal to be voted upon and approved. The Parity amendment, considered one of the most iniquitous agreements that were ever incorporated into law by the Philippines, was ratified through a plebiscite on March 11, 1947 (Concepcion 1955, 948; Zaide and Zaide 1987).

Finally, the Supreme Court also inhibited itself from deciding another controversial issue: the treason cases of those who collaborated with the Japanese. On September 25, 1945, A People’s Court was established under Commonwealth Act No. 682 to try those who have been charged with committing crimes against national security during the war. The law gave the Supreme Court the power to review all the decisions which were rendered by the People’s Court.

During its existence, the People’s Court did not convict any of the prominent individuals accused of collaborating with the Japanese (Constantino and Constantino 1978).

But on those instances where a person was convicted and raised an appeal, the Supreme Court largely sidestepped making a determination by employing very strict evidentiary requirements (Vejerano 1999, 10).

On January 28, 1948, President Roxas granted full and complete amnesty for all of those who were accused of crimes against national security through Proclamation No. 51. The People's Courts were formally abrogated by Republic Act No. 311, which was promulgated on June 19, 1948. Treason cases which were not covered by Proclamation No. 51 were transferred to the Courts of First Instance. Their decisions could be appealed to the Court of Appeals or to the Supreme Court.

A problem was that the Court of Appeals was only reconstituted on October 24, 1946 having been abolished by President Osmeña on March 10, 1945 as a cost-saving measure. Before its reconstitution, the Supreme Court had around 40 treason cases on its docket. The high tribunal decided to pass these possibly controversial cases to the Court of Appeals. In *Re Cases Appealed to the Supreme Court* (82 Phil. 111 [1948]), the Justices argued that since the maximum penalty being prayed for in the cases were less than *reclusion perpetua* or death; they could no longer involve themselves in the process.

This decision was perplexing because the cases reached the Supreme Court's docket *before* the reconstitution of the Court of Appeals (Guevarra 1999, 454). However, it fitted perfectly with the Court's general policy of avoiding possible conflicts with the executive and legislative branches. Roxas had control of both branches. His party had the capability to curb the court's jurisdiction, reduce its number, or threaten its judges with impeachment. Furthermore, five of the eleven members of the Supreme Court were associated with the

Japanese regime. “To have expected these men to convict their *compadres*”, said Steinberg (1967), “was to expect the impossible” (p. 151).

In 1948, President Roxas suffered a heart attack from which he was unable to recover. His demise bitterly splintered the LP, between those who supported his Vice-President, Elpidio Quirino, and then Senate President Jose Avelino. The collision of the political ambitions of the two men eventually found its way to the Supreme Court. The case of *Avelino v. Cuenco* (83 Phil 17 [1949]) involved the attempt of Quirino’s allies in the Senate, together with some NP members, to remove Avelino from his position. Instead of allowing a privilege speech in support of a resolution of vote of confidence to proceed, Avelino walked out of the hall with his supporters. Undeterred, Quirino’s group, and their NP allies named Antonio Cuenco as Senate President.

Avelino challenged his removal as Senate President before the Supreme Court on the basis of a lack of a Senate quorum to conduct its business. The Court initially refused to rule on the basis of the political questions doctrine. *However, the presence of two warring factions presented the Court with the political opportunity to advance judicial power.* Because of the existing division in the ruling elite, they could push their jurisdiction into the domains of the political branches with minimal cost. An attack on the court by the losing side would be countervailed by the winners. The alternative was to endure unyielding criticism that it was “refusing to take responsibility on their shoulders” (Sevilla 1984, 28).

The Supreme Court thus intervened into a case it previously would have ruled to be in the legitimate domain of the Senate. It ruled that Cuenco was the legitimate president of the Senate. The Court entered the political thicket; and it would be invited to do so even more in

the future. Ironically, it would be Quirino, and his divided LP, that would experience the defiance of a more assertive Court.

4.6.2 Restraining Quirino and his Emergency Powers

Elpidio Quirino had the misfortune of presiding over the government with a bitterly divided party. His political standing enabled the Supreme Court, which was dominated by Osmeña's appointees, to vigorously strike at the executive and strengthen judicial power. From 1948 to 1953, Quirino's appointees never constituted the majority in the Supreme Court.²⁸ There was never an instance when a majority of the court's members owed their position to him (see Table 3.1).²⁹ The Supreme Court which was willing but unable to go against the LP during Roxas' unified government was given the opportunity to do so because of the split within the ruling party.

²⁸ At this time all cases were decided *en banc*, or by the entire court of eleven justices sitting as one body, thus normally requiring six votes for a majority. [Is this what you meant?]

²⁹ By the beginning of 1951, there were more justices who were appointed by an LP president than an NP.

Table 4.1 SC Justices by Appointing President During Quirino's Tenure (1948-53)

1948	<i>Osmeña (NP) - 8</i>
	Briones, Feria, Moran, Ozaeta, Paras, Pablo, Perfecto, Bengzon
	<i>Roxas (LP) - 2</i>
	Padilla, Tuazon
	<i>Quirino (LP) - 1</i>
	Reyes
1949	<i>Osmeña (NP) - 7</i>
	Briones, Feria, Moran, Ozaeta, Paras, Pablo, Bengzon
	<i>Roxas (LP) - 2</i>
	Padilla, Tuazon
	<i>Quirino (LP) - 2</i>
	Reyes, Montemayor
1950	<i>Osmeña (NP) - 5</i>
	Feria, Moran, Paras, Pablo, Bengzon
	<i>Roxas (LP) - 2</i>
	Padilla, Tuazon
	<i>Quirino (LP) - 4</i>
	Reyes, Montemayor, Bautista, Jugo
1951	<i>Osmeña (NP) - 5</i>
	Feria, Moran, Paras, Pablo, Bengzon
	<i>Roxas (LP) - 2</i>
	Padilla, Tuazon
	<i>Quirino (LP) - 4</i>
	Reyes, Montemayor, Bautista, Jugo
1952	<i>Osmeña (NP) - 4</i>
	Feria, Paras, Pablo, Bengzon
	<i>Roxas (LP) - 2</i>
	Padilla, Tuazon
	<i>Quirino (LP) - 5</i>
	Reyes, Montemayor, Bautista, Jugo, Labrador
1953	<i>Osmeña (NP) - 4</i>
	Feria, Paras, Pablo, Bengzon
	<i>Roxas (LP) - 2</i>
	Padilla, Tuazon
	<i>Quirino (LP) - 5</i>
	Reyes, Montemayor, Bautista, Jugo, Labrador

Quirino's weak party support enabled the Supreme Court to constrain the executive vigorously. In the view of Cruz and Datu (2000), "although there were many instances when it sustained him, significantly more were the times it did not" (p. 138).

In no other cases was the Court more forthright against Quirino than the Emergency Powers cases. In *Araneta v. Dinglasan* (84 Phil. 368 [1949]), the issue was whether the president's could still use the emergency powers which were provided by Commonwealth Act No. 761. On the basis of the Act, Quirino issued executive orders for purposes as varied as regulating the amount of permissible rental fees and imposing limits on exports. His nemesis, Jose Avelino, together with some NP stalwarts who were associated with Jose Laurel, challenged Quirino's exercise of emergency powers.

The Court supported the challengers. It held that the National Assembly only granted the president emergency powers in 1942 because of the inability of the Assembly to meet due to war. However, C.A. No. 761 ceased to be operative when the legislature resumed its regular functioning.³⁰ Therefore, Quirino's executive orders had no force of law because they were based on a law that was no longer operative (Cruz and Datu 2000, 138).

The Court's ruling in *Dinglasan* did not stop Quirino from issuing executive orders. The issue in *Rodriguez v. Gella* (92 Phil. 605 [1953]) was the validity of Quirino's orders to provide funding to some public projects and to assist people in areas that were affected by typhoons, floods and earthquakes. The only difference between this case and *Araneta* was that House Bill No. 727, which was passed by Congress to officially abrogate the President's emergency powers, was vetoed by Quirino. The Court steadfastly ruled against the president, holding that:

³⁰ Four justices contended that the Act ceased to be effective law upon the resumption of Congress' regular session on May 25, 1946. The other justices argued that it became ineffective much earlier, on the legislature's special session on June 9, 1945 (Vejerano 1999, 24).

To contend that the bill needed presidential acquiescence to produce effect would lead to the anomalous, if not the absurd situation that while Congress may delegate its powers by simple majority, it might not be able to recall them except by two thirds vote. In other words, it would be easier for Congress to delegate its power than to take it back. *That is not right, and is not, and ought not, be the law* (p. 605).

Other Quirino attempts to amass even greater powers for the executive department were sternly struck down by the court. In *Lacson v. Roque* (92 Phil 456 [1953]), Quirino was rebuked for suspending the Mayor of Manila simply because a case was filed against the local executive. The Court held that Quirino's action was beyond what "general supervision" of local government meant.

Meanwhile, in *Mondano v. Silvosa* (97 Phil 143 [1955]), the Court explicitly denied the president's view that all powers which were enumerated in the Constitution belonged to the executive. This was known as the theory of "residual powers". The Supreme Court ruled that the executive can only exercise those powers which were manifestly provided by in the Constitution or in ordinary legislation.

The legislative branch did not escape the court's bold assertion of its power. In *Endencia v. David* (93 Phil. 696 [1953]), the Court held that the authority to interpret the Constitution on matters of compensation belonged to the judicial domain; a prerogative that it would not concede to the encroachment of the judicial branch.

The Quirino administration was weakened from within. The LP was hopelessly fractured between the Avelino and the Quirino wings. This made it less costly for the court to negate the actions of the rulers since the probability of an attack on the court was attenuated by the inability of the branches to coordinate against the judiciary. The court asserted its right to be the final arbiter of all constitutional questions. *When rulers are weak, courts confidently negate.*

4.6.3 The Nacionalistas Return to Power: Magsaysay and Judicial Deference

Elpidio Quirino's losing battles with the Supreme Court abetted his downfall from the presidency (Cruz and Datu 2000, 145). He lost to his Defense Secretary, Ramon Magsaysay, by a considerable margin, in 1953. Magsaysay received 68.9% of the total votes compared to 31.1% for Quirino (Hartmann, Hassall and Soliman 2001, 226). Magsaysay gained renown for bringing the armed rebellion of the *Hukbong Mapagpalaya ng Bayan* (The Army that Liberates the Nation) to an end. He defected to the Nacionalista Party in order to compete against Quirino (Wurfel 1988, 97).

Magsaysay's popularity carried the NP to victory in both houses of the legislature as well. His party controlled 59 of 102 seats in the House of Representatives (57.8%) and 14 of 24 seats in the Senate (58.3%).³¹ Magsaysay had a firm hold on the government; the undisputed leader of a unified government.

As a consequence, even though majority of the Supreme Court in 1953 were LP appointees, the Justices found it politically expedient to support the initiatives of the Magsaysay administration. It deferred to the government's position on land reform (*Primero v. Court of Agrarian Relations*, 101 Phil No. L-10594 [1957]), as well as on giving preferential treatment to Filipinos on retail trade (*Ichong v. Hernandez*, 101 Phil. 1155 [1957]). The latter case involved the validity of Republic Act No. 880, which prohibited foreigners from engaging in retail trade. The petitioners in the case, mostly Chinese merchants, argued that the law violated the Constitution's equal protection clause (Article III,

³¹ In 1955, the NP came to control 21/24 seats of the Senate (87.8%), further strengthening the Magsaysay leadership.

Section 1). The Supreme Court steadfastly supported the law, ruling that it was a valid exercise of police power.

With Magsaysay at the helm, the government steadfastly pursued people who were associated with the *Huks* and with the communist movement. The Court sought to temper the government's treatment of its opponents. In *People v. Hernandez* (99 Phil. 515 [1956]), the government pushed to convict Amado Hernandez, a noted playwright, of rebellion "complexed" with murder. If the position of the government had been affirmed, Hernandez would have been given the death sentence.

However, the court ruled that rebellion is a single crime, that killings done in the process of rebellion are constitutive, not separate, parts of the offense. Only when a number of offenses were devoid of any political motivation could a string of offenses be tried separately.³² Tate (1992b) commented that the decision in *Hernandez* forced Magsaysay to modify its policies in fighting the rebellion (p. 113). In his interpretation, the Court's action represents a vigorous assertion of judicial prerogatives against the leader of a unified government.

However, it is worth noting that the only practical effect of the Supreme Court decision in 1956 was to allow Hernandez to post bail while his conviction is being appealed. The lower court denied his application for bail (Cruz and Datu 2000, 145). If rebellion can be "complexed" with other offenses, he would not have been able to obtain provisional liberty since murder is a non-bailable offense.³³ But the Court could have immediately freed Hernandez since he was being held on a crime that did not exist. The evidence against

³² The Court would apply the ruling in *Hernandez* to a subsequent case, *People v. Geronimo* (100 Phil 90 [1956]).

³³ In effect, the Supreme Court's ruling held that murder and other offenses were considered necessary components in the commission of rebellion, and thus were "absorbed" by the latter offense.

Hernandez was also quite weak, as evidenced by the fact that it took the prosecution almost a year before the government filed a case against him in court.

However, the Court was facing not only a unified but also a popular government. Given the saliency of the rebellion issue to Magsaysay (Wurfel 1988, 15; Dolan 2003, 65-66), it is very plausible that the government would have attacked and sanctioned the Court had it freed Hernandez while he was in power. It is worth noting however, that the Supreme Court would eventually acquit Hernandez of all charges on May 30, 1964. At that time, Magsaysay was no longer at helm, and government was bitterly divided under Diosdado Macapagal.

4.6.4 Consolidating Control over Executive Prerogatives: The Supreme Court, Garcia, and Macapagal

On May 17, 1957, President Magsaysay was killed when his plane crashed on Mount Pinatubo. His Vice-President Carlos P. Garcia succeeded as president and head of the NP. Garcia would eventually receive his own mandate by beating Jose Yulo, Manuel Manahan, and Claro M. Recto in the presidential elections that same year. The NP would also control both houses of the legislature, winning 19 of 24 seats in the Senate (79.2%) and 82 of 102 seats in the House (80.4%). Garcia was at the helm of a strongly unified government.

As expected, the relationship between Garcia and the Court was relatively “calm” (Tate 1992b, 113). However, Garcia would lose in the next (1961) elections to the LP candidate, Diosdado Macapagal. Before leaving office, Garcia attempted to keep NP control of the bureaucracy, designating 350 *ad interim* appointments the day before Macapagal’s ascension into the presidency. When Macapagal assumed control of the government, he

cancelled his predecessor's "midnight" appointments. Despite Macapagal's orders, a Garcia midnight appointee, Dominador Aytona, went to the Central Bank to take his post. Macapagal sent the armed forces to prevent him from entering the banks' premises (Vejerano 1999, 41). Aytona countered by petitioning the Supreme Court to allow him to take his position as governor of the Central Bank (*Aytona v. Castillo*, (4 Supreme Court Report Annotated [SCRA] 1[1962])

For the Supreme Court, there was minimal risk in rebuking a president who had fallen out of power. With the turnover in government an accomplished fact, the high tribunal was presented with an opportunity to constrain the appointive prerogatives of the executive with minimal risk to its standing. The Court ruled against Aytona, and censured Garcia for abusing his presidential prerogatives. The Justices expressed severe doubt that he took deliberate action and careful consideration in naming 350 appointees in one night. They regarded it as a "partisan effort to fill vacant positions (which had been vacant for months) irrespective of the fitness and other conditions, and thereby deprive the new administration of an opportunity to make the corresponding appointments" (page number would be better.)

Macapagal won his first legal battle before the Supreme Court. However, he assumed the presidency with certain political disadvantages. First, the Nacionalista Party continued to control both houses of the legislature. It would do so until the end of Macapagal's term as president. In addition, a majority of the Supreme Court justices were appointed by NP presidents in the first two years of his presidency. If Macapagal thought that Aytona foreboded good things to come, succeeding events demonstrated that he was badly mistaken. The case of Elpidio Quirino before him had demonstrated that *a divided government enables*

a court that is politically opposed to the administration to negate the state's contentions confidently.

Macapagal would suffer one stinging defeat after another before the Supreme Court. Beginning with *Garcia v. Executive Secretary* (6 SCRA 1 [1962]), the administration sought to prevent Garcia's midnight appointees from returning to their old posts. By taking their midnight positions, the administration contended, they have relinquished their right to their previous offices. The Court rebuked the Macapagal administration for its bad faith: "if the appointments were void, the assumption of office had no effect" (p. 1). The Garcia appointees were allowed to go back to their places of work.

Macapagal and supporters of his "New Era" program continued to target NP appointed officials with the aim of replacing them with their own (Vejerano 1999, 44). The problem was that in their zeal to get back at the NP's, they violated key aspects of due process as it was developed in Supreme Court jurisprudence. The omissions made it easy for the Supreme Court to strike down the government's position in litigation.

The case of Merrera v. Liwag (9 SCRA 104 [1963]) involved a Garcia supporter who was appointed as an auxiliary justice in Pangasinan. The Macapagal administration targeted him for removal on the grounds that he was one of Garcia's *ad interim* appointees. The Court reinstated him because his appointment actually transpired before Garcia's midnight frenzy.

In another case, the LP tried to replace the police chief of Zamboanga with one of their supporters. In *Libarnes v. Executive Secretary* (9 SCRA 261 [1963]), the Court once again rebuked the administration, holding that according to the Civil Service Law, Libarnes could only be removed if there was just cause. And belonging to the opposition was not a valid rationale for termination in Philippine law.

Macapagal's actions were also struck down by the court when he attempted to bypass the NP-dominated legislature. When he entered into executive agreements to import rice without getting prior approval from the National Economic Council as demanded by statutory law, the Supreme Court reprimanded him in *Gonzales v. Hechanova* (9 SCRA 230 [1963]). The high tribunal held that he could not repeal acts of the legislative branch simply by entering into an executive agreement.

Macapagal's frustrations with the Supreme Court exploded into the open after the Court's decision in *Garcia v. Executive Secretary* (6 SCRA 1 [1962]). The issue in the case was the validity of the president's suspension of the chairman of the National Development Board allegedly for actively campaigning for NP candidates. Macapagal charged that the Court, especially Justice J.B.L. Reyes, was "ideologically biased" to his political adversaries (Rama 1969). Justice Reyes retorted that the President's behavior in the case showed a lack of "open mind, soberness and restraint" (Ibid.). The president countered that while he *can* rule for Garcia, Reyes will *never* rule against Garcia. He concluded his diatribe against the Supreme Court by stating: "I prefer a president who is a tyrant to a justice who is a tyrant!" (Vejerano 1999, 45).

The Court must have done some careful calculation of the political equation because Macapagal could have asked for the court's reorganization or the reduction of its jurisdiction. He could have also moved for the forced resignation of Justice Reyes through the impeachment process. However, Reyes had the support of the Nacionalista Party (Vejerano 1999, 46). Deprived of control over the legislative branch, the president could not muster enough political power to attach his opponents in the high tribunal. As was seen in the case of Elpidio Quirino, divided government enables assertive courts. Retaliation became even

more difficult when the Justices were named “Men of the Year for 1963” by the *Philippine Free Press* (Locsin 1964, 8) and for being “eloquent reminders of the rule of law” (Macaraeg 1963, 36).

4.6.5 Confidence before the Storm: Judicial Negation Prior to Martial Law

Macapagal’s losing battles with the Court contributed to his defeat in the next elections to Ferdinand Marcos (Tate 1992b, 114). Marcos defected to the NP in order to face Macapagal and defeated him in a bitterly contested election in 1965. However, the LP retained control of both houses of Congress. Marcos had to rule over a divided government. Marcos and the NP would only be able to dominate both branches during Marcos’s second term in 1969.

Given the division among the ruling elite, the Supreme Court was able to confidently constrain the actions of government. Under Chief Justice Roberto Concepcion, the high tribunal obtained reputation of zealously protecting human rights and promoting social justice (Guevara 1999, 528-31). “Through his leadership, the Court discarded a spate of dated doctrines in favor of a shift toward nationalism and a more liberal interpretation of civil rights” (Cruz and Datu 2000, 166).

One of the most significant rulings adopted the exclusionary rule in searches and seizures. The issue in *Stonehill v. Diokno* (20 SCRA 383 [1967]) was whether evidence which was gathered through illegal means may be used against the accused in a Court of Law. In other words, do “fruits from the poisonous tree” have any probative value in the Philippine courts of law? The ruling effectively displaced as precedent the Court’s decision

in *Moncado v. People's Court* (80 Phil 10 [1948]) where it ruled that illegally seized objects and items have probative value if permitted by the Rules of Court. Writing for the Court, Justice Concepcion held that the “non-exclusionary rule is contrary, not only to the letter, but also to the spirit of the constitutional injunction against unreasonable searches and seizures” (Ibid.)

The strengthened confidence of the court vis-à-vis the other branches of government is best seen in the Court's holding in *Gonzales v. Commission of Elections* (129 Phil 7 [1967]), where the Justices revisited the question of whether the process of proposing to amend the Constitution belonged to the exclusive domain of the legislative branch. The Concepcion Court refused to hide behind the comforts of the “political questions” doctrine.

The high tribunal held that the judiciary has the power to inquire into the legality of the manner through which the constituent power was used by the legislative branch. The process involved in amending the Constitution was a justiciable, not a political question. To emphasize its point, the Court pointedly stated that “to the extent that this view may be inconsistent with the stand taken in *Mabanag v. Lopez Vito*, the latter should be deemed modified accordingly” (p. 7).

However, politics in the Philippines was becoming turbulent. The government was being challenged from multiple sides. Tensions were simmering between Christians and Muslims in Mindanao. Left-leaning students were holding nearly daily demonstrations to protest government policies on wages and employment, as well as to denounce what they referred to as “American neo-colonialism” (Noble 1986, 77-8; Timberman 1991, 60-2). The protests developed into what it now referred to as the “First Quarter Storm” of January 1970. Even more importantly, two grenades were detonated at an opposition party rally in Plaza

Miranda (Blitz 2000, 106-8; Celozza 1997, 30-1). Marcos laid the blame on the disorder that ensued to the communists, the Muslim rebels, and to the local opposition headed by Benigno Aquino Jr (Wurfel 1988, 17-21). To deal with the deteriorating situation, Marcos suspended the privilege of the writ of habeas corpus on August 1971.

The president's order was immediately challenged before the Supreme Court. The issue in *Lansang v Garcia* (42 SCRA 448 [1971]) was whether the Court has the power to inquire whether the president's suspension of the writ has a factual basis. Marcos contended that the "wisdom" of the suspension cannot be reviewed by the court; it was part and parcel of his military powers, and was therefore a political question. Justice Concepcion, writing for the Court, ruled that the judiciary has the power to review whether the suspension is supported by facts:

Indeed, the grant of power to suspend the privilege is neither absolute nor unqualified. The authority conferred by the Constitution, both under the Bill of Rights and under the Executive Department, is limited and conditional...*Far from being full and plenary, the authority to suspend the privilege of the writ is thus circumscribed, confined, and restricted not only by the prescribed setting of the conditions essential to its existence but also, as regards the time and place where it may be exercised.* These factors and the aforementioned setting or conditions mark, establish, and define the extent, the confines and the limits of said power, beyond which it does not exist (p. 448. Emphasis added).

The Court's ruling was a resolute defense of its prerogatives to limit the military powers of the executive and to protect human rights. The Justices could have avoided a potential confrontation with the executive by simply employing the "political questions" doctrine. However, the Supreme Court had grown assertive and protective of its prerogatives through the years largely by boldly ruling on controversial political questions when divisions exist among the ruling elite. It has gained much political capital in doing so and "the highest

respect for its independence and integrity” (Cruz and Datu 2000, 174). In *Lansang*, it was not about to back down.

Some scholars have a different view of *Lansang*. They characterized it as one of those decisions that laid down the foundation of Martial Law. For example, Del Carmen (1979, 88-90) contended that by upholding the president’s suspension of the writ of corpus, the Court in effect validated Marcos’ view that serious threats to the security of the state exists. He even ventured to state that *Lansang* may have “emboldened” Marcos to declare Martial Law (p. 88). For Tate and Sittiwong (1986) the Court’s conclusion that the President’s suspension of the writ had factual support “weakened the grounds its justices might have used later to support challenges to the validity of the Martial Law declaration” (p. 5. See also Mijares 1976, 153-8).

However, we should carefully distinguish between a decision’s *doctrinal*, as opposed to its *political*, consequences (See Fernandez 1999, 579-83 for a similar view). The Court has considerable control on the form and substance that the law should have, but it does not have any control on how political actors are going to use their decisions. As doctrine, *Lansang* expanded the scope of judicial power to include factual review of the president’s exercise of his military powers.

After *Lansang*, the duration of any suspension of the privilege of the writ or Martial Law declaration *does not depend solely* on the President. It can now *also* be lifted by the Supreme Court through a decision that the executive’s actions are not supported by facts. Thus, Fernandez (1999) remarked that “as a constitutional technique, *Lansang v. Garcia* marks a high point in the assertion of by the Supreme Court of its checking power directed at Executive prerogative in emergency” (p. 580).

While the Court supported the President's suspension of the writ in *Lansang*, the Court reserved for itself the authority to review *in the future* whether the facts support the continuation of the suspension of the privilege of the writ, or a Martial declaration.³⁴ By proclaiming this power as a *constitutional* principle, the Court effectively conveyed to Filipinos that the high tribunal *can* and *will* consider challenges to the president's actions as the nation's commander-in-chief. For example, Senator Lorenzo Tañada stated that he will continue to file cases in the Supreme Court until the suspension of the writ is rescinded (Mijares 1976, 155). Thus, it is hard to see how *Lansang* can be considered a jurisprudence that is supportive of the executive's use of military powers, like the declaration of Martial Law.

What can be contended is that the *practical* effect of the ruling was to provide Marcos with an instrument that he can twist and bend for his political purposes (Bernas Interview, 2007). He utilized it to rationalize his desire to remain in power. Interpreting *Lansang* as unanimous validation of his view that the security of the state was at risk, Marcos placed the entire nation under Martial Law on September 21, 1972 (Rempel 1993, 101; Noble 1986; Mijares 1976, 154-6).

4.7 Conditions for Controlling the State: The Philippine Experience

The legal history of the Philippine Supreme Court demonstrated that the growth of judicial power is conditioned by the political opportunities that open and close for the

³⁴ It is worthy to note that the core holding of the Court's ruling in *Lansang* has now been enshrined in the Philippines' current (1987) Constitution (Article VIII, Section 18, par. 3).

judiciary; what has been referred to in the literature as political opportunity structures (McAdam 1996; Tarrow 1994). It is not enough that the judges are *willing* to control the actions of the state, it is often necessary for conditions to develop that will *enable* them to do so. Thus, Ginsburg (2003) contended that judicial power is often built incrementally. The court often begins to decide under conditions of low equilibrium: its pronouncements are often ignored; when it has the temerity to stand its ground, it gets attacked (pp. 73-75).

The court is able to move to high equilibrium by seizing opportunities to assert its power as the final arbiter of legal and constitutional issues. In the case of the Philippines, the fragmentation of government in the Quirino, Macapagal, and Marcos years enabled the Court to protect human rights and limit the prerogatives of the executive. Negation was also enabled by the fact that their chances for winning in the next elections were weakened by their skirmishes with the Supreme Court. Political turnover was imminent.³⁵ These situations enabled the judiciary to confidently set its vision of the law. This pattern has been shown to exist in other contexts as well (See Helmke 2003, 2005; VonDoepp 2005, 294-7). At high equilibrium, litigants come to view the court as a credible venue for pursuing their interests. Public support can develop as a deterrence mechanism, protecting the courts from being attacked by the state (Moustafa 2003; Vanberg 2005).

The question that now confronts us is how judicial power can develop in settings where power is concentrated in the hands of one person, party, or clique. *When do courts become willing to constrain the power of dictators? What opportunities enable them to do so?* After the discussion on how the Philippine Supreme Court developed its power prior to Martial Law, we now turn to the study of how judicial control of the state becomes possible under dictatorships.

³⁵ Marcos was constitutionally barred from running for a third term in 1973.

CHAPTER FIVE

CONSTRAINING CAESAR: JUDICIAL NEGATION IN THE PHILIPPINE SUPREME COURT DURING THE MARCOS DICTATORSHIP, 1972-86

“Fear has been the pervasive presence in our people’s lives since the Marcos golpe fell... only in a few did courage combine with outrage to produce action.”

---**Senator Benigno Aquino Jr.** (1984)

5.1 Introduction

The game of judicial negation is played in a political field that shifts and changes during the course of time. Its scope and depth are hypothesized to be heavily influenced by regime duration and the mechanisms that the dictatorship has selected to control the judiciary. It is within those constraints that the judiciary may attempt to limit the government’s exercise of political power. The aim of this chapter is to apply the theoretical contentions that were developed in the previous chapters to interpret the actions and choices made by the Philippine Supreme Court during the Marcos dictatorship.

This chapter is divided into five parts. In the first section, a brief historical background of the events that led to the declaration of Martial Law is provided. It discusses the various reasons that motivated Marcos to place the Philippines under military rule. It also

details the various instruments that were available to him in his attempt to keep himself in power. In the second part, I describe how Marcos tried to overcome the challenge of regime justification. The section expounds on the mechanisms that he adopted to obtain legal validity from the Supreme Court while simultaneously limiting the scope and depth of judicial power. Eventually, the high tribunal had to define its role in the new political order in the critical case of *Javellana vs Executive Secretary* (50 SCRA 33). I employ the instrument of game theory to predict and explain the Court's choice to support the new institutional arrangement. The third section contains an analysis of the structures that were adopted by the dictatorship to consolidate its power. Marcos was able to keep the Court in line with his regime primarily through selection rather than sanction. As a result, the Court produced a jurisprudence that was generally supportive of the regime.

In the fourth section, I provide an evaluation of the jurisprudence of the Philippine Supreme Court as the dictatorship confronted the challenge of regime breakdown. Qualitative evidence suggests that the high tribunal began to treat the claims of the dictatorship more negatively when Marcos allowed elections for both the interim and the regular *Batasang Pambansa* (National Assembly). While it still dominated by Marcos and his party, the re-establishment of a legislature allowed the articulation of alternative viewpoints by more moderate actors within the ruling elite (Fernandez 1999, 731-54; Celozza 1997, 66-8). The negative treatment of the government's claims became even more pronounced after the 1983 assassination of Senator Benigno Aquino Jr., the most ardent opponent of the regime, providing some support to the contention that signs of possible turnover in leadership provides an incentive for the gavel to control the gun (Helmke 2002, 2005). In addition, external actors like the United States began to demand that the regime

demonstrate increased respect for human rights and civil liberties (Blitz 2000, 129-45). I contend that these developments provided the high tribunal with opportunities to limit the prerogatives of the dictatorship more assertively. In the last section, I briefly summarize the insights that we have gained on Court-Dictator relationship in studying the Philippine case.

5.2 Motivations for Martial Law

In 1965, Ferdinand Marcos, Diosdado Macapagal's campaign manager in the 1961 electoral contest, shifted to the NP when the incumbent reneged on his promise to serve for only four years (Rempel 1993, 16). He defeated Macapagal to take over control of Malacanang (Hartmann, Hassall and Soliman 2001).

In his inauguration at the Rizal Park, Marcos exclaimed that he was given a "mandate for greatness", and promised the Filipino people that he would "end every form of waste or conspicuous consumption and extravagance" (cited in Blitz 2000, 103). However, the legislature was controlled by the LP during Marcos' term (see Table 5.1 below). He found it difficult to push through with his political and economic agenda.

Before Martial Law, the Philippine Congress had been always been a recalcitrant check on executive power. Often however, the disagreements were not over the reason and features of the policy but the amount of money that the executive was willing to provide to legislators for their districts. "In these circumstances," said Doronila (1993), "the normally adversarial relationship between Congress and the President was exacerbated by conflicts which had little to do with national policy issues" (p. 124). Marcos was particularly resentful of the Senate. He wrote:

The Senate is turning out to be a serious stumbling block to our reform programme. Most of the Senators are egoistic men concerned with their own personal ambitions and oblivious to the public welfare. *And their pet dream is to cut the power of the presidency no matter what the consequences* (cited in Doronila 1993, 130. Emphasis added).

Table 5.1 Political Parties in Control of the Executive and Legislative Departments

ELECTION YEAR	PRESIDENT	HOUSE³⁶	SENATE
1946	Manuel Roxas (LP)	LP	LP
1949	Elpidio Quirino (LP)	LP	LP
1953	Ramon Magsaysay (NP)	NP	NP
1957	Carlos Garcia (NP)	NP	NP
1961	Diosdado Macapagal (LP)	NP	NP
1965	Ferdinand Marcos (NP)	LP	LP
1969	Ferdinand Marcos (NP)	NP	NP

Marcos' ability to implement his agenda was made more difficult by the rise of two armed challenges to the power of the state. In 1968, Jose Maria Sison, together with some other student activists, re-established the Communist Party of the Philippines (CPP). They criticized their old comrades, the *Partido Komunista ng Pilipinas* (PKP), for participating in elections that perpetuate the rule of capitalists and their political supporters (Chapman 1987; Jones 1990). They contended that the lives of the poor cannot be improved in a political system that is based on the contradictions of capitalism.

The objective of the new CPP was the seizure of political power through violence. From Mao Tse Tung, Sison and his comrades took the notion of the "protracted people's war". The strategy involved the establishment of control of the countryside and then using them as bases for attacking and seizing the cities (Guerrero 1979; Weekley 2001). The

³⁶ The legislative house is considered "controlled" by a particular party if it has the majority in terms of plurality.

party's military wing was named the "New People's Army" (NPA). It was headed by Bernabe Buscayno, who once commanded forces for the Huks.

At almost the same juncture, an armed Muslim challenge to the government emerged in the southern Philippines. Nur Misuari, Salamat Hashim, and other young Muslim intellectuals secretly formed the Moro National Liberation Front-Bangsa Moro Army (MNLF-BMA) with the objective of establishing a separate state in Mindanao (Chalk 2002). It was primarily an ethnic uprising to assert the Filipino Muslims' historical rights to their homeland and to reverse their marginalization in political affairs and economic development in the South.

The "Jabidah Massacre" of March 1968 was the triggering cause of the Muslim uprising (George 1980; Kamlian 1995). Operation Jabidah was a military expedition that was organized by Marcos to instigate disorder in Sabah and allow the Philippine government to strengthen its territorial claim to the said territory.³⁷ Some of those who were recruited to join the operation were Muslims. Thereafter, they were found dead on the island of Corregidor after backing out from the operation when told of its mission (Che Man 1990; Gutierrez 2000; Noble 1976).

The incident triggered widespread Muslim indignation and resentment. The fiasco that was Jabidah was seen as the culmination of a history of prejudice, ill treatment, and discrimination by the Philippine government against the Muslims (George 1980; Kamlian 1995). Misuari and his supporters framed the event as internal colonialism: The state had become a *gobirno a sarwang tao* (government of foreign people) who manipulates and exploits the *Moro* for selfish political ends. The MNLF uprising was a call to *jihad*, a holy war against the state that had become *dar-al-harb* (an abode of war).

³⁷ Sabah was being claimed by both the Philippines and Malaysia (Noble 1977; Steinberg 1990).

Marcos rationalized his declaration of Martial Law on September 21, 1972 as an attempt to save the Philippines from the “rebellion and armed action undertaken by these lawless elements of the communist and other aggrupations organized to overthrow the Republic of the Philippines” (Presidential Decree [P.D.] 1081, cited in Rosenberg 1979, 240). However, in 1972, it is debatable whether the extent of the danger posed by the both the CPP and the MNLF necessitated the extraordinary step of declaring Martial Law (Timberman 1991, 66-8). Compared to Marcos’ estimates of 8,000 guerillas, 10,000 active cadres and 100,000 supporters, the United States Department of State’s Bureau of Intelligence and Research (INR) found that their total sum was probably less than 9,000. The Rand Corporation’s estimates were 1,000 guerillas and 5-6,000 supporters (Blitz 2000, 118). Meanwhile, Misuari’s MNLF had an estimated 6,000 armed supporters at that time (State Failure Project 2005) and had suffered heavy losses against the Philippine armed forces since fighting broke out in 1972 (Molloy 1988; Balacuit 1994).

The emergence of the armed challenges provided Marcos with the opportunity to reorganize the armed forces and obtain considerable money for himself and his supporters. He took control of the military by forcing the resignation of top military officials including the Armed Forces Chief of Staff, Vice Chief of Staff, the heads of the Philippine Army (PA) and the Philippine Constabulary (PC) and most of the provincial commanders. As replacements, Marcos named fellow Ilocanos. Ernesto Mata assumed the position of Chief of Staff, with Segundo Velasco taking over at the Constabulary. Marcos also took the opportunity to name his cousin, then Colonel Fabian Ver, as the new head of the Presidential Security Command (PSC). Marcos tightened his grip on the military establishment (Casper 1995, 94; Blitz 2000, 125).

Marcos then sought to obtain financial resources from the United States. In 1965, Lyndon Johnson ceased the American bombing of North Vietnam and attempted to frame the situation as a multinational war. The Philippines was one of the first to respond to Johnson's call for support from other countries (Brands 1992). In exchange, Marcos obtained economic assistance worth \$45 million from the American government, as well as \$3.5 million to fulfill the dream of his wife, Imelda, to establish a Cultural Center in Metro Manila. With the rise of anti-Vietnam protests, Marcos negotiated for even more money to protect the American bases (Berry 1989).

5.3 Methods for Remaining in Power

Just like any rational politician, Marcos sought to stay in power. He believed that his efforts to improve the economy of the country were frustrated by Congress. Thus, he needed more time in office to complete his reforms. He believed that he was the only one who was seeing the immensity of the task that needed to be done:

...the Senate, notwithstanding the serious problems that can be solved by legislation, wastes its time on petty politically oriented debate. It has not done any work at all and they are halfway on the 30 day special session. *I cannot but agree with some critics of democracy about its many weakness and failings* (cited in Doronila 1993, 130. Emphasis added).

As a war hero, he also considered himself to be the person most capable of handling the communist insurgency and the Muslim rebellion. He came to see himself as the “savior” of the country: the person who will go down in history as the one who brought the country back from the brink of disaster and into greatness. In his diaries, he wrote about his divine mandate to “save the country again from the Maoists, the anarchists, and the radicals”. He

dreamt that God told him that “you are the only person who can do it. Nobody else can” (Rempel 1993, 101). When he officially proclaimed Martial Law, Marcos employed the same rhetoric: “I assure you that I am utilizing this power vested in me by the Constitution *to save the Republic and reform our society*” (Rosenberg 1979, 229. Emphasis added).

However, the fundamental law barred him from seeking a third term in 1973. Article VII, Section 5 of the 1935 Constitution clearly stated that “No person shall serve as President for more than eight consecutive years”. One of the ways for Marcos to continue to have a high level of political influence was to select a crony as successor. He considered naming his wife, Imelda, as his party’s candidate in the next elections (Rempel 1993, 141). However, popular support for the NP was on the decline. They lost four seats to the LP in the 1971 Senatorial elections. With the victory, Benigno Aquino Jr. of Tarlac, Marcos’ archrival and head of the LP slate, emerged as the frontrunner in the 1973 presidential elections. Marcos conveyed that he would never allow Aquino to become president (Noble 1986, 82).

The second mechanism was to push for modification of the 1935 Constitution in order to lift the term limit on the office of the president (Wurfel 1988, 106-12; Karnow 1989, 379). Marcos succeeded in pushing for a Constitutional Convention to introduce needed “reforms” to the 1935 Constitution. In June 1971, the Convention started work on a draft chapter to shift the country’s political system from a presidential to a parliamentary one. The objective of Marcos’ supporters was to enable him to continue to rule the government as prime minister. “If the Cons. Con. adopts the parliamentary system of government”, said Marcos, “this will settle the whole question” (Rempel 1993, 141).

A third way to remain in power was to frame the intensifying social violence and disorder to justify the imposition of Martial Law. Under Article VII, Section 10(2) of the

1935 Constitution, the President can place the entire country under military rule when “invasion, insurrection or rebellion exists or there is an imminent danger thereof.”

Amidst the backdrop of student demonstrations, communist activities in the countryside and the Moro rebellion in the South, Marcos used two high-profile events to implement his plans to place the country under Martial Law. The first was the bombing of the meeting of opposition candidates in Plaza Miranda. Marcos immediately blamed the communists and other subversive elements for the incident. However, his critics pointed out that he might have instigated the incident himself to justify the declaration of Martial Law (Thompson 1995, 44; Timberman 1991, 63-4).

The second incident was the ambush of Marcos’ Defense Secretary, Juan Ponce Enrile on September 22, 1972. Allegedly, Enrile’s car encountered a hailstorm of bullets on his way home but escaped unscathed. Marcos wrote that the shooting “makes the martial law proclamation a necessity” (Rempel 1993, 184).

While the ambush occurred on the 22nd, Marcos placed the official date of the declaration of Martial Law as September 21, since it was divisible by seven, his lucky number. Fourteen years thereafter, Enrile revealed that the entire event was staged (Dolan 2003, 69). He was nowhere near the area and that his men actually took turns shooting at an empty vehicle. The Philippines was ushered into authoritarianism by a non-event (Noble 1986, 84)

5.4 The Philippine Supreme Court and the Challenge of Regime Justification

Upon the declaration of Martial Law, Marcos padlocked Congress and eventually abolished it. Marcos' political opponents, including Senators Benigno Aquino Jr., Jose Diokno, and Francisco Rodrigo were rounded up and incarcerated. Political parties were banned. Rallies and demonstration were prohibited. Print, radio, and television outlets were closed. Curfew was imposed and strikes were curtailed (Celoza 1997, 40-3). Other than the bureaucracy, the only institution that Marcos allowed to continue to function normally was the judiciary (Tate 1993; Muego 1988). In the phase of emergence, authoritarian leaders tend to justify their seizure of power through the legal process. This was certainly the case here.

Marcos utilized legality as the primary mechanism for justifying his rule. In his first statement to the nation after a declaration of Martial Law, he explicitly cited a decision made by the Supreme Court as the primary corroborating evidence of the existence of a clear danger to the Republic's existence:

There is no doubt on everybody's mind that a state of rebellion exists in the Philippines...*This danger to the Republic of the Philippines and the existence of a rebellion has been recognized even by our Supreme Court in its decision in the case of Lansang vs. Garcia, dated December 11, 1971.* Since the Supreme Court has promulgated its decision, the danger has become graver and rebellion has worsened or escalated ... (Rosenberg 1979, 221).

In *Lansang*, the Supreme Court has considered a challenge to a Marcos suspension of the writ of habeas corpus in 1971. As I contended in Chapter 3, *Lansang* was not as supportive of martial law as Marcos asserted. A principal holding of the case had been that,

contrary to government claims, the factual basis of such a declaration was reviewable by the Supreme Court. Chief Justice Concepcion, writing for a unanimous Court, proclaimed:

Far from being full and plenary, the authority to suspend the privilege of the writ is thus circumscribed, confined and restricted, not only by the prescribed setting or the conditions essential to its existence, but also, as regards the time when and the place where it may be exercised... *And, like the limitations and restrictions imposed by the Fundamental Law upon the legislative department, adherence thereto and compliance therewith, may within proper bounds, be inquired into by the courts of justice.* Otherwise the explicit constitutional provisions thereon would be meaningless... (42 SCRA 448. Emphasis added).

However, Marcos saw the Supreme Court's decision in a different light. He focused on the Court's refusal to challenge the president's position on the existence of a state of rebellion. For Marcos, *Lansang* meant "I can place the Philippines or any part thereof under martial law" (Rempel 1993, 134).

In Proclamation No. 1081, the document that officially declared Martial Law on September 21, 1972, Marcos lifted verbatim a substantial number of paragraphs from the Court's decision in *Lansang*. The next day, he issued an order (General Order [G.O.] No. 3) which stated, among other things that "the judiciary shall continue to function in accordance with its present organization and personnel, and shall try and decide in accordance with existing laws all criminal and civil cases" (Fernandez 1999, 596-7). With these actions, Marcos was trying to create the image that his action was not an illegal usurpation of power, but a valid and necessary one. He described his new government as a *constitutional authoritarian regime*; a system where "the broad powers he wields were subjected to checks and balances by the country's Supreme Court" (Abueva 1988, 54; Del Carmen 1979, 87). In the emergence phase of the dictatorship, Marcos will attenuate the power of the judiciary not

by attacking its independence or removing its liberal members, but through restrictions of the jurisdiction of the Supreme Court (Tate 1993; Moustafa 2005).

5.4.1 The Dictator's Dilemma

Marcos intensely desired the judicial validation of his declaration of Martial Law (Wurfel 1988, 133; Vejerano 1999, 55-57). Approval by a court that was relatively autonomous was certain to strengthen his standing within the domestic population as well as to foreign actors. Given the high amount of respect that has been accorded to the Supreme Court before the declaration Law, Marcos had the opportunity to “steal” some of the Court’s legitimacy and rub it off to his authoritarian regime.

However, Marcos was uncertain about the allegiance of the members of the Supreme Court in 1972 (See Table 5.2). Four members of the tribunal were appointed by Diosdado Macapagal, his electoral adversary in 1965 (Concepcion, Reyes, Makalintal, Zaldivar). Concepcion, Reyes and Zaldivar have gained renown for their independence and strong defense of civil rights (Cruz and Datu 2000). Four justices were appointed by Marcos in his first term as president (Castro, Fernando, Teehankee, Barredo), when he was constrained in these designations by the Commission on Appointments which was controlled by the Liberal Party. He had to select a candidate that would pass muster in the Commission. He could not appoint Justices that he absolutely trusted. In 1969, Marcos’ Nacionalista Party seized control of both houses of Congress. Marcos was only then able to appoint three Justices (Makasiar, Esguerra, and Antonio) as head of a unified NP government. These three justices were allegedly Marcos’ most ardent supporters in the Court at the beginning of martial law (Del Carmen 1979, 99).

Table 5.2 Members of the Supreme Court (September 21, 1972)

JUSTICE NAME	APPOINTING PRESIDENT	RULING PARTY IN CONGRESS (TIME OF APPOINTMENT)
Roberto Concepcion (CJ)	Diosdado Macapagal (LP)	NP
J.B.L. Reyes	Diosdado Macapagal (LP)	NP
Querube Makalintal	Diosdado Macapagal (LP)	NP
Calixto Zaldivar	Diosdado Macapagal (LP)	NP
Fred Ruiz Castro	Ferdinand Marcos (NP)	LP
Enrique Fernando	Ferdinand Marcos (NP)	LP
Claudio Teehankee	Ferdinand Marcos (NP)	LP
Antonio Barredo	Ferdinand Marcos (NP)	LP
Felix Makasiar	Ferdinand Marcos (NP)	NP
Salvador Esguerra	Ferdinand Marcos (NP)	NP
Felix Antonio	Ferdinand Marcos (NP)	NP

Marcos was aware of the dangerous ramifications of a Supreme Court decision that might invalidate his declaration of Martial Law on the basis of lack of factual support. He worried that opposition to his regime might be emboldened. Even more importantly, he feared the deleterious effect of a judicial negation of his proclamation to the military's support to his rule:

The doctrine of review is dangerous as it will undermine the habit of obedience inbred in the military. For every soldier may entertain doubts as to the legality of the order suspending the privilege of the writ or even of Martial Law --- and thus cause a delay which would be fatal to the security of the state (Rempel 1993, 120).

5.4.2 The Selection of Institutional Mechanisms

Marcos had the option of summarily dismissing all the Justices and appointing a new set of personnel. He could have also resorted to physical threats or bribery. However, he was probably wary that such actions would have placed his regime's commitment to the rule of law into serious doubts. Thus, Marcos resorted to *institutional* mechanisms to control the judiciary (Muego 1988, 91-6; Tate 1993).

First, he attacked the *depth* of the Supreme Court's decision-making by attenuating its power of judicial review. Under G.O. No. 3, which was issued the next day after the proclamation of Martial Law, Marcos declared that the judiciary, contrary to existing precedent, *cannot* accept nor rule on any challenges on any actions that he has undertaken after September 21, 1972. Specifically, he removed the court's authority to rule on these types of cases:

1. Those involving the validity, legality, or constitutionality of any decree, rules, orders or acts issued, promulgated or performed by me or by my duly designated representative pursuant to Proclamation No. 1081, dated September 21, 1972;
2. Those involving the validity, legality, or constitutionality of any rules, orders or acts issued, promulgated or performed by public servants pursuant to any decree, rules, orders or acts issued and promulgated by me or by my duly designated representative pursuant to Proclamation No. 1081, dated September 21, 1972.

In G.O. No. 3-A, Marcos added that the validity, legality or constitutionality of the Proclamation No. 1081 *itself* was outside the ambit of the Supreme Court's powers of judicial review (Bernas 1984, 508).

Besides contending that his decisions cannot be legally challenged, Marcos also excised from the regular judiciary the power to try and decide on cases that involve issues of public order: He restricted the judiciary's *scope* of decision-making. Using a broad language, he sought to effectively curtail the judiciary's criminal jurisdiction, denying it the power to try and decide on:

1. Those involving crimes against national security and the law of nations;
2. Those involving crimes against the fundamental laws of the state;
3. Those involving crimes against the public order;
4. Those crimes involving the usurpation of authority, rank, title, and improper use of names, uniforms, and insignia;
5. Those involving crimes committed by public officers (Rosenberg 1979, 243).

One is immediately struck by the language that was employed in the order. It was written so expansively that any action that was negatively viewed by the regime cannot be challenged in the courts. By the simple insistence that an act was against "the public order" or "fundamental laws", a person was deprived of the capacity to challenge the government's actions through the regular judiciary. "Interpreted broadly, "contended Del Carmen (1979),

“this encompasses any and all crimes ranging from the most serious to the trivial, from subversion to vagrancy” (p. 107).

The dictator then bifurcated the judicial system by creating a parallel system of military tribunals. He granted these courts a broad jurisdiction. Under G.O. No. 8, they were empowered to “try and decide cases of military personnel and *such other cases that may be referred to them*” (Fernandez 1999, 644. Emphasis added). The last phrase opens up the possibility of civilians being tried in military courts even if the regular court system continues to function. Subsequently, vocal opponents of the regime like Senator Benigno Aquino Jr. were tried by military commissions.

Marcos left no stone unturned. His order also touched on criminal cases that are pending in civil courts. In G.O. No. 12, the dictator made clear that crimes against public order are to be tried and decided by military tribunals *exclusive* of the civil courts. Thus, pending cases in civil courts that involve subversion, sedition, insurrection and rebellion were effectively transferred to military tribunals.

The establishment of military tribunals cuts into the very heart of procedural due process. First, the rules and procedures of military courts are designed for members of the armed forces, not civilians. Since the regular courts were allowed to continue to function under Proclamation No. 1081, there should have been a *standard* to govern when a particular case is to be channeled to the military courts. No such standard was provided in the order. The president or his agent (e.g. the Chief of Staff) was given broad discretionary power to refer cases to the military courts. It was “nothing less than an outright takeover of the duties and prerogatives of the judiciary” (Del Carmen 1979, 108).

Second, the parallel system allowed the prosecutor to be the final judge. Under G.O. No. 8, the president was empowered to refer cases to the military courts. However, the armed forces were under the control of the chief executive in his capacity as commander-in-chief (1935 Constitution, Article VII, Section 5). In other words, the president can modify, set aside, or reverse the decision of the military tribunals. Such a grant of power to a person to be both accuser and judge is the very definition of tyranny that the rule of law seeks to prevent (Fuller 1969; Raz 1979).

The issuance of these instruments placed the dictatorship on a collision course with the Philippine Supreme Court. The general orders are best regarded as the executive's weapons in the struggle for constitutional definition with the high tribunal. Bernas (1984) noted that the Justices did not consider themselves bound by the general orders: "They either ignored it or...they said that the President himself has withdrawn General Order No. 3-A through his book *Notes on the New Society*" (p. 511. See also Wurfel 1988, 117).

5.4.3 Justification through Reconstitution of Philippine Political Order

In the diachronic model that I presented in Chapter 4, I argued that during the phase of emergence, the dictator's treatment of the Court is heavily influenced by two factors: its legitimacy deficit and the allegiance of the Court. Without popular consent, the regime seeks judicial validation of its actions. Legality becomes the primary mode for gaining the acquiescence or support of the domestic population and external actors. However, such validation becomes useful only when the Court possesses some level of freedom from the regime. This produces what I referred to as the dictators' dilemma: *how can they allow*

courts to be relatively autonomous while ensuring that the judiciary will continue to support their rule.

Marcos sought to control the judiciary by *institutional* means. Through several general orders, he attenuated the scope and depth of the judiciary's decision-making and created a parallel system for trying his opponents. However, the effect of these mechanisms depended on the duration of Martial Law. Under the law that existed at that the time, there were two ways through which a declaration of Martial Law could be terminated. First, Congress could revoke the president's declaration of a national emergency (1935 Constitution, Article VI, Section 16). Second, the Supreme Court could annul the President's declaration of Martial Law due to the absence of a factual basis. Once lifted, the President could then be sued or challenged for actions that he took during the state of emergency.

The composition of the Supreme Court did not give Marcos confidence that the majority would be supportive of the *continuation* of the Martial Law regime. As I mentioned in 5.4.1, he could count on only three (Makasiar, Antonio, Esguerra) solid supporters in the high tribunal. In fact, even after the declaration of Martial Law, the Supreme Court had asserted its powers: on September 26, 1972, it immediately granted the petitions for writs of habeas corpus of the legislators that Marcos arrested five days earlier (Fernandez 1999, 598). Determined to portray himself as a *constitutional* dictator, Marcos yielded to the Court and instructed the military to bring the legislators before the Justices and to deliver the government's memoranda to the Chief Justice (Ibid.).

If the Court were to find the martial law declaration to be without sufficient factual basis, Marcos would be forced to release the members of Congress who were under military custody. Assuming Congress was to reconvene on January 23, 1973 as scheduled, these

people were certain to make it difficult for Marcos' supporters in Congress to pass any law that would prolong the duration of his regime (Wurfel 1988, 128). The opposition could also use the legislative podium to criticize and delegitimize Marcos' rule.

It probably became clear to Marcos that it would be hard for him to continue in power under existing law (Del Carmen 1979, 87-8). Thus, he decided to employ another institutional mechanism: *charter change*. He ordered the Constitutional Convention to accelerate the production of a draft constitution that would transform the Philippine political system from a presidential to a parliamentary system. The presumption was that, once that was accomplished, Marcos would lift Martial Law and seek the office of Prime Minister. The key to the continuation of Marcos's authoritarian rule was in Section 3, of the Transitory Provisions (Article XVII):

Sec. 3 (1). The incumbent President shall initially convene the interim National Assembly and shall preside over its sessions until the interim speaker shall have been elected. *He shall continue to exercise his power and prerogatives under the 1935 Constitution and the power vested in this constitution to the President and Prime Minister until he calls upon the interim National Assembly to elect the interim President and the interim Prime Minister, who shall then exercise their respective powers vested by this Constitution.*

Sec. 3(2). All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent president shall be part of the law of the land, and shall remain valid, legal, binding and effective *even after lifting of Martial Law* or the ratification of this constitution, unless modified, revoked, or superseded by subsequent proclamations, orders, decrees, instructions, or other acts of the *incumbent* president, or unless expressly and explicitly modified or repealed by the regular national assembly (1973 Constitution. Emphasis added)

If ratified, the new Constitution would have the effect of transforming all the general orders, and decrees that were issued by Marcos into valid and standing law. The new charter would give him the legality he had sought without going through the Supreme Court of whose allegiance he was uncertain.

Section 3(2) also proclaimed that no other person or institution can modify, revoke or supersede Marcos' actions except Marcos himself as "the *incumbent* President" or by the regular national assembly, which would not come into being until after the lifting of Martial Law. Thus, it begs the question: *when does Marcos lose his near absolute powers?* According to Section 3(1), it ends when "he calls upon the interim National Assembly to elect the interim President and the interim Prime Minister". It did not establish a specific date. "Since no definite date for such elections was set", said Del Carmen (1979), "the president could call it within twenty days or twenty years" (p. 92). Were the new constitution, with its open-ended transitory provisions to be adopted, the incumbent president would legally be able to rule *as long as he wants*; that is, until he decides to call upon the National Assembly to do its task.

Under the existing constitution, for the 1973 Constitution to become controlling law, it had to be approved by: (1) the members of the Constitutional Convention; (2) the people through a plebiscite (1935 Constitution, Article XV, Section 1). Section 2 of the Transitory Provisions (Article XVII) provided a blatant political incentive for members of the Constitutional Convention to give their approval to the draft constitution:

Sec. 2 The Members of the interim National Assembly shall be the incumbent President and Vice President of the Philippines, those who served as President of the 1971 Constitutional Convention...and those delegates to the 1971 Constitutional Convention who have opted to serve therein by voting *affirmatively* to this Article (1973 Constitution. Emphasis added).

A member of the Convention who voted to approve the draft constitution automatically became a member of the National Assembly with its guaranteed salary of P216,000, a rather "generous" amount at that time. Only 15 out of the 317 delegates opposed the draft

constitution when the Convention adopted it on November 29, 1972 (Vejerano 1999, 52; Celozza 1997, 48).

Marcos thereafter scheduled the Constitution for popular ratification. Through Proclamation No. 73, he called for a plebiscite on the draft charter on January 15, 1973. He directed the Armed Forces to allow the people to debate and discuss the draft Charter on December 1, 1972 (Fernandez 1999, 600; Celozza 1997, 49). For Marcos, it was imperative that the new constitution be approved before Congress resumed its session on January 23, 1973. Under the 1973 Constitution, his emergency powers lapse when Congress convenes. This principle was laid down by the Supreme Court in *Araneta v. Dinglasan* (84 Phil. 368 [1949]). In other words, when Congress gets back on session, Marcos cannot rule by decree anymore.

However, a petition was filed in the Supreme Court on December 7, 1972, challenging the power of the President to amend the Constitution. In *Planas v. COMELEC* (43 SCRA 105 [1973]), the petitioners argued that the power to amend the Constitution was vested in Congress, not the President, under Article XV, Section 1 of the 1935 Philippine Constitution. They asked the Court to render a preliminary injunction on the proposed ratification in order to make the President desist from any action related to the ratification procedure.

5.4.4 The Philippine Supreme Court and Regime Justification: The Plebiscite Case

Judicial precedent was certainly against the dictatorship in the *Planas* case. The Supreme Court had ruled in *Araneta* that the president's emergency military powers are

abrogated when the regular Congress reconvenes. Fernandez (1999) contended that “on the fundamental questions of power, the PLANAS petition stood on impregnable authority” (p. 607). Marcos immediately recognized the formidable challenge presented to his rule by the *Planas* petitions. He withdrew Proclamation No. 73, and on December 23, 1972 postponed the plebiscite.

Marcos then decided to bypass the ratification mechanism laid down in the 1935 Constitution by organizing “citizen’s assemblies” on December 31, 1972. Under Proclamation No. 86, people were gathered in a certain area and were asked multiple questions, including whether they approve of the new Constitution. Voting was held on January 10-15, 1973, through an open show of hands, in violation of the secret ballot system which was required by existing electoral laws (Celoza 1997, 52; Muego 1988, 99).

In light of Marcos’s attempt to ratify the draft constitution through an alternate method, the petitioners in *Planas* pleaded to the Supreme Court to render a decision urgently. They appended a supplemental motion asking the Court to enjoin the government from proceeding with any action related to the citizen’s assemblies. The Court scheduled the hearing of the case as well as the supplemental motion on January 17, 1973.

On the day of the hearing, the Justices received Proclamation No. 1102 where Marcos reported that 14,976,561 members of the Citizen’s Assemblies favored the adoption of the Constitution, and 743,869 voted against. Marcos averred that because of this, the new Constitution “*has thereby come to effect*”.

The Supreme Court thereafter by a vote of 9-1 dismissed the *Planas* petitions on the grounds that it had become moot because the president had withdrawn Proclamation No. 73, and proceeded with ratification by citizen’s assemblies. Thus, there was no need for the

Court to issue an injunction. , It refused to rule on Proclamation No. 1102 because it was not raised in the petition. But challenging P-1102 was obviously impossible because it was delivered on the day of the hearing!

The Philippine Supreme Court had the opportunity to deal the dictatorship with telling blows had it wanted to. First, it could have issued a temporary restraining order on the executive upon the filing of the *Planas* petitions on December 7, 1972. This could have made it more difficult for Marcos to proceed with the organization of the citizen's assemblies. However, "the High Court did not stand in the way, and made no adverse move, while President Marcos embarked upon an arguably revolutionary course..." (Fernandez 1999, 608).

Second, the Justices had the option of resolving the *Planas* petitions on their merits rather than on mootness. The Court's decision in *Araneta* , clearly gave the power to amend the Constitution to Congress, not to the President. Cruz and Datu (2000) described how the Court's decision in *Planas* was received:

The people were far from satisfied with the decision and felt that the court was hedging. *Many believed that, had it been bolder, it could have been outlawed martial law before it could take root and grow.* Small wonder then that, even at that early stage, there were already dark forebodings of the baser tyrannies yet to come (p. 177. Emphasis added).

On January 23, 1973, petitions were filed in the Supreme Court, asking the high tribunal to order the government to cease and desist from pursuing any actions to implement the "new Constitution." The petitions specifically challenged the manner as well the results of the ratification by citizen's assemblies. The central issues in *Javellana v. Executive Secretary* (50 SCRA 33) were as follows:

1. Is the issue of the validity of Proclamation No. 1102 a justiciable, or political, and therefore non-justiciable question?
2. Has the Constitution proposed by the 1971 Constitutional Convention been ratified validly, conformable to the applicable constitutional and statutory provisions?
3. Has the aforementioned proposed Constitution been approved by the people?
4. Are the petitioners entitled to relief?
5. Has the aforementioned proposed Constitution been put into force?

In *Javellana*, the Court was asked not only to decide on these questions but to ultimately define its role under the dictatorship. It was the Court's defining moment.

5.4.5 *Javellana v. Executive Secretary: A Game Theoretic Analysis*

What decision by the court was sustainable at equilibrium? In this section, I employ the rudiments of game theory to determine if it can assist in the explanation and prediction of the Court's decision in the critical case of *Javellana*. Quackenbush and Zagare (2006) contended that game theory can also be fruitfully utilized to "gain insight into single cases that are intrinsically interesting, theoretically significant, or both" (p. 113). In the history of Court-Dictator relations in the Philippines, *Javellana* is both interesting and theoretically significant.

I consider the *Javellana* case as a sequential game with perfect information. The Court (C) moves first. It has the option of validating (V)³⁸ the ratification by the citizen's assemblies (Proclamation 1102) or negating (N) it. Thereafter, the Dictator (D) makes his move in response to the Court's decision: Acquiesce (Q) to the decision or Abolish (B) the judiciary.

On the part of the Supreme Court, its ruling in *Dinglasan* had clearly stated that the power to amend the Constitution belonged to Congress. Furthermore, election law requires voting by secret ballots and not by *viva voce*. If they choose to follow their precedent and existing law, Marcos conveys the threat that he will sanction the court.

Chief Justice Roberto Concepcion recounted that the dictatorship made it known to the Justices that the draft Charter was of utmost importance to the regime. After the *Planas* petitions were filed, the Justices were told how "important" the new constitution was to the dictatorship:

Immediately after Christmas, probably around the 27th, I was told that six members were being called to Malacanang...And the President told them that the Minister of Justice and the Solicitor General were panicking about the threat of the questions propounded to them during the hearing in the Supreme Court, that the cases on martial law were matters of life and death. *That he would not take it sitting down...* (cited in Brillantes 1987, 57. Emphasis added).

Legal scholars contended that if the Court had rendered a negative decision, Marcos would have certainly abolished the Supreme Court and reorganized the judiciary. Fernandez (1999) contended that "if the courts had resisted the dictatorship, the courts would have been

³⁸Includes a decision where the Court ends up allowing the Proclamation to become effective law because no opinion gets enough support to become controlling law (i.e. six out of ten). In this case, the Supreme Court ends up validating the status quo.

simply replaced by military tribunals” (p. 579). This was also the position taken by one of the Justices who asserted that:

What the critics would want is to have a frontal clash with Mr. Marcos. In a Martial Law regime that’s not practical, 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 it would have been abolished (Haynie 1994a, 758. Emphasis added).

However, two factors can make it difficult for Marcos to abolish the judiciary, despite the threats. First, Marcos’ hold on power was tenuous. He has yet to consolidate its control. Thus, the regime could be overpowered by an opposing coalition or unravel from within. Second, abolishing the Court will expose Marcos’ “commitment” to the rule of law as a façade (Muego 1988, 99). We can map the Court’s preference ordering to be:

1. Court negates the proclamation, Marcos acquiesces (N, Q)³⁹;
2. Court validates the proclamation, game ends (SQ);
3. Court negates the proclamation, Marcos abolishes the judiciary (N, B).

Marcos prefers that the Court supports his position and maintain the status quo. He has also signaled to the Court that he considered the case a matter of “life and death”. We can reasonably map out his preference ordering to be:

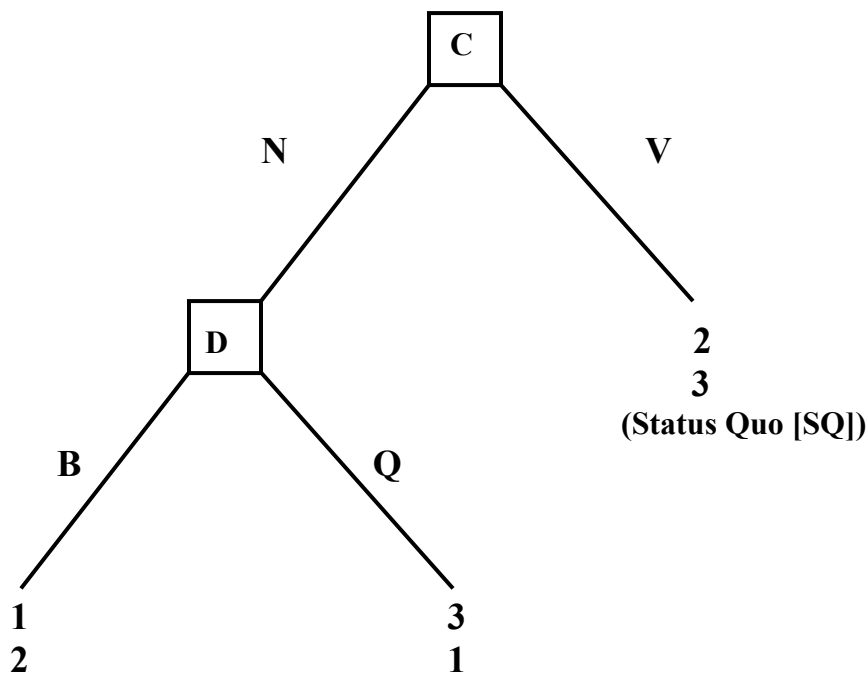
1. Court validate his proclamation, game ends (SQ);
2. Court negates his proclamation, he abolishes the judiciary (N, B);

³⁹ We assume that Justices who were not appointed by the dictator during the period of unified government or dictatorship are politically predisposed against the regime. Since we are working at the aggregate level, these judges constitute the majority, I consider the Court as politically predisposed to negate the dictatorship.

3. Court negate his proclamation, he acquiesces (N, Q).

The game is represented in an extensive form below. The first node (C) represents the Supreme Court. The two possible moves are Validate (V) or Negate (N). Thereafter, the Dictator moves. He can Abolish (B) the Supreme Court or Acquiesce (Q) to its decision.

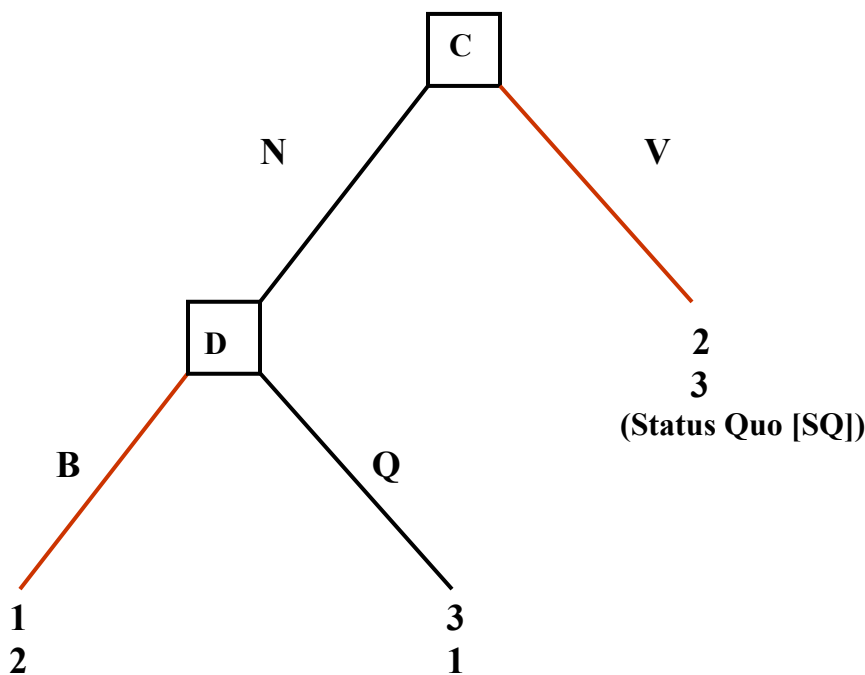
Figure 5.1 Extensive Form of the *Javellana* Game



We can solve the game through backward induction (Ordershook 1992, 63-73; Osborne 169-78). First we consider the dictator's payoffs if the Court chooses to negate. He must decide whether to abolish the judiciary and lose all claims to legality or to acquiesce to the decision that may turn out to be the death knell of his regime. If he chooses B in response, he gets 2; if he acquiesces, he receives 1. Since $2 > 1$, we expect the dictator to abolish the judiciary in case of a negation (See Figure 5.2).

We now move further up the tree. The Court knows that if it negates, it is likely to be abolished. Thus, we compare the Court's payoffs if it chooses to Negate (which is 1) with what it is likely to receive if it chooses to validate the dictator's action (which is 2). Since $2 > 1$, we expect the Court to avoid a decision that effectively strikes down Proclamation 1102. The equilibrium of this game is for the Court to allow the status quo to continue and the game ends.

Figure 5.2 Solution of *Javellana* Game by Backward Induction



It is worthwhile to notice that the game's incentive structure does not have a strategy that allows the Court and the Dictator to move to an action profile where both actors can jointly improve their payoffs, a condition known as "Pareto improvement". The Court can

only increase its payoffs if it moves N, and the dictator moves to Q. However, as this move will lower D's payoffs, the path is unlikely to be taken.

Thus, even if this game is *repeated*, we would expect both actors to choose the same strategy. The status quo in this instance is a *sustainable* equilibrium. As long as D credibly threatens Abolition, the Court will choose to validate. There is some evidence that that this is what Marcos did. One of Marcos' closest advisors, Primitivo Mijares, revealed that:

One of the means which the President has found effective to bend the will of the Supreme Court to his liking is *the scheme of his calculated leaks on his plans for the high court should he be ever be rebuffed by the judiciary*. Every time the high court will be called upon to decide a suit against the President or the regime, he would mount a forum to warn the justices that an assertion of judicial independence would result in the loss of their jobs (cited in Del Carmen 1979, 112, fn 83. Emphasis added.).

5.4.6 *Javellana v. Executive Secretary: An Analytical Narrative*

On March 31, 1973, the Court rendered its historic decision (50 SCRA 30). In the decision written by Chief Justice Concepcion, the Court strongly asserted its power to review the case, despite the general orders that have been issued by Marcos. On the first issue, as to whether the case was justiciable, six members of the Court (Concepcion, Makalintal, Zaldivar, Castro, Fernando and Teehankee) ruled that they had “neither the authority nor the discretion to decline passing upon the said issue, but are under the *ineluctable obligation*...to support and defend the Constitution—to settle it”. Four justices (Makasiar, Antonio, Esguerra, Barredo) contended that it was a political question.

As to the whether the ratification was valid under the 1935 Constitution, six Justices (Concepcion, Makalintal, Zaldivar, Castro, Fernando and Teehankee) rebuked the dictatorship, asserting that there were many anomalies in the ratification process. The

absence of an official ballot, as well as the inability of the citizen's assemblies to effectively screen those who are disqualified by law to vote, made the exercise invalid under the old Charter. Zaldivar described the method chosen by the dictatorship as the "rule of the crowd, which is only one degree higher than the rule of the mob". Four Justices (Makasiar, Antonio, Esguerra, Barredo) took the position that the process complied with the provisions of the 1935 Constitution.

On the issue of whether the people have acquiesced to the draft Constitution, the Court bitterly split. Three justices, Concepcion, Zaldivar, and Fernando, went against the dictatorship's position. The draft constitution was not adopted nor acquiesced to by the Filipino people. Thus, the 1935 Constitution was still in effect. Meanwhile, Makasiar, Antonio, Esguerra, Barredo took the opposite view. They contended that the ratification of the people "*cures any infirmity in its submission*". Makalintal, Castro, and Teehankee abstained from giving an evaluation because the constraints of Martial Law made it impossible for them to determine the will of the people. They stated that "under a regime of Martial Law, with the free expression of opinion through the usual media vehicles restricted, they have no means of knowing, to the point of judicial certainty, whether the people have accepted the Constitution".

Was the 1973 Constitution in force? Once again, Makasiar, Antonio, Esguerra, Barredo contended that it was in force. Barredo in particular, argued that the court must accord "due respect" to the executive branch, arguing that:

...[T]he courts must accord due respect to the acts of other departments, as otherwise the smooth running of the government would have to depend entirely on the unanimity of opinions among all its departments...*To my knowledge, there is yet no country in the world that has recognized judicial supremacy as its basic governmental principle, no matter how desirable we might believe that idea to be.* (Emphasis added).

Concepcion and Zaldivar sided against the position of the dictatorship. Four justices, Makalintal, Castro, Teehankee and Fernando abstained because they found it impossible to determine the people's will under Martial Law. A majority of the Justices (6 out of 10) was needed to declare the 1973 Constitution to be *not in force*. It was not reached in this case. Thus, in the dispositive portion decision, the Court dismissed the prayer of the petitioners for a restraining order. It declared that "*there is no further judicial obstacle to the new Constitution being in force and effect.*"

In this case, the Court strongly asserted its power of judicial review and declared by majority that the procedure chosen by the administration was illegal. However, Concepcion, Zaldivar, Fernando, and Teehankee failed to hold the votes of Makalintal and Castro. Thus, there were no sufficient votes to declare the 1973 Constitution to be not in force. This led to the interesting result where the Court was able to simultaneously assert its judicial power *and* to declare that the draft Constitution was effective de facto because the threshold of six votes was not reached. For Wurfel (1988), "the court itself was the primary beneficiary of this decision; it survived, showing at least the courage of a gentle rebuke" (p. 117). The Supreme Court won some skirmishes in *Javellana*, but effectively lost the war.

Justices Makalintal and Castro decided to abstain partly because they feared what Marcos would do in response. They said that "if a new government gains authority and

dominance through force, it can be effectively challenged only by force; no judicial dictum can prevail against it” (Del Carmen 1973, 1059-60). With the 1973 Constitution in place, all of Marcos’ actions were now justified by the fundamental law itself (Article XVII, Sec. 3[2]).

5.5 The Philippine Supreme Court and the Challenge of Regime Institutionalization, 1975-82

With the Supreme Court’s decision in *Javellana*, the Marcos dictatorship was able to reconstitute the political order. It marked the demise of the 1935 Constitution and the legalization of the new regime. Marcos had his Constitution. Post-*Javellana*, the challenge for the rulers was regime institutionalization, which can be defined as to the transformation of “the newly created institutional rules into rules that are accepted and routinely used by all major political forces” (Munck 1998, 9).

While the dictatorship has achieved its goal of legitimation through constitutional reform, its rule can still be undermined by challenges raised by its political opponents to the Supreme Court. For authoritarian regimes to consolidate, challenges to their rule must be given due course. There must be a way in the system to dissipate subject discontent and frustrations (Kirchheimer 1961, 259-99; Friedman 1975, 193-223). If not, subjects will seek extra-constitutional means to obtain redress, a development that is not conducive to regime institutionalization.

However, losses in cases that are salient to the regime can embolden the opposition. The Court then becomes an arena of contestation where results and events can spiral out of the government’s control (Pereira 2005, 125-8). Support to the judiciary by law groups,

professional organizations, entrepreneurs, or foreign investors can make it difficult for the regime to take back the judicial independence that it has given and allowed to expand (Moustafa 2003). Litigation, instead of mass demonstrations, becomes the primary mode for contesting the actions of government. The Court becomes the focal point for confronting the prerogatives of the state.

For authoritarian rulers, regime institutionalization depends on the ability of the political order to allow the articulation and redress of societal grievance against the state in the courts while ensuring that the judiciary does not develop into a focal point for collective action (Kirchheimer 1969). In the diachronic model that I developed in Chapter Three, I contended that given the fact that legality had been obtained, they can resort to selection methods to keep the courts under control.

They can also allow the judiciary to control and negate its policies, as long as it is limited to non-sensitive issue areas, like administrative law. I refer to this phenomenon as “contained autonomy”. For example, the regime can continue to suppress the right of labor to strike but allow employees to bring their grievance against the government in Court. The option to litigate mitigates the absence of the right to collective protest. This leads to the paradoxical situation where a Court that generally sides with labor and against the state actually facilitates the continuity and stability of the dictatorship.

5.5.1 The Judiciary under the New Constitution

The 1973 Constitution stated that “judicial power shall be vested in one Supreme Court and in such inferior Courts as may be established by law” (Article X, Section 1). As a constitutional body, it could not be abolished nor be deprived of its jurisdiction. However, its

membership was increased from eleven to fifteen (Section 2[1]). Under the new rules, the Members of the Supreme Court and lower courts were to be appointed *solely* by the President (Section 4).

The new Constitution allowed Marcos to appoint five (instead of just one), new members of the Supreme Court. Assuming he was able to support firm supporters, this effectively diluted the possibility of the high tribunal reversing its decision in *Javellana*. Remember that in that case, six Justices actually ruled that the ratification by citizen's assemblies violated the tenets of the 1935 Constitution but divided on the question as to whether such procedural infirmities prevented the new Constitution from being in effect. Under the new rules, eight out of fifteen votes would now be needed to invalidate a law or treaty. With four solid votes in the Court (Makasiar, Antonio, Esguerra, Barredo) and five new congenial appointees, Marcos' actions ensured that he would be able to control the tribunal without having to wait for the six who had declared his ratification of the new constitution illegal in *Javellana* (Concepcion, Zaldivar, Teehankee, Makalintal, Castro, Fernando) to resign or retire.

It was probably important for Marcos to allow the dissidents to remain in the Court at the beginning of his rule. As I contended in Chapter Three, for the judiciary to be effective as a provider of legitimacy, it must have some degree of independence (Thompson 1975; Pereira 2005).

However, Marcos envisioned the possibility of his own agents defecting against him in the future (Fernandez 1999, 659). Thus, he inserted a mechanism in the new Constitution that allowed the President to remove incumbent members of the Judiciary simply by appointing their successors (Article X, Section 9). Without any explicit constitutional

constraint, the president was given the power to dismiss judges any time, for any reason. “As a consequence, from 1973 to 1981...the entire corps of judges, including the Justices of the Supreme Court, were hostage to Executive Power” (Fernandez 1999, 612). For Del Carmen (1979) this had the effect of changing the status of the Justices to temporary employees or “casuals” (p. 109).

Given the *sole* power to appoint and to dismiss, Marcos sought to reconstitute the Court to his *personal* image. He appointed five of his classmates at the Law School of the University of the Philippines to the Supreme Court: Ramon Aquino, Ramon Fernandez, Juvenal Guerrero, Pacifico de Castro, and Vicente Ericeta. As early as 1975, Marcos had nine presumably solid votes in the Court, ensuring him of success before the tribunal.

5.5.2 Facilitating Regime Consolidation: The Supreme Court’s Post-Javellana Decisions

The decision on the ratification cases, especially *Javellana*, allowed the regime to overcome the challenge of justification. Even though the Court reached a very narrow decision in the case, it became a convenient instrument for constructing a defense of the Martial Law regime. The jurisprudence of the Supreme Court after *Javellana* largely favored the dictatorship against petitions that challenged its validity and legality (Noble 1986, 95; Cruz and Datu 2000, 174)

In the very important case of *Aquino v. Ponce Enrile* (59 SCRA 183 [1974]), the Supreme Court upheld the proclamation of Martial Law. In denying Senator Aquino’s

petition for the privilege of the writ of habeas corpus, the Court also overruled its ruling in *Lansang*:

Whether or not there is constitutional basis for the President's action is for [Marcos] to decide alone...In the exercise of that power this Court should not interfere or take part in any manner, shape or form, as it did in the Lansang case. When this Court required the Army officers, who furnished the president with the facts on which he acted, to present proofs to establish the basis of the habeas corpus suspensions, this court practically superimposed itself on the executive by inquiring into the existence of the facts as basis of action. This is indeed unfortunate...

In *Aquino v COMELEC* (62 SCRA 275 [1975]), the Supreme Court placed its stamp of approval on the concentration of political power in the hands of the president. In his petition, Senator Aquino challenged Marcos' ability to legislate when such power was given by the new Constitution only to the National Assembly. The Court ruled that Marcos had legislative powers during the period of Martial Law. This was expressly recognized in Section 3(2) of the Transitory Provisions (see 5.4.3).

In *Sanidad v COMELEC* (73 SCRA 333), the issue was whether Marcos can propose amendments to the new Constitution (Vejerano 1999, 67-9). The Court ruled that without a legislature and with the Supreme Court powerless to propose amendments, the executive has the power because:

For the President to shy away from that actuality and decline to undertake the amending process would leave the governmental machinery at a stalemate or create in the powers of the State a destructive vacuum, thereby impeding the objective of a crisis government "to end the crisis and restore normal times". *In these perilous times, that presidential initiative to reduce into concrete forms the constant voice of the people reigns supreme* (p. 368. Emphasis added).

Finally, in *Aquino v. Military Commission No. 2* (63 SCRA 546 [1975]), the Supreme Court was confronted with the challenge of validating or negating the military tribunals which Marcos created through G.O. No. 8. In the absence of clear precedents, the tribunals usually referred to the jurisprudence of the United States Supreme Court for guidance. In both *Ex Parte Milligan* (4 U.S. 124, 18 L ed 297) and *Duncan v. Kahanamoku* (324 U.S. 304), the American high tribunal has ruled that as long as civil courts are available and functioning, civilians cannot be tried by military courts.

However, the Philippine Supreme Court ruled the other way. First, it reiterated its decision that the President had legislative powers (*Aquino v. Comelec*) during the period of Martial Law. This power was expressly recognized in Article XVII, Section 3(2) of the new Constitution, which stated that: “All proclamations, orders, decrees, instructions, and acts promulgated, issued, or done by the incumbent president shall be part of the law of the land, and shall remain valid, legal, binding and effective *even after lifting of Martial Law* or the ratification of this constitution...” Given this logic, G.O. No. 8, the decree that established the military tribunals was adjudged constitutional:

Indeed, it has been said that in time of overpowering necessity, “public danger warrants the substitution of executive process for judicial process”. According to Schwartz, “The immunity of civilians from military jurisdiction must, however, give ways in areas governed by Martial Law. When it is absolutely imperative for public safety, legal processes can be superseded and military tribunals authorized to exercise the jurisdiction normally vested in the courts (pp. 575-6. Emphasis added).

The Court sustained this reasoning in a series of cases involving Communist leaders: *Buscayno v. Ponce Enrile* (102 SCRA 10[1981]), *Sison v. Ponce Enrile* (102 SCRA 33 [1981]), and *Ocampo v. Military Commission No. 25* (109 SCRA 24 [1981]). The

dictatorship's need for "speedy justice" on its opponents was validated by the Supreme Court, at the expense of procedural due process.

I contend that these decisions of the Philippine Supreme Court effectively *consolidated* Marcos' authoritarian rule. After *Javellana*, Marcos' dictatorship was now supported by the fundamental law of the Philippines. After *Aquino v. Ponce Enrile* (59 SCRA 183 [1974]), the Philippine Supreme Court officially shirked from its duty to oversee the presidential exercise of his executive and legislative powers, holding that it will no longer "interfere or take part in any manner, shape or form, as it did in the *Lansang* case" (p. 183). At this juncture of authoritarian rule in the Philippines, the only body that could challenge Marcos' hold on power seemed to have caved in.

5.6 Supreme Court Jurisprudence and Authoritarian Decay, 1983-86

Three political developments beginning 1983 changed the landscape of Philippine politics. First was the assassination of Marcos' arch-nemesis, Senator Benigno Aquino Jr. on August 21, 1983 (Lande 1986, 114-8; Celozza 1997, 125-31). Aquino attempted to return to the Philippines in order to convince Marcos to call for democratic elections. However, he was brutally murdered at the tarmac of the Manila International Airport (MIA). Aquino's death was largely attributed to Marcos' regime. Aquino's funeral came to be seen as a symbolic protest against the dictatorship. It was one of the largest in the history of the country. Around two million people walked to bring Aquino to his grave (Dolan 2003, 73; Diokno 1988, 133).

After Aquino's murder, Marcos' government faced increasing and intensifying number public protests. Mass demonstrations, labor strikes, public boycott of companies associated with the dictator and his supporters, and condemnation from human rights groups (Timberman 1991, 124-34; Blitz 2000, 158-65). This was described by Thompson (1995) as the development of the "parliament in the streets". Between Aquino's death on August 21 and September 30, 1983, more than 150 anti-government marches and rallies were reported (Thompson 1995, 116). Surprisingly, Marcos allowed these demonstrations. The regime was unable to immediately reply to the challenges. Wintrobe's (1998) model suggests that in instances of regime decay, the best response for the regime formally is to *repress*. Marcos' inability to do so emboldened the opposition to challenge the regime more directly (Kline and Worthen 2006, 145). The expressions of public protest, as well as their increasing

number and intensity, were clear signals that the continuation of the dictatorship was in peril. In Helmke's (2003, 2005) theory, this development changes the incentive structure for the judges, and should provide opportunities for judicial negation.

The second political development was the entry of more opposition members in the National Assembly. The elections for the regular *Batasang Pambansa* on May 14, 1984 resulted to Marcos' party, the *Kilusang Bagong Lipunan* (Party of the New Society) KBL obtaining 112 seats (61.2%). But the opposition party *United Nationalist Democratic Organization* (UNIDO), in a strong showing, took 60 seats in the legislature (33%). Marcos himself was surprised. He remarked that "our instructions to our people to allow the opposition to win some seats," he said, "*might have been taken too literally*" (cited in Blitz 2000, 162. Emphasis added).

For Fernandez (1999), the entry of a stronger opposition enabled the legislature to be a more effective check to Marcos. He argued that thus "return to tripartism" enabled the Supreme Court to assume a stronger role as a protector of liberty (p. 721). Politically, the victory of the opposition meant that Marcos not only had to deal with powerful players within KBL (e.g. Tolentino, Ople) but also with his more established opponents in politics (e.g. Francisco Sumulong, Eva Estrada Kalaw, Cecilia Munoz Palma, Marcelo Fernan, and Jaime Ferrer, among others).

Finally, Marcos also had to contend with increasing pressures from the United States and foreign investors, whom Celozza (1997) referred to as the dictatorship's "network of support" (p. 115). After the Aquino assassination, the political situation in the Philippines instigated massive capital flight (Kline and Worthen 2006, 147). The GDP declined by 5.5 percent in 1984 and another 4 percent in 1985. Real per-capita GDP was estimated to have

decreased by 15 percent on those two years. Marcos was also under increasing pressure from the United States to introduce “needed reforms” in the country as a precondition for the delivery of foreign assistance (Blitz 2000, 160-2). To ease these pressures, and to placate his foreign supporters, Marcos called for “snap” presidential elections in January 1986. Knowing that the opposition will be divided, he hoped to use the elections as proof that he still had the support of the people.

However, the opposition united behind the candidacy of Aquino’s widow, Corazon Aquino, and Marcos was forced to resort to non-legal means to perpetuate himself in power, including harassment of Aquino’s supporters and vote padding in the Commission on Election’s computer system (Thompson 1995, 149-58). Everyone was not surprised when the National Assembly, where the KBL still enjoyed the majority, proclaimed Marcos as the winner of the 1987 presidential elections.

Aquino spearheaded a massive civil disobedience campaign against Marcos. Political tensions were exacerbated by rumors of a military coup against him. It turned out later that the U.S. government was aware of this plan by Marcos’ defense Secretary Juan Ponce Enrile and his key supporters within the military, known as the Reform the Armed Forces Movement (RAM) (Kline and Worthen 2006, 156). When Marcos moved against Enrile, the latter was forced to declare his opposition to Marcos. Together with then Armed Forces of the Philippines (AFP) Vice Chief of Staff Fidel V. Ramos, they took Camp Crame and prepared to hold off Marcos militarily.

In a crucial turn of events, Enrile and Ramos managed to obtain the support of the influential Catholic prelate, Jaime Cardinal Sin, who called on the people to support them by surrounding the military bases as protection against Marcos’ troops (Thompson 1995, 156-8).

More supporters came, headed by Aquino's widow, Corazon Aquino. It was "People Power" against a dictator. Marcos was forced to make a difficult decision between attacking the military bases and accepting responsibility for the civilian casualties, or, in the words of Senator Paul Laxalt, "to cut and cut cleanly" (cited in Kline and Worthen 2006, 165). Marcos decided to "cut" (though not necessarily cleanly). He left Malacanang and went into exile in Hawaii. "People power" had won, and the Philippines was on its way back to democracy.

For the purposes of this dissertation, what is crucial to note that a marked difference in the jurisprudence of the Supreme Court became apparent after these political developments, especially after the assassination of Senator Aquino. The Supreme Court became more assertive in upholding civil rights; especially press freedom, as well as criminal due process rights. Even more importantly, the Supreme Court will strongly rebuke the dictator for judicial intervention in the landmark case of *Galman v. Sandiganbayan* (144 SCRA 43 [1986]).

With the dictatorship intent on suppressing the provision of information on the deteriorating economy as well as on the failing health of the dictator, the Supreme Court asserted the people's rights to an independent press. In three highly salient cases, the high tribunal castigated the dictatorship for its actions to inhibit press freedom. In the landmark case of *Babst v. National Intelligence Board* (133 SCRA 800 [1984]), the Supreme Court declared as unconstitutional the military practice of "inviting" journalists who have written negatively against the regime to an "interview" or tactical interrogation about the content of their writings or the identity of their sources. In *Burgos v. Chief of Staff of the Armed Forces* (132 SCRA 316 [1984]), the high tribunal enunciated that negative criticisms of the

dictatorship do not provide the military with the power to search and seize materials and articles from publication offices without valid warrants. This was reiterated by the Supreme Court in *Corro v. Lising* (137 SCRA 492 [1985]), where it also added that the closure of publication offices to deny entry into them after a military raid constitute grave violations on the rights to private property and free speech.

The Supreme Court also limited the government's discretion on other forms of mass media. In *Gonzales v. Katigbak* (137 SCRA 717 [1985]), the high tribunal asserted its right to review the discretion of the dictatorship on "censoring" television shows and movies. It declared that the state's deletion of scenes from a movie that was critical of life under the regime was unconstitutional because the standards that it employed were overly restrictive. The Supreme Court contended that in matters of artistry, a more liberal standard should be applied, "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit" (p. 717).

After 1983, the Supreme also began to demonstrate temerity in restricting the government's prerogatives in the arrest and detention of its opponents. The case of *Salonga v. Pano* (134 SCRA 438 [1985]), involved one of the most vocal critics of Marcos, Senator Jovito Salonga, who was arrested and held on the basis of the many negative opinions that he expressed against the dictatorship. In a strong rebuke of the state's proclivity to suppress any perspective that is contrary to its own, the Court emphatically declared that "no man deserves punishment for his thoughts" (p. 438). "If there is any principle of the Constitution that more imperatively calls for attachment than any other," the Court wrote, citing the American jurist Oliver Wendell Holmes, "it is the principle of free thought – not free thought for those who agree with us, but freedom for the thought that we hate" (Ibid.).

The Court also started to become more assertive in curtailing the military procedures that made it easier for the regime to prosecute and convict its adversaries. In *Nolasco v. Ponce Enrile* (139 SCRA 502 [1985]), the Court laid down the rule that no person can be convicted without personally hearing the charges against him. Thus, the any person who was arraigned *in absentia*, cannot be tried and convicted. It then did away with the process of convicting persons in court simply on the basis of written testimonies and/or affidavits. In a strong defense of the right of the accused to confront his accusers, the Court expressed in *People v. Santos* (139 SCRA 583 [1985]), that all those who are being tried have the right to see their accusers and subject their statements to cross-examination.

Finally, in *Galman v. Sandiganbayan* (144 SCRA 43 [1986]), the Supreme Court had the opportunity to proclaim its independence from the regime, and regain the support and trust of the general population. At issue in the case was the veracity of the verdict rendered by a lower court, the *Sandiganbayan*, which exonerated all the military officers who were charged with the assassination of Senator Benigno Aquino from any criminal liability. The ruling was challenged on the grounds that there is undeniable evidence that the president had directly *intervened* in the judicial process, to the point of demanding that the *Sandiganbayan* produce the type of outcome that he wants; namely, the acquittal of all of those who are accused in the case. The Supreme Court strongly rebuked Marcos and the *lower court* for their “criminal collusion”, and declared that:

The criminal collusion as to the handling and treatment of the cases by public respondents at the secret Malacanang conference (and revealed only after fifteen months by Justice Manuel Herrera) completely disqualified respondent Sandiganbayan and voided *ab initio* its verdict (p. 85).

Under the theory that was presented in the second chapter of the dissertation, I contended that political and economic developments can generate changes in the decision-making of the Philippine Supreme Court. The fragmentation in government, the threat of capital pull-out, the deterioration of the national economy, and the political turnover in leadership, all provided opportunities for the Supreme Court to strongly assert itself against the dictatorship. For the individual justices, they provided incentives to defect from the regime in order to save their careers. “The revolutionary change in political regime leading to the ouster of the President,” said Fernandez (1999), “might arguably have precipitated baser motives” (p. 732). Meanwhile, for the Supreme Court as an institution, the events provided it with the chances to restore its political standing and legitimacy. The task in the next analysis is to determine whether the qualitative and jurisprudential analyses which were undertaken in this chapter has quantitative support; that is, to empirically test whether those political developments had indeed enabled the gavel to defy the gun.

CHAPTER SIX

JUDICIAL NEGATION AND THE MARCOS DICTATORSHIP: AN EMPIRICAL ANALYSIS

*Impartiality in political trials is about on the level with the Immaculate Conception:
One may wish for it, but one cannot produce it.*

---**Theodor Mommsen** (cited in Kirchheimer 1961, 304).

*Judicial independence is possible in an authoritarian regime.
But you will have a lot of martyrs.*

---**Fr. Joaquin Bernas, S.J.** (Interview, 2007)

6.0 Introduction

Liberty finds no refuge in judiciaries who fear. When the decisions of a court are determined by the desires of the state, then it ceases to be a forum of principle and is reduced to a fort of social control (Dworkin 1985; Nonet and Selznick 1978). However, the assent of the gavel to the threat of the gun is not always cowardice but can also be prudence: at the very least it enables the courts to fight for liberty or justice some other day. Opportunities to gain some autonomy from the state may be facilitated by political and economic developments (Barros 2002; Moustafa 2003; Helmke 2005). If judicial behavior is very much affected by its political context, we can expect judicial behavior to respond to changes in the configuration of state power.

The objective of this chapter is to provide an empirical and quantitative examination of the determinants of judicial negation within dictatorships, which was discussed in the theoretical portions of this dissertation. The goal is to identify the conditions under which the judiciary is able to limit the prerogatives of authoritarian leaders. The purpose of the quantitative examination is *confirmatory*: to test quantitatively whether the model that was developed in Chapter Two is able to significantly explain when and why courts defy.

6.1 Modeling Judicial Negation in Dictatorships

6.1.1 *Level and Unit of Analysis*

The decision-making literature has persuasively argued that employing the individual choice (e.g. Justice vote), as the unit of analysis cannot fully explain policy selection (e.g. a court decision), which is a group-level dependent variable (see Levy 2003, 254). To resolve a case, the judicial mind is strongly affected by the decision rule: the number required for a court's holding to be considered controlling law. To be meaningful, personal characteristics must be incorporated into a theory that explains how these individual beliefs, biases, and principles are *aggregated* into a judicial ruling.⁴⁰

Evidence exists that even when a judge has discerned what the law “demands” in a particular case, the number of people in the majority and in the minority heavily influence the choice between joining or dissenting (Epstein and Knight 1998; Maltzman, Spriggs, and Wahlbeck 2000; Bonneau et al. 2005). Thus, while individual characteristics may explain some variance in predicting outcomes, they must be analyzed in conjunction with variables at the group level of analysis (March 1994; Levy 2003).

For the purposes of this paper, the analysis will be conducted at the court level and the unit of analysis is the case decision. The court-centered approach has a certain intuitive appeal. To dispose of a case, what matters is the aggregate number of votes for

⁴⁰ For a through discussion of levels and unit of analysis, see Ray 2001.

and against the government. In this approach, the margin of difference becomes interesting when the number tips to the other direction.⁴¹

6.1.2 *Theoretical Summary and Hypotheses*

In this section, I provide a concise restatement of the hypotheses that will be tested in the empirical part of this chapter. In Chapter Two, I contended that the government has two instruments at its disposal to bend the judiciary to its will: *sanction* and *selection* (Dahl 1957; Murphy 1964). The state becomes an even more formidable party in litigation when the rulers have the capacity to *punish* the court. Strategic theory posits that in settings where power is unified in the hands of one person or party, courts are less likely to negate (Iaryczower et al. 2002, 700-4). There is much support in the literature for the proposition that *fragmented power* equates to more aggressive courts (Barros 2002; Scribner 2003). The coordination problem brought about by division is the mechanism that enables the courts to constrain the state (Rios-Figueroa 2004, 6). It attenuates the capacity of the dictator to punish the court.

In the context of dictatorships, judicial negation may be facilitated by the establishment of legislatures. Boix and Svolik (2007, 3-4) demonstrated that a dictator's accession to a legislature signals the growing power of some of his supporters. The legislature is usually a concession entered into by the dictator with his followers in order

⁴¹ Inferences validated at multiple levels are certainly stronger. However, the study of judicial negation at the individual justice level requires a different set of assumptions and theorizing (cf. Helmke and Sanders 2006). This is certainly an area where this research can be extended.

to maintain their support. It can be created to placate the demand of his more moderate followers for some form of popular representation. However, this can develop into a body that ensures that the dictator credibly commits to his promises to provide rents or to share power (Ibid., 14-15). This is why dictators have shown wariness in establishing legislatures as they can easily spiral out of their control (Wurfel 1988, 127; Gandhi and Przeworski 2001). Thus, I hypothesized that:

H₁: If the government is fragmented, courts are more likely to rule against the government's position in litigation.

Meanwhile, Moustafa (2003) and Smith (2005) made the observation that international actors can open up opportunities for the judiciary to control state behavior. They can attenuate the dictators' capacities to punish the courts by imposing costs on state retaliation. The literature on "credible commitments" demonstrated that when domestic leaders decide to open their polities to the global economy, foreign investors must be convinced that they will honor their promises. One mechanism for ensuring that the state's commitment will be adhered to is an independent court (Leeds 1999; Barros 2002). Increasing flows of foreign direct investments deter state reprisal on the judiciary because of the negative signal that it may send to external actors, who may respond to such attacks by withdrawing their money and support. Thus, I evinced that:

H₂: When foreign direct investments increases, courts are more likely to negate the position of the government in litigation.

Governments can also control the judicial branch by *selection*, that is, through the appointment process (Dahl 1957). The dictator brings the judiciary in line by filling it with people who share his views. Upon seizure of political power, the dictator is usually confronted with a court that is composed of magistrates who are not personally beholden to him (Helmke 2002; Iaryczower et al. 2002). Some of the sitting Justices may owe their appointments to previous administrations or to a compromise between two political parties. In the selection explanation, we expect these judges to be more likely to oppose the coercive regime compared to those Justices whose appointments were dependent *solely* on the dictator's discretion. In the latter case, the dictator does not need to consider the preferences of any other body or person and can select pure agents.

In the selection explanation, we expect negations to cluster at the front end of the dictator's term. Judges who are not beholden to the dictator for their positions are more likely to sit at the court at the beginning of authoritarian rule. In the long run however, the dictator eventually crafts the court in his own image. Negations should steadily decline when the dictator begins to staff the high tribunal with his agents.

H₃: *Courts that are ideologically opposed to the government are more likely to rule against the government's position in litigation.*

Meanwhile, the political scientist Gretchen Helmke (2000, 2005) made the compelling contention that under certain conditions, sanction can overcome selection. One such situation is when the current government is seen to be on the verge of losing

control. “To the extent that the preferences of the outgoing and incoming government diverge, judges who wish to avoid sanctions will face an incentive to begin ruling against the government as long as it begins to lose power” (Helmke 2000, 19). This is the core contention of her theory of *strategic defection*.

In the context of dictatorships, this theory predicts that judicial negation should intensify when clear signals that a regime is breaking down emerge. Helmke’s theory has the virtue of being able to explain how negation can occur even when majority of the judges in the court were appointed by the current dictator: they rule against him not because they disagree with his views, but because they fear sanctions from the incoming set of rulers. Thus:

H₄: *When political turnover is imminent, courts are more likely to rule against the government.*

Finally, *case type* may matter. The judiciary may come to aggressively invalidate the position of the state in litigation because the government has recognized the political value of negation in certain type of cases. For example, the dictatorship may desist from attacking the court in response to invalidations of actions by its agencies in economic cases (e.g. property expropriation, wage compensation) because of the political benefit that it may obtain in allowing such actions. In allowing the courts to vote for the underprivileged or the weak, authoritarian leaders can increase their support from their subjects because they are willing to let “social justice” be done (Jayasuriya 2000).

This is the reason why the government is willing to allow the “rule of law” to develop in certain areas like the economy while maintaining its prerogative in matters of public order. Fraenkel (1960) referred to this phenomenon as the “dual state”. The government seeks maximum flexibility in matters that involve national security and safety (e.g. criminal cases) but considers it to its benefit to allow the courts much discretion in economic cases. In line with this reasoning, I hypothesized that:

H₅: Courts are more likely to negate the position of the government in economic cases.

6.1.3 Control Variables

Is an improving economy an influence enabling or inhibiting structure? Haggard and Kaufman (1985) suggested that economic development should be positively related to the exercise of judicial negation. We expect the state to be more tolerant of dissent when things are going well economically. When economic conditions are deteriorating, the government tends to use decree powers. The mechanism that enables the government to tolerate judicial negation is the fact that since the economy is going well, it becomes averse to confrontation with the court that can inject instability into the system. “When economic conditions deteriorate, the political branches of government are potentially more inclined to constrain opposition, even from the courts” (Herron and Randazzo 2003, 426). Thus, I surmise that:

H₆: *When the economy is improving, courts are more likely to negate the position of the government in litigation.*

Violence is usually employed by the government at the beginning of authoritarian rule in order to countermand attempts by other forces to oppose its rule. Coercion also imprints in the public mind the heavy cost of going against the state. However, we expect that as the enemies of the regime are neutralized (brutalized may be the more apt term), we expect the state to be less inclined to the use of force. This is because it is more costly to use violence compared to other means of control (e.g. indoctrination). When the propensity of the state to employ force has leveled, the court can attempt to incrementally expand its influence. When judges fear less about losing their lives (or limbs), the setting is more amenable to judicial negation. Thus:

H₇: *When the government's use of repression has increased, courts are less likely to negate its position in litigation.*

Finally, I controlled for the saliency of a case.⁴² The contention is that the more politically important is a given case for the government, the *less likely* is the judiciary to negate. “While there is a tendency to assume that every exercise of the power of judicial review is important, many are not” (Whittington 2003, 463). In general, the more important a type of case to the government, the less willing it is to tolerate a negative court ruling. In equilibrium, judicial negation is not expected when a case is of core interest to the government (Epstein, Knight and Shvetsova 2001, 130).

⁴² I thank Professor Stacia Haynie for her assistance in with this section (Haynie interview, 2007).

H₈: *When a case is salient to the government, courts are less likely to negate its position in litigation.*

6.1.4 *Interaction Relationship*

Viewed from a strategic perspective, an action is the result of the interaction between willingness and opportunity (Cioffi-Revilla and Starr 1995). “Willingness” is the position taken by a decision-maker among different alternatives after calculations of cost and benefit. Meanwhile, the term “opportunity” refers to the possibilities that exist in an environment given a set of constraints (Most and Starr 1989, 23-35).

The effects of Court ideology may not be monotonic. Courts with members who are not beholden to the dictator and ideologically predisposed against the state may fear violent repercussions from the state in case of negation. Thus, they wait for the development of opportunities that will allow them to carry out their preferred policy position (Barros 2002; Iaryczower et al. 2002). This means that an interaction relationship may actually exist between court ideology and political fragmentation. Justices who do not owe any loyalty to the dictator may choose to negate only when they have seen division among the ruling elite.

H₉: Courts that are ideologically opposed to the dictatorship are more likely to negate the government’s position in litigation when there is political fragmentation.

6.2 Research Design

6.2.1 Source of Data

The data for this empirical study was taken from the Philippine Supreme Court (PSC) Decisions Dataset Version 1.1.⁴³ The dataset contains all the decisions of the Philippine Supreme Court which appeared on the *Supreme Court Reports Annotated* (SCRA) from 1961 to 1987. The SCRA is published by a private publication company (Central Lawbook Publishing Company). However, it is the main reference used in legal research and opinion writing in the Philippines. Since the first volume of SCRA was published in 1961, this is also the first year in the PSC dataset. The data ends in June 1987 because this was the latest SCRA volume (Volume 150) when C. Neal Tate, the project's Principal Investigator, directed the dataset construction. Coding for the PSC dataset was done from September 1, 1987 to January 16, 1988.

The dataset currently contains 15,190 observations. It considers every docketed case number as a separate decision. "In coding jargon, the individual case dispute represented by a discrete docket number is our proper 'unit of analysis' or analytical 'case'" (PSC Codebook 2004, 11). The dataset provides details on the various aspects of a case, from basic information (e.g. month and year of decision), to its substantive issue and directionality of the decision, among others. It also records the votes of the Justices on each case as well.

⁴³ I am using the second release, which was edited on October 31, 1996.

6.2.2 Variable Operationalization

6.2.2.1 DEPENDENT VARIABLE

The dependent variable in the study is “judicial negation”, operationally defined as those instances when the government was conferred a defeat in litigation. The dependent variable was taken from the variable “Treatment of Government Agency” in the PSC Dataset (outgov3). It was structured into a dichotomous variable that is coded 0= government wins; 1 = government loses. Cases in the PSC dataset which were coded as “system missing” as well as those instances where presence of government as a party cannot be determined (“9”) were excluded from the analyses.

I selected only those cases that involved the “government” defined to include the president and vice president, the various departments, boards, commissions, and agencies (See Appendix A for the List, pp. xiv-xvii). The temporal domain of the study was September 21, 1972 (the beginning of Martial Law) up to February 26, 1986 (end of Marcos regime). After robustness and outlier diagnostics, a total of 1,803 observations were included in the analysis.

6.2.2.2 INDEPENDENT VARIABLES

6.2.2.2.1 FRAGMENTATION

Following the analysis of Boix and Svolik (2007), Gandhi and Przeworski (2001) and Svolik (2007), I considered the establishment of a legislature as a sign of the growing power of the elite vis-à-vis the dictator. Legislatures are usually demanded by a moderate bloc within the dictator’s coalition. They may serve as commitment devices

entered into by the dictator and his supporters to exchange information, discuss and debate policies, and smooth out differences (Boix and Svobik 2007, 13-15). In the case of the Philippines, they also allowed the opposition to gain some measure of political influence as well as platform for criticizing the government.

To capture political fragmentation, I developed an ordinal variable that was coded 0 when no legislature was present, 1 during the period of the interim *Batasang Pambansa* (IBP) [National Assembly], and 2 during the period of the regular *Batasang Pambansa*. I contend that this is a valid measure of the concept of fragmentation in government.⁴⁴ After the legislative elections on June 12, 1978, the party of the President, the *Kilusang Bagong Lipunan* (KBL) (New Society Movement) captured 137 of the 165 seats (83%) in the interim *Batasang Pambansa*.⁴⁵ It provided some of the more liberal members of Marcos' coalition, like Arturo Tolentino, Salvador Laurel, Cesar Virata, Blas Ople, and Vicente Abad Santos to have some influence on the formation of government policy. Two regional parties (Pusyon Bisaya, Mindanao Alliance) won 27 seats, and brought independent thinkers like Hilario Davide and Reuben Canoy.

The elections for the regular *Batasang Pambansa* on May 14, 1984 saw the KBL getting 112 seats (61.2%) with the opposition party *United Nationalist Democratic Organization* (UNIDO) winning a surprising 60 seats (33%). I contend that from 1984-86, the government became even more fragmented (see also Thompson 1995, 125-32). Not only had Marcos had to deal with powerful players within his own party in the legislature (e.g. Tolentino, Ople) but also with a lot more powerful and established

⁴⁴ The preferences of the legislature as a body is best represented by the median legislator which can be estimated through NOMINATE or Bayesian Monte Carlo Markov Chain (MCMC) techniques. Unfortunately, coded roll call data is currently unavailable for both the 1978 and 1984 legislatures.

⁴⁵ It was considered only an interim body because Marcos was yet to 'officially' lift Martial Law.

political opponents (e.g. Francisco Sumulong, Eva Estrada Kalaw, Cecilia Munoz Palma, Marcelo Fernan, and Jaime Ferrer , among others).

6.2.2.2 FOREIGN INVESTMENTS

Data on foreign direct investments (FDI) were taken from the *World Development Indicators* (World Bank 2005). Information on the Philippines was available for the years of interest, 1972-1987. The data contained information on FDI net inflows as percentage of the country's Gross Domestic Product (GDP). Following Kohler and Kreuter (2005, 221), this variable was centered. This means that the mean was subtracted from each value. The regression constant now becomes the mean predicted value of foreign direct investments, instead of 0, which is unlikely to be of any substantive interest. Centering is also important when working with models that have interaction terms (Aiken and West 1991).

The variable was also lagged by a year. This was undertaken to address the problem of possible endogeneity (King, Keohane and Verba 1994, 185-96). By lagging, the causal arrow is sharpened, and we discount the possibility that it is the negative decisions of the courts that actually causes the increase or decrease in investments.

6.2.2.3 COURT PREFERENCES

The *Court's predisposition* was measured by counting the number of Justices who were not appointed by the ruler during periods of unified government or dictatorship, divided by the total number of Justices who were involved in disposing of a case. The expectation was that the larger the percentage of judges in the court who were not

appointed solely by the current executive, the greater the probability of judicial invalidation.

In the case of the Philippines, the qualitative analysis in Chapter Five demonstrated that this measure has some face validity. I expect the four Macapagal appointees (Justices Concepcion, Zaldivar, Reyes, Makalintal) and those who were appointed during periods of divided government (Justices Teehankee, Fernando, Castro and Barredo) to be relatively more critical of Marcos than those who were appointed by Marcos during the period of unified democratic government (Justices Makasiar, Esguerra, Antonio) as well those who were named during the Martial Law period.⁴⁶

6.2.2.2.4 POLITICAL TURNOVER

In her work on Argentina, Helmke (2002, 2005) posited that the pressure to defect from the current government begins to ripen two years before the end of its rule. In this model, the threat of sanctions comes from the future government as the incumbent's hold on power become tenuous. Among the various signals of impending political turnover are political scandals, anti-government mass actions, and shift of public support to the opposition.

In the case of the Philippines, we are dealing with a situation that is characterized by *regime change*: the transformation of society from a dictatorship to a democracy. In operationalizing this variable, it is important to identify an event or a succession of events that may have signaled to the Justices that the regime may have entered the phase of regime breakdown. In the case of the Philippines, this was the assassination of Marcos'

⁴⁶ It must be pointed out that Justice Antonio Barredo emerged as one of the staunchest supporters of Marcos (Cruz and Datu 2000; Fernandez 1999).

arch-nemesis, Senator Benigno Aquino Jr. on August 21, 1983 (Lande 1986, 114-8; Celozza 1997, 125-31).

His death and what the protest that it produced afterwards produced sent clear signals that the regime was in trouble. After Aquino's death, Marcos' government was confronted with increasing and intensifying number of mass demonstrations, labor strikes, public boycott of companies associated with the dictator and his supporters, and condemnation from human rights groups (Timberman 1991, 124-34; Blitz 2000, 158-65). Between August 21 and September 30, 1983, around 165 anti-government marches and rallies were held (Thompson 1995, 116). Thus, I operationalized this variable as a dichotomous variable coded "1" if the decision was rendered on or after August 21, 1983, and 0 otherwise.

6.2.2.2.5 ISSUE AREA: *THE "DUAL STATE" THESIS*

The "dual state" thesis that was formulated by Fraenkel (1960) held the dictatorship is likely to allow the rule of law to exist in the economic realm (which he referred to as the "normative" state) while maintaining maximum discretion in matters of public order (the "prerogative" state). To secure its survival, the dictatorship keeps tight control on issue areas that involve national security and safety (e.g. criminal cases) but considers it to its benefit to allow the courts much discretion in business regulation or labor issues. *Ceteris paribus*, courts are more likely to negate in economic issues.

In order to operationalize this concept, I constructed a dichotomous variable coded "1" if the substantive issue of in a case that involved the government was:

1. Government regulation of business;
2. Government regulation of natural resources/land reform;
3. Taxation;
4. Labor issues;
5. Worker's compensation.

All other cases that did not fall into the above-mentioned categories were coded as "0".

6.2.2.2.6 *ECONOMIC GROWTH*

In order to measure the Philippines' economic development, I took the GDP Per Capita growth from the *World Development Indicators* (World Bank 2005). It captures the growth in GDP per capita from the previous year (in percentage). Following Kohler and Kreuter (2005, 221), this variable was centered. The regression constant now becomes the mean predicted value of GDP per capita growth.

6.2.2.2.7 *REPRESSION*

Since the research is interested with the effect of the state's disposition on physical integrity to judicial behavior, a suitable measure could have been the "political terror" index as conceptualized by Michael Stohl and his associates (Stohl and Carleton 1985; Gibney and Stohl 1988) and extended by Poe and Tate (1994) and Poe, Tate, and Keith (1999). It is a five-point scale that assesses conditions within states in terms of the prevalence of murder and torture based either on the reports of Amnesty International

(AI) and the U.S. State Department. However, adopting this measure will produce missing values for the years 1972-75 since the first AI reports only came out in 1977.

Another possible measure was the Freedom House Civil Liberties Index. It ranks the conditions in a given polity from 1-7 with the lowest number representing the highest degree of freedom and seven the lowest. However, this index includes a lot of other variables than just state repression. There is also very little variation in the data. The Philippines was given a rating of “5” for 11 of the 15 years included in the series.

The Banks' Cross-National Time-Series Dataset has a variable for purges, defined as “any systematic elimination by jailing or execution of political opposition within the ranks of the regime or the opposition”. Similar to the Freedom House Civil Liberties Index, there was little variation in the data. The Philippines was given a rating of “0” for 12 of the 15 years included in the series. But this has the advantage of focusing on state action against the political opposition as well within its own ranks. Thus, this variable maps nicely with the theory that was developed in 6.1.2. I constructed an interval variable, with the number of purges ranging from 0 to 7. This was lagged a year since a purge usually affects an institution *post-facto*.

6.2.2.2.8 CASE SALIENCE

I controlled for the saliency of a case.⁴⁷ The contention is that the more politically important is a given case for the government, the *less likely* is the judiciary to negate. Justices who have served under Martial Law consistently pointed out in their interviews

⁴⁷ I thank Professor Stacia Haynie for her assistance in with this section (Haynie interview, 2007).

that they considered constitutional law cases, especially those that involved civil rights and criminal procedures (especially *habeas corpus* petitions) to be salient.

To operationalize this concept using the PSC dataset, I constructed a dichotomous variable coded “1” if the substantive issue of a case involved:

1. Civil rights and liberties;
2. Criminal procedure claims.

All other cases that did not fall into the above-mentioned categories were coded as “0”.

6.2.2.2.9 INTERACTION OF COURT PREFERENCE AND FRAGMENTATION

In order to capture the joint relationship of court preference and political fragmentation, an interaction term was created by multiplying the two variables. This captures the possible non-monotonic effect of Court ideology. Substantively, this represents the theory that courts negate only when they have seen the fracturing of the governing elite.

6.2.3 Methodology

I tested three separate models of judicial negation. The baseline model included all the variables except for case saliency. It evaluated the impact of the independent variables on all type of cases. In the second model, I controlled for case saliency. Finally, in the third model, I included the interactive term.

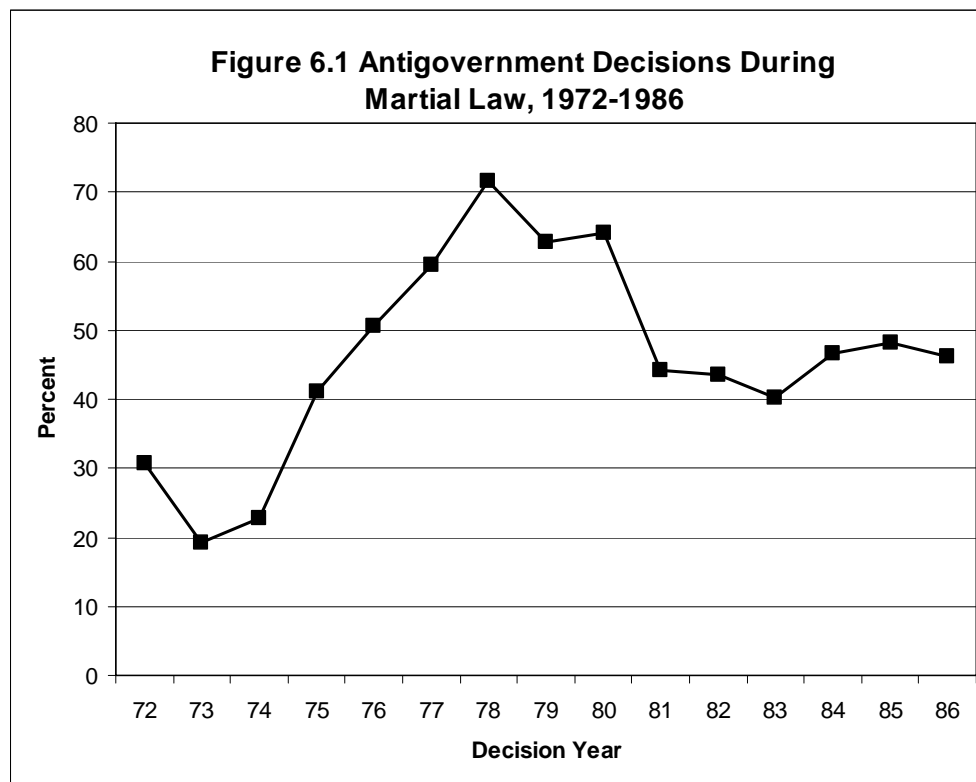
The paper employed logistic regression to test its conjectures given the dichotomous nature of the dependent variable (Menard 2002; Powers and Xie 2000, 3-85). Logistic regression has some desirable properties that facilitate ease in interpretation including the reporting of effect sizes in terms of odds ratios, which is not available in the probit (Hosmer and Lemshow 2000, 47-85). All regression estimates were computed with robust standard errors. All statistical analyses in this paper were accomplished through *Stata 9*.

6.3 Results and Discussion

6.3.1 Description of Variables

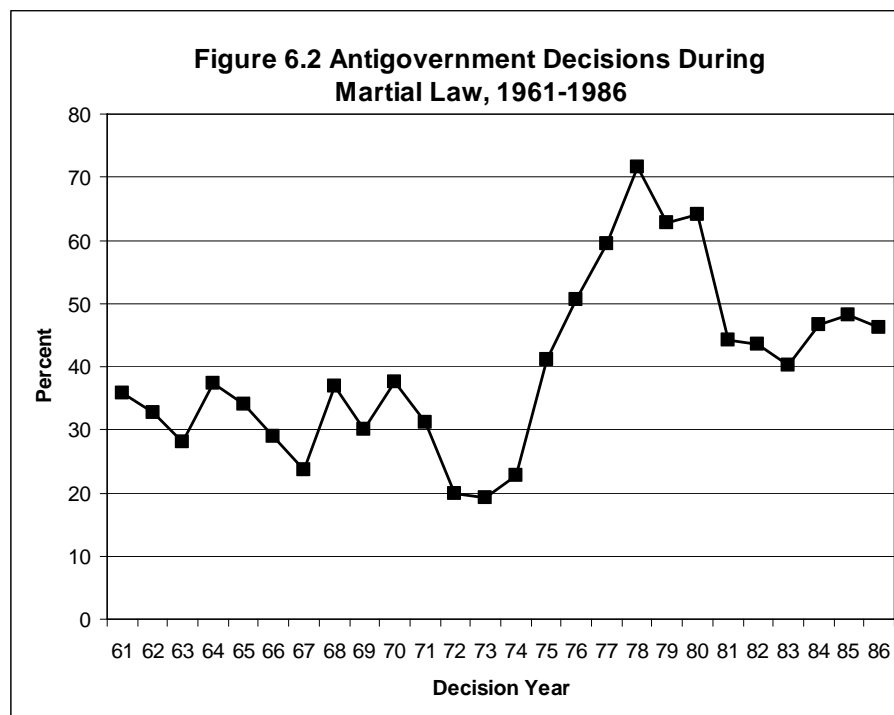
Descriptive longitudinal analysis of the dependent variable indicated that the Philippine Supreme Court initially refrained from challenging the emergence of the authoritarian regime and its attempt to secure its standing through legalization. The

percentage of negative decisions rendered by the high tribunal decreased the year immediately after the declaration of Martial Law (See Figure 6.1). This provides some support to the contention made by Fernandez (1999) that the Court was largely “instrumental in stabilizing the dictatorship” (p. 511). Cruz and Datu (2000) argued that the Justices should have acted much bolder at the beginning when the dictatorship has yet to take root; when existing law and precedents were making it difficult for Marcos to keep up the façade of “constitutional authoritarianism”.



However, the Philippines is an interesting case for the study of judicial negation in authoritarian regimes because a cursive look at the trend of the data reveals a most interesting pattern: *after an initial downward course, the percentage of negative*

decisions sharply turned upward. In fact, if we examine the pattern of negative decisions from 1961 up to 1986, the data indicates that the Court was most critical of the government during the period of Martial Law [1972-86] (see Figure 6.2). This goes against most of the literature which evinced that it is most difficult for the judiciary to act negatively against the contentions of the state in contexts of concentrated power (Fraenkel 1960; Barros 2002; Jayasuriya 2000). The trend suggests that as the authoritarian regime consolidated, the Supreme Court decided more cases against the dictator. One possible conjecture was that the members of the Supreme Court were a courageous lot who were willing to be martyred.



However, a more thorough analysis of this interpretation is needed. It is quite possible that these negations were primarily on cases that were not salient to the regime.

In this perspective, the Court gains some legitimacy from the population as an independent institution by striking against the state. On the other hand, from the point of view of those who rule, the actuations of the judiciary were permissible as long as they were quarantined on cases which are not of core interest to them (Moustafa 2003; Haynie 2003). The dictator can even point to his critics, both domestic and foreign, that the sharp rise in negative decisions proves the existence of judicial independence and the rule of law in the polity. The objective of this empirical analysis is to provide a systematic analysis of the motivations as well as the conditions that made the Philippine Supreme Court go against the ruler and his apparatuses.

Following the coding methodology of the PSC dataset, the dependent variable was coded as a dichotomy with 1=government loses, and 0 otherwise. During the period of authoritarianism, judicial support was actually the modal category, accounting for more than half of the decisions (908/1803 or 50.4%).

Table 6.1 Philippine Supreme Court Decisions, 1972-86

Value	Frequency	Percent
Progovernment	908	50.4
Antigovernment	895	49.6
Total	1803	100.00

Table 6.2 provides a descriptive summary of the variables which were included in the general model of judicial negation. Variable diagnostics were implemented to account for missing data. Statistical techniques were also implemented in order to identify

influential observations and outliers (Kohler and Kreuter 2005, 268-77). The result was a dataset with 1803 observations.

Table 6.2 Descriptive Statistics

<i>Variable</i>	<i>Obs.</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min.</i>	<i>Max.</i>
Negation	1803	.496	.500	0	1
Fragmentation	1803	.852	.659	0	2
Foreign Investments	1803	4.00	4.18	-3.3	10.7
Court Preferences	1803	2.16	1.57	0	10
Turnover	1803	.226	.418	0	1
Economic Case	1803	.563	.496	0	1
Economic Growth	1803	1.11	3.91	-9.5	6
Repression	1803	.348	1.24	0	7
Case salience	1803	.106	.308	0	1
Fragmentation X Court Preferences	1803	1.18	1.18	0	4.44

6.3.2 Analysis of Model 1 (Base Model)

6.3.2.1 REGRESSION DIAGNOSTICS

Logistic regression diagnostics of the base model provide us with some confidence in the empirical results (See Table 6.3). Model 1 had a Wald χ^2 of 176.30 which is statistically significant (Prob>chi2 = 0.000). The model also correctly classifies 65.45% of the cases. Finally, Long's (1997) Adjusted Count R^2 tells us that including the independent variables in the model lowers our error rate by 30.4% compared to prediction that is based solely on the modal category of the observed dependent variable.

The results of the logistic regression provided ample empirical support to three key variables in the model. It provided strong support to the theory that courts are more willing to go against the dictatorship when divisions within the dictatorship emerged;

especially when this has been institutionalized (e.g. the dictator allows the establishment of a legislature). In addition, increasing foreign investments also had significant positive effect on the probability of the judiciary going against the government. Finally, the issue involved in the case mattered: the court was more likely to side against the state when the case is economic in nature. Two other variables, case preferences and political turnover reached significance, but their direction ran contrary to the direction proposed by the theory which was developed in Chapter Two. The outcomes for economic condition and repression were not statistically significant.

**Table 6.3 Logistic Estimation of Judicial Negation
At the Philippine Supreme Court under Authoritarianism
(Model 1)**

Variables	Expectations	Coefficient (SE)^a	p-value^b
Fragmentation	+	.385 (.148)	.004**
Foreign Investments	+	.057 (.016)	.000**
Court Preferences	+	-.208 (.050)	.000**
Turnover	+	-.353 (.184)	.027*
Economic Case	+	1.05 (.103)	.000**
Economic Growth	+	.032 (.022)	.071
Repression	-	-.002 (.058)	.488
Case Salience		-----	-----
Fragmentation X Court Preferences		-----	-----
Constant		-.866 (.156)	.000**
Observations		1803	
Wald χ^2		176.30	
Log Likelihood		-1147.57	
Percent Correctly Predicted		65.45	
R²_{adjCount}		.304	

^a Robust standard errors.

^b One-tailed test. * = significant at p<.05; ** = significant at p<.01

6.3.2.2 DISCUSSION OF RESULTS

6.3.2.2.1 *NEGATION AND POLITICAL FRAGMENTATION*

Logistic regression estimates provided support to the contention that division among the ruling elite enable judicial negation (Barros 2002; Iaryczower, Spiller, and Tommasi 2002). The coefficient of the variable was in the expected direction (+.385) and it was statistically significant at the .01 threshold (p-value = .004). If all the variables in the model are held either at their mean or modal category, the probability of the high tribunal negating the contentions of the state increases by 19 percent when we vary the value of the fragmentation variable from its minimum to maximum (see Table 6.4).

In the case of the Philippines, Marcos took all the legal precautions before he allowed the re-establishment of the legislature. Wurfel (1988) contended that Marcos was wary of allowing another state institution because it can easily get out of his control (p. 127). Indeed, Marcos was caught by surprised when the opposition won more seats than he expected in the 1984 elections. In an interview after the voting, he said that he can only presume that “our instructions to our people to allow the opposition to win some seats might have been taken too literally” (cited in Blitz 2000, 162). The re-establishment of an Assembly provided a forum for more liberal members of Marcos’ party (e.g. Arturo Tolentino, Blas Ople). After the 1984 elections, some of Marcos’ venerable political enemies gained access to the *Batasan* (e.g. Francisco Sumulong, Eva Estrada Kalaw). The statistical analysis suggests that these developments gave the Supreme Court some space to limit the power of the dictatorship.

Table 6.4 Changes in Predicted Probabilities⁴⁸ of Judicial Negation (Model 1)

<i>Variables</i>	min → max ⁴⁹	0 → 1 ⁵⁰	Δsd ⁵¹
Political Fragmentation	.19	n.a.	n.a.
Foreign Investments	n.a.	n.a.	.06
Economic Case	.26	.26	n.a.

6.3.2.2.2 *NEGATION AND FOREIGN INVESTMENT*

The results also provide some, albeit weaker, evidence in support of the “credible commitments” thesis which was advanced by Moustafa (2003) and Smith (2005). Increased amounts of foreign investment are significantly and positively related (+.057) to negation by the Supreme Court (p-value = .000). As reported in Table 6.4, a standard deviation change in age centered on the mean increases the likelihood of a negative decision by 6 percent, holding other variables to their means or modal category.

Foreign capital was most important to a dictator like Marcos (Wintrobe 1998, 46-55). It enabled him to keep the loyalty of his supporters as well as to enrich his own and his family’s fortunes. In addition, he used the resources to procure instruments of

⁴⁸Changes in predicted probabilities are calculated based on parameter estimates reported in Table 6.3, with all variables set at their mean or modal values unless otherwise specified.

⁴⁹ Changes in predicted probability as variable value changes from minimum to maximum (for ordinal variables).

⁵⁰ Change in predicted probability as variable value changes from 0 to 1 (for dichotomous variables).

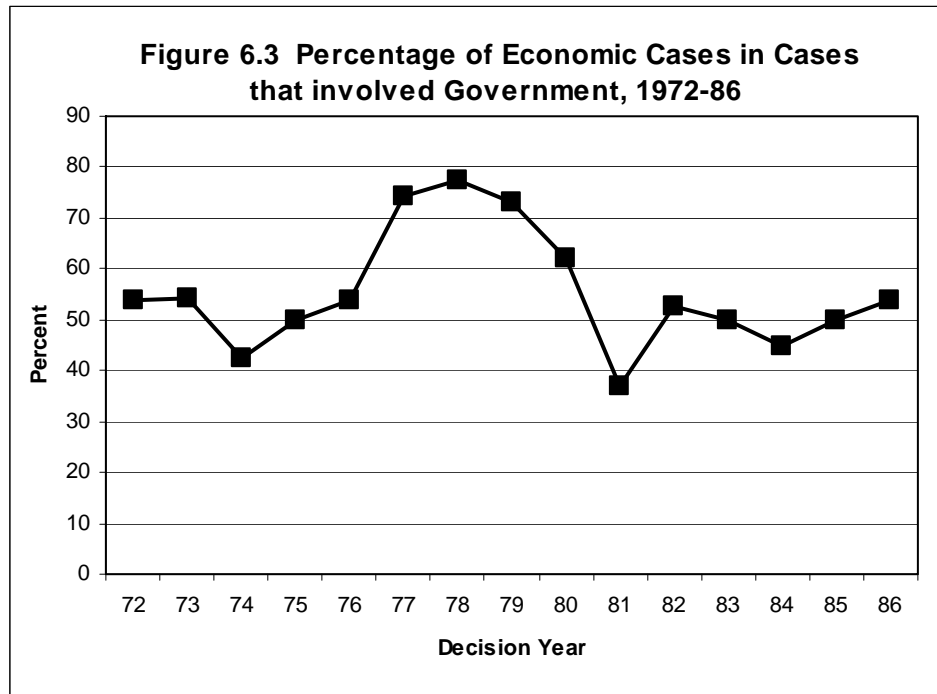
⁵¹ Change in predicted probability as variable value changes from one standard deviation below the mean to one standard deviation above the mean (for continuous variables).

violence like arms when he needed them. However, it was precisely the need for such investors that may have allowed the Supreme Court to invalidate some of the regime's policy. For a dictator like Marcos, such negative acts of the judiciary can still be put to positive use: he can point out to his foreign partners that their capital would be safe when placed in the country since an "independent" judiciary exists to protect their investments (See Muego 1988, 101).

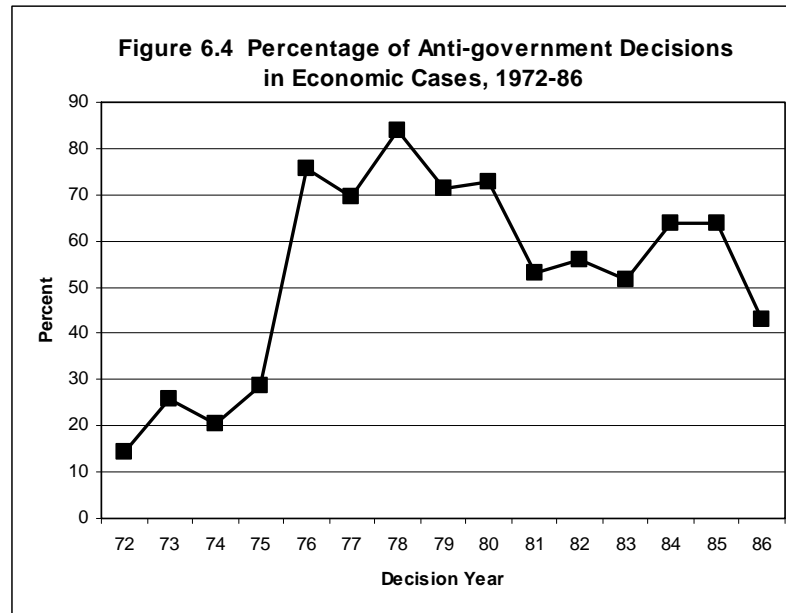
6.3.2.2.3 NEGATION IN ECONOMIC CASES

Consistent with the contentions of Fraenkel (1949) and Jayasuriya (2000), cases that involved economic issues (e.g government regulation of business, labor issues) is a strong predictor of judicial negation. This is indicated by the positive coefficient of the economic case variable (1.05) which was statistically significant at the .01 threshold (p-value = .000). If all the variables in the model are held either at their mean or modal category, the probability of the high tribunal negating the contentions of the state increases by 26 percent when the dispute is economic in nature (see Table 6.4)

Figure 6.3 depicts the annual percentage of economic cases in the Supreme Court's docket during the period of Martial Law. On average, it constituted 55% of the high tribunal's docket per year.

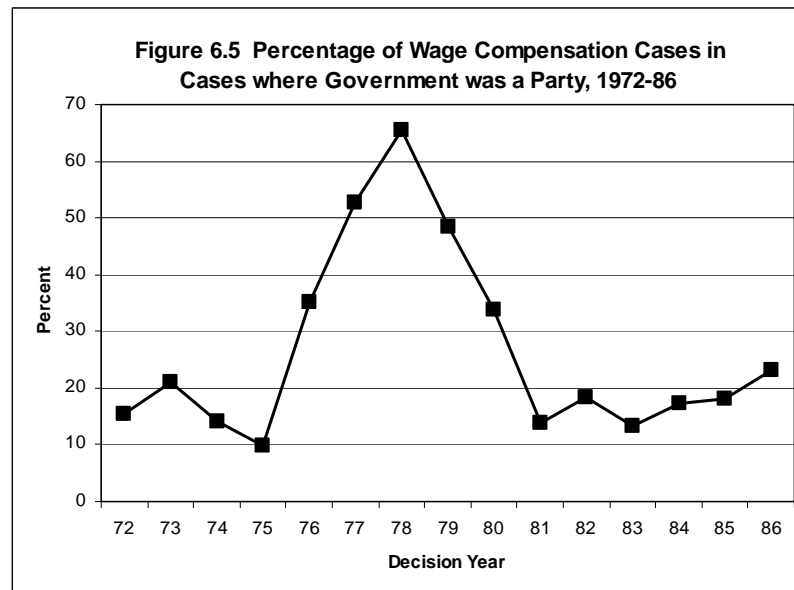


Upon examination, we notice a sharp increase in the number of economic cases beginning 1977, when retirements were allowing Marcos to reconstitute the Court according to his image. Interestingly, the government was successful on this type of cases until 1976, when it lost in 75% of these kinds of disputes. This rose to 84% in 1978 (See Figure 6.4) at the very period when 65% (9/14) of the Supreme Court Justices were appointed by Marcos, without any checks from any other institution. In a manner that is contrary to the expectations of the theoretical literature (Loewenstein 1946; Sartori 1962), the pattern on the Philippines suggests that the more the President dominates the Court through selection, the more likely it was to strike against his government.

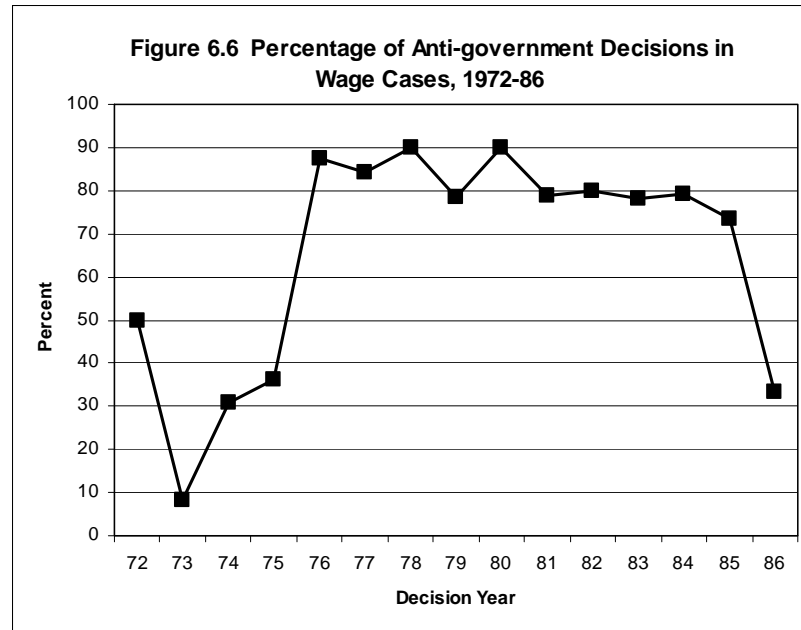


It appears that this phenomenon was largely a conscious creation of the Court. Figure 6.5 indicates that the high tribunal accepted and reviewed larger numbers of wage compensation cases. They were largely challenges of the decisions made by the Workmen's Compensation Commission (Bacungan 1977). The institution handled cases that emanated from the labor sector, the part of the population that was largely critical of the regime and one of the leftist movement's main sources of support.

It is worth noting that declines in the number of wage compensation cases occurred in the years after the purges in 1975 and 1980. The court took the signal from the dictatorship that the regime needed support and probably took less of this type of issues. Another possible interpretation was that after the purges, laborers feared filing cases of this type to the Court. However, the percentage of compensation cases increased dramatically beginning in 1975. Similarly, after the purge of 1980, the number of wage cases was on the upward trend.



In majority of the wage compensation cases, the Philippine Supreme Court aggressively ruled against the contentions of the state. Figure 6.6 indicates that the government was defeated heavily in these cases. On average, it lost 65 percent of the time per year. Even heavier losses were imparted to the dictatorship during those periods when Marcos appointees dominated the Supreme Court (1979-85). The change in the agenda allowed the Martial Law Supreme Court to regain some of the respect and support from the public and the legal community which they had lost after their largely supportive stance towards the dictatorship after the *Javellana* case.



Without the trust of the general population, the judiciary gets marginalized in the allocation of society's resources and values. It becomes an irrelevant institution (Friedman 1975; Nonet and Selznick 1978). This can motivate judiciaries in dictatorships, even those which are stacked with supporters of the autocrat, to develop and demonstrate an image of independence. In the case of the Philippines, the Supreme Court was able to create this perception of independence in the area of economic rights. As a champion of "social justice", the Court hoped to convince litigants that it was still an institution that can dispense justice fairly (Gupit and Martinez 1993).

I refer to this process as one of "manufactured judicial legitimacy". Using creative interpretation to find a way to favor the laborer, the high tribunal harnessed an image that it was relatively autonomous from the state, a champion of the oppressed.

Legal scholars marveled at the way the Philippine Supreme Court went out of its way to provide a victory for the laborer (Bacungan 1977; Gupit and Martinez 1993).

For example, in *Belmonte v. Workmen's Compensation Commission* (58 SCRA 138), a postman suffered from a stroke and was found dead the next day while going through his regular work. The Commission recommended against the request for job-related compensation because the stroke and the death was not the *direct* result of any actual danger that was posed by the nature the job. The Supreme Court thought otherwise, noting that the stroke may not have been directly caused by his employment, but the "illness was *aggravated* by his employment of 24 years performing the duty (many times simultaneously) of letter carrier and acting postmaster" (p. 138. Emphasis added). In his analysis of the Court's labor decisions, Bacungan (1977) concluded that: "it is a case of rejoicing among the workers in the country, that the Supreme Court, as indubitably indicated by the many decisions in labor under Martial Law, is such a kind and *compassionate* Court" (p. 113).

Using the technique developed by Long and Freese (2006, 162), the results in Table 6.5 indicate that the probability of the government losing in an economic case *increases* when the number of non-Martial Law appointees *decrease*. The dictator was placed in that paradoxical situation where an appointment increases the likelihood of a loss. However, this trend applies only to economic cases.

**Table 6.5 Predicted Probability of Negation
For Economic Cases**

Percentage of Non-Martial Law Appointees	Negation in Economic Case (Predicted Probability)
0	.7073
10	.6626
20	.6147
30	.5645
40	.5130
50	.4611
60	.4101
70	.3610
85	.2896
100	.2325

One plausible explanation is precedent: later courts are beholden to the generally pro-labor reasoning and disposition that was pronounced by their predecessors. For example, Gupit and Martinez (1993) contended that “the country has string constitutional concepts of social justice and protection to labor” (p. 103). However, precedent cannot explain how the Court came to be so pro-labor, when it was apparently not so in the past (See Fig. 6.3). Another plausible explanation is “manufactured legitimacy”: the more the Court was perceived as beholden to Marcos, the greater was its effort to project its independence. The increase in wage compensation cases allowed it to aggressively strike down the decisions of the government, in favor of labor who were the main sources of dissent during the dictatorship years.

6.3.2.2.4 COUNTER-HYPOTHESIS RELATIONSHIPS

It turned out that the probability of the dictatorship losing a case in the high tribunal actually decreases (-.208) when there are more Justices in the Court who were not appointed by Marcos during the dictatorship or unified government. This was statistically significant (p-value= .000). This meant that in the Philippine context, the Supreme Court was actually more active in negating when it had more Martial Law appointees. However, the preceding analysis pointed out that the Marcos appointees may have chosen to go against the government by going against the agencies of the dictatorship in economic matters in order to obtain a modicum of political legitimacy.

Meanwhile, the Philippine case appears to be a difficult case for strategic defection theory. The high tribunal was actually *more likely* to negate the state the farther it was to the end of authoritarian rule. The negative direction of the coefficient for political turnover (-.353) was contrary to what was predicted by Helmke's theory (2002; 2005). In this regard, the selection explanation seems to provide the better explanation. Through the process of appointments, Marcos was able to build a fairly reliable bulwark of support (Tate 1993, 327-8; Tate and Sittiwong 1986, 8-9). While there was a slight increase in judicial negation beginning 1983, its magnitude was modest compared to the years 1973-78 (See Fig. 6.1).

The Philippine case suggests that courts may not always act as strategic defectors, but can also choose to act as final forts of support for dictatorships: sustainers of authoritarian hegemony.⁵² If the dictator chooses his agents well, the judiciary may turn

⁵² Hirschl (2003) developed a concept that he referred to as "hegemonic preservation" to refer to situations where courts in newly democratized societies act to protect the interests of the old elite. However, I am referring to situations where courts act to sustain struggling dictatorships.

out to be an invaluable ally during the regime's period of crisis. One of the Justices who served under Martial Law referred to Marcos as "*segurista*" which is a Filipino description for someone who does not take risk. By being a *segurista* with the people that he named to the tribunal, Marcos had a generally supportive Supreme Court even when his regime was coming down (Noble 1986, 85).

Thus, while the dictatorship was beset by economic problems, and pounded by international criticism in 1983 for its human rights record (Lande 1986; Celozza 1997), the Supreme Court proclaimed its unequivocal support to Marcos in *Garcia-Padilla vs. Enrile* (121 SCRA 472). In a virtual abdication of the judicial review powers it so steadfastly defended in *Lansang*, Justice Castro, writing for the Court, held that:

The judiciary can, with becoming modesty, ill afford to assume the authority to check or reverse or supplant the presidential actions. On these occasions, the President takes absolute command, for the very life of the Nation, and its government, which incidentally, includes the courts, is in grave peril. In so doing, the President is answerable only to his conscience, the people, and to God. For their part, in giving him supreme mandate as their president, the people can only trust and pray that, giving him their own loyalty with utmost patriotism, the President will not fail them (Emphasis added).⁵³

Interestingly, purges by the Marcos administration did not seem to have an effect on the Court's ability to render negative decisions. Theory holds that courts are likely to be deterred from going against the government after a demonstration of the state's willingness and capacity to detain and execute opponents within or outside its ranks (Pereira 2005; Mueller 1991; Kirchheimer 1961). Descriptive longitudinal analysis suggested that purges may have attenuated the Court's willingness to accept wage compensation cases as well as negating on this type of case. Negation by the Supreme

⁵³ To which Cruz and Datu (2000) commented, "And the people prayed – oh how they prayed!" (p. 192).

Court declined in the years that immediately followed the purges of 1972 and 1980 (See Figure 6.2).

The decline could have been the effect of Marcos' demonstrated willingness to punish his opponents during the emergence and consolidation phase of the regime. Two months after the declaration of Martial Law, the military stated that they have arrested more than 6,000 people (Mijares 1976, Chapter 3). Later reports showed that the true number is around five times more (Youngblood 1990, 140-3). The regime had also become notorious for the repressive way it treated its prisoners in Camp *Bagong Diwa* (New Consciousness) in Bicutan as well as the national penitentiary in Muntinlupa. Critics and opponents of Marcos' New Society were subjected to the some of the most cruel forms of torture and physical punishment (Youngblood 1990, 151-7).

However, logistic regression results showed that while the coefficient for repression was in the expected direction (-.002), it was not statistically significant.⁵⁴ We can surmise that in conjunction with other factors, repression does not allow us to effectively discriminate between instances of negation and validation.

Finally, the results from the base model indicated that the Supreme Court somehow followed the growth charts. The coefficient for the economic development variable was in the expected direction (+.032), but it was not statistically significant at the traditional .05 threshold (p-value = .071). The formal model that was developed by Wintrobe (1998) contended that increasing prosperity allows tinpot dictators to gain legitimacy based on their performance. Therefore, in the long run, they become less dependent on other sources to sustain themselves in power (e.g. legality, repression).

⁵⁴ This could possibly be attributed to the measure that was selected, which had very little variation in value. Despite this limitation, the Banks' dataset provided the best possible information available.

Thus, *increasing* economic condition provides an opportunity for the court to negate since the dictator is less likely to use force. That seems to be what we found here.

6.3.3 Analysis of Model 2 (With Case Saliency)

6.3.3.1 REGRESSION DIAGNOSTICS

Logistic regression diagnostics of Model Two provide us with some confidence in the empirical results (See Table 6.6). Model 2 had a Wald χ^2 of 176.39, which is statistically significant (Prob>chi2 = 0.000). The model also correctly classifies 65.67% of the cases. Finally, Long's (1997) Adjusted Count R^2 tells us that including the independent variables in the model lowers our error rate by 30.8% compared to prediction that is based solely on the modal category of the observed dependent variable.

The results of the logistic regression indicated that even when we control for the saliency of the case, the Philippine Supreme Court was still willing to go against the dictatorship when the division emerges among the elite. The results also evinced that foreign investments remained positively related to the probability of the judiciary going against the government. Finally, the government was still more likely to lose in cases which were economic in nature. In Model Two, saliency turned out to be an insignificant variable in the prediction of judicial negation. The outcomes for court preferences and political turnover remained significant but were in the direction opposite to the one proposed by my theory. The coefficients for economic condition and repression remained statistically insignificant.

**Table 6.6 Logistic Estimation of Judicial Negation
At the Philippine Supreme Court under Authoritarianism
(Model 2)**

Variables	Expectation	Coefficient (SE)	<i>p</i> -value
Fragmentation	+	.385 (.148)	.004**
Foreign Investments	+	.057 (.016)	.000**
Court Preferences	+	-.208 (.050)	.000**
Turnover	+	-.353 (.184)	.027*
Economic Case	+	1.06 (.112)	.000**
Economic Growth	+	.032 (.022)	.070
Repression	-	-.002 (.058)	.489
Case Salience	-	.044 (.184)	.406
Fragmentation X Court Preferences	+	-----	-----
Constant		-.877 (.162)	.000**
Observations		1803	
Wald χ^2		176.39	
Log Likelihood		-1147.54	
Percent Correctly Predicted		65.67	
$R^2_{adjCount}$		.308	

* = significant at $p < .05$; ** = significant at $p < .01$ (one-tailed test)

6.3.3.2 DISCUSSION OF RESULTS

6.3.3.2.1 *NEGATION AND POLITICAL FRAGMENTATION*

The effect of political division as an enabler of negation remained significant when a case saliency variable was included in the model. The coefficient was in the expected direction (+.385) and is statistically significant (p-value = .021). As reported in Table 6.7, if the value of fragmentation is allowed to vary from minimum to maximum, the likelihood of a negative decision increases by 19 percent.

Table 6.7 Changes in Predicted Probabilities of Judicial Negation (Model 2)

<i>Variables</i>	min → max	0 → 1	Δsd
Political Fragmentation	.19	n.a.	n.a.
Foreign Investments	n.a.	n.a.	.06
Economic Case	.26	.26	n.a.

6.3.3.2.2 *NEGATION AND FOREIGN INVESTMENT*

The effect of external actors also continued to persist even when case saliency was controlled for. Increasing amounts of foreign investment induced judicial negation. The coefficient was in the expected direction (+.057) and is statistically significant (p-value = .000). As reported in Table 6.7, if the value of foreign direct investments is allowed to vary from one standard deviation below the mean to one standard deviation above the mean, it increases the likelihood of a negative decision by 3 percent.

6.3.3.2.3 *NEGATION IN ECONOMIC CASES*

When we include a variable in the model to control for case salience, the economic case variable remained significant. Its positive coefficient (+1.06) was statistically significant beyond the .001 threshold (p-value = .000). If all the variables in the model are held either at their mean or modal category, the probability of the high tribunal negating the contentions of the state increases by 26 percent when the dispute is economic in nature (see Table 6.7).

6.3.3.2.3 *COUNTER-HYPOTHESIS RELATIONSHIPS*

The coefficients for case salience was not in the expected direction (.044) and was not statistically significant (p-value = .491). As far as the period of Martial Law was concerned, the Justices were not affected by the fact that a case may be politically sensitive to the regime. Only 11 percent (191/1803) of the cases in the Supreme Court's docket from 1972-86, were salient, as operationally defined in 6.2.2.2.8. The regression values for the case saliency variable must be interpreted in conjunction with the other predictive variables. In the Philippine context a case that is politically sensitive to the government may still be struck down by the Supreme Court because of its commitment to social justice or to manufacture political legitimacy. Based on the quantitative analysis, the negative action in a salient case may also be facilitated by the presence of foreign actors. The Justices were more likely to strike down a case when the volume of capital that may pull out from the country is considerable (See Table 6.6).

The coefficient for economic growth remained in the expected direction (+.032) but was statistically significant (p-value = .070). Two other variables, court preferences and political turnover remained in the opposite direction to the one proposed by theory that was developed in Chapter Two. The outcome for repression remained statistically insignificant.

6.3.4 Analysis of Model 3 (With Interaction)

6.3.4.1 REGRESSION DIAGNOSTICS

Logistic regression diagnostics of the third model, one that included a variable interacting fragmentation and court preferences, demonstrated that adding a multiplicative term to our analysis increased our capacity to predict the instances of judicial negation (See Table 6.8). Model 3 had a Wald χ^2 of 172.26, which is statistically significant (Prob > chi2 = 0.000). The log likelihood of Model 3 (-1137.46) is lower compared to Model 1 (-1147.57) or Model 2 (-1147.54). This conveys that the third model have a better “goodness of fit”, meaning the inclusion of the interaction term lessened the deviance of the model from the “true” model (Menard 1995, 18-36; O’Connell 2006, 14). The model is able to correctly classify 67.33 percent of the cases. The value on the Adjusted Count R^2 indicates that the model with an interaction term reduces the error rate by 34.2 percent, telling us that adding an interaction term increases our ability to discriminate between judicial negation and validation.

**Table 6.8 Logistic Estimation of Judicial Negation
At the Philippine Supreme Court under Authoritarianism
(Model 3)**

Variables	Expectation	Coefficient (SE)	<i>p</i> -value
Fragmentation	+	.268 (.150)	.037**
Foreign Investments	+	.057 (.016)	.000**
Court Preferences	+	-.375 (.071)	.000**
Turnover	+	.044 (.202)	.413
Economic Case	+	1.04 (.112)	.000**
Economic Growth	+	.011 (.022)	.310
Repression	-	.062 (.066)	.170
Case Salience	-	-.032 (.190)	.433
Fragmentation X Court Preferences	+	.297 (.070)	.000**
Constant		-.671 (.166)	.000**
Observations		1803	
Wald χ^2		172.26	
Log Likelihood		-1137.46	
Percent Correctly Predicted		67.33	
$R^2_{adjCount}$		.342	

* = significant at $p < .05$; ** = significant at $p < .01$ (one-tailed test)

6.3.4.2 DISCUSSION OF RESULTS

The coefficient of the interaction term that was created by multiplying the court's preferences and political fragmentation was in the expected direction (+.211) and was statistically significant (p-value = .371). Substantively, this tells us that the judicial negation of courts with non-Marcos appointees was conditioned by the fragmentation of those who rule. Substantively, this meant that those Justices who were not beholden to Marcos for their appointments bided their time before they struck against the dictatorship. A standard deviation change in the interactive term centered on the mean increases the likelihood of a negative decision by 10 percent (See Table 6.9)

Table 6.9 Changes in Predicted Probabilities of Judicial Negation (Model 3)

<i>Variables</i>	min → max	0 → 1	Δsd
Fragmentation X Court Preferences	n.a.	n.a.	.10
Foreign Investments	n.a.	n.a.	.06
Economic Case	.26	.26	n.a.

Two other variables which were not part of the interactive term continued to be statistically significant: foreign investments and economic cases (See Table 6.9). Case type continued to be the strongest predictor of judicial negation. The coefficient for the

economic case variable remained in the positive direction (1.05) and is statistically significant (p-value = .000). If a case involves an economic regulation or labor issue, the probability of judicial negation increases by 26 percent.

Foreign direct investments remained positively related to the willingness of the court to negate. Its coefficient remained in the expected direction (+.057) and was statistically significant (p-value = .000). When the variable is made to vary from one standard deviation below the mean to one standard deviation above the mean, the likelihood of a negative decision increases by 6 percent.

The variable political turnover became insignificant in Model 3. In addition, the sign of the coefficient also changed. This may be due to its high correlation with the interactive term (-.68). However, I contend that the variables are conceptually distinct and I retained the variables in Model 3. The case saliency and repression variables remained statistically insignificant and the change in their signs maybe related to the multicollinearity that was introduced in the model by the interactive term and political turnover. The solution to this statistical occurrence is the gathering of more data before an interaction term is introduced (Menard 2002, 75-78; Hosmer and Lemeshow 2000, 140-1). Thus, the results of Model 3 must be considered with due caution. Finally, the estimate for economic development still failed to reach statistical significance.

6.4 *Courts, Dictators, and the Pursuit for Legitimacy: Insights from the Philippine Case*

The objective of this chapter was to provide an empirical examination of the conditions under which the judiciary is able to control and limit the contentions of the state in litigation routinely and resolutely. The crucial questions were: *when do gavels go against the gun? When do they invalidate state action?*

The Philippine case suggests that the gavel defies the sword because they need to. Devoid of the trust and respect of the population, the judiciary fades as an irrelevant institution in the allocation of society's resources and values (Kirchheimer 1961; Friedman 1975). Judiciaries in dictatorial settings need to develop and demonstrate an image of independence. In the case of the Philippines, this was largely done by the Supreme Court in economic cases, where they aggressively ruled against the decisions of the government (See Table 6.10). As a champion of social justice, the Court hoped to convince litigants that it is still an institution that can dispense justice fairly. The Supreme Court seemed to have succeeded in doing so, as legal and historical scholars noted that despite the composition of the Court, Marcos' challengers kept going to the tribunal (Muego 1988; Wurfel 1988; Haynie 1994; Fernandez 1999).

**Table 6.10 Logistic Estimation of Judicial Negation
At the Philippine Supreme Court under Authoritarianism**

Variables	Expectations	Model 1	Model 2 <i>(With Saliency)</i>	Model 3 <i>(With Interaction)</i>
Fragmentation	+	.385 (.148)**	.385 (.148)**	.268 (.150)**
Foreign Investments	+	.057 (.016)**	.057 (.016)**	.057 (.016)**
Court Preferences	+	-.208 (.050)**	-.208 (.050)**	-.375 (.071)**
Turnover	+	-.353 (.184)*	-.353 (.184)*	.044 (.202)
Economic Case	+	1.05 (.103)**	1.06 (.112)**	1.04 (.112)**
Economic Growth	+	.032 (.022)	.032 (.022)	.011 (.011)
Repression	-	-.002 (.058)	-.002 (.058)	.062 (.066)
Case Saliency	-	-----	.044 (.184)	-.032 (.190)
Fragmentation X Court Preferences		-----	-----	.297 (.070)**
Constant		-.866 (.156)**	-.877 (.162)**	-.671 (.166)**
Observations		1803	1803	1803
Wald χ^2		176.30	176.39	172.26
Log Likelihood		-1147.57	-1147.54	-1137.46
Percent Correctly Predicted		65.45	65.67	67.33
$R^2_{adjCount}$		.304	.308	.342

* = significant at $p < .05$; ** = significant at $p < .01$ (one-tailed test)

The empirical results also indicated that that the court defied the dictator because it can. This chapter suggests that division within the ruling elite facilitate assertive action by the court. In addition, external actors can have some influence on the ability of the courts to control the behavior of governments (See Table 6.10). The entry and action of foreign investors is useful in stifling the ability of the dictatorship to retaliate against the judicial system. The literature tells us that the ability of the court to constrain the power of the dictatorship and defend human rights is enhanced by the presence of some alternative political force, whether domestically or exogenously generated (Barros 2002; Iaryczower et al. 2002; Wintrobe 1998). That is what I have found here.

Some have claimed that the story of the Philippine Supreme Court under Martial Law is the narrative of how a dictator was able to transform a once formidable institution into fairly reliable ally (Noble 1986; Celozza 1997; Vejerano 1999). However, it also tells us something about the need of judicial systems for legitimacy as well as their ability to do justice when the opportunity presents itself. Thomas Jefferson once asked whether justice can ever grow from the soil of absolute power. The story of the Philippine Supreme Court indicates that justice can still be done even in the most demanding of conditions. But it will only come from those who are willing to resist power, however manufactured or strategic that resistance turns out to be.

CHAPTER SEVEN

*TAMING THE SWORD IN THE APARTHEID STATE:
JUDICIAL NEGATION IN THE SOUTH AFRICAN
APPELLATE DIVISION*

*The Rule of Law is a miracle;
it is nothing less than man protecting himself
against his own cruelty and selfishness.*

---**Alan Paton** (1987, 283. Cited in Abel 1995)

Lawyers, like spiders, are a nuisance to autocrats.

---**Hugh Corder** (1988, 19).

7.1 Introduction

Are there factors that can sufficiently explain judicial negation? The objective of this chapter is to compare the pattern of decision-making in two most different countries: the Philippines and South Africa. While both countries have experienced periods of authoritarianism, they differ in a lot of ways (See Table 1.1). In the most different systems approach to case selection in comparative politics, the analyst selects cases that vary sharply in features that are not the central to the study (Gerring 2007, 139-42; Pennings, Keman and Kleinnijenhuis 1999, 43-49). The aim is to identify a factor or a set of factors that consistently produce a significant effect, in the same direction, across

different settings. Babbie (2002) referred to those factors as potential sufficient causes (pp. 88-9).

This chapter is composed of three parts. In the first part, I provide a brief history of South Africa, with a focus on the policies of the authoritarian state to produce and maintain racial separation. I also discuss the South African legal system, placing particular emphasis on the sources of law and the structure of the judicial hierarchy that existed from the establishment of the unified state of South of Africa up to the transition to democracy in 1994.

In the second part, I apply the framework that was mapped out in chapters two and three to construct a theory-driven qualitative study of the phenomenon of judicial negation in the Republic of South Africa. Through the use of process tracing (George and Bennett 2004; Van Evera 1997), I identify the key factors that impeded or enabled judicial negation in the South African Supreme Court (the Appellate Division) on cases like those that involved *apartheid*, the policy of “separate development of the races” and national security from 1950-94 (Deegan 2001, 23-42; Thompson and Prior 1982, 70-99).

In the third part, I conduct a quantitative examination of the decision-making in the high court. The purpose of this part is *confirmatory*; that is, to test quantitatively whether the general theory that was developed in Chapter Two is able to significantly explain judicial negation in the South African setting.

7.2 Historical and Political Context of the South African Legal System

7.2.1 African Indigenous Communities

The history of South Africa has always been written from the point of view of the white man. Thus, most historical accounts of the Republic of South Africa begin with Vasco de Gama's trip around the Cape of Good Hope in 1497-98, followed by Jan van Riebeeck's seizure of the Cape in 1652 to serve as a refreshment station for the trading activities of the Dutch East India Company. In this type of historical narration, the story of the native Africans are written from a third person's perspective. This kind of historiography has been employed by colonial states to expand and legitimize their dominion over the so-called "uncivilized" territories (Clark and Woger 2004, 6-9). The indigenous South Africans were considered a "tabula rasa" for white invaders or capitalists to civilize or victimize" (Thompson 1995, 2).

The earliest human communities in South Africa survived through foraging, fishing, and hunting. Some of the earliest fossils of *homo sapiens* were found in South Africa; in the mouth of the Klasies River in the eastern Cape province, as well as the Border Cave that is found between Natal and Swaziland (Hall 1987). They are considered to be the genetic predecessors of the Khoisan people today. Recent evidence suggests that they are also related to the Bantu-speaking Africans who constitute nearly 75 percent of the population of what is now Republic of South Africa (Thompson 1995, 6). By the seventeenth century, the indigenous communities in southern Africa were engaged in three different forms of subsistence. The San occupied the mountainous areas

and relied mostly on hunting. The Khoikhoi lived in the western part and kept sheep and cattle.⁵⁵ A third group, the Bantu speakers farmed the well watered eastern regions of the country (Thompson and Prior 1982, 21).

The early Africans were organized primarily around chiefdoms. They vary in both form and size. A “chiefdom” can be a village of a thousand people or a network of families that is controlled at the center by a chief (Ross 1999, 15-19). In some instances, local chiefs can consent to the governance of an overlord. These organizations are identified by an ancestral figure (e.g. Zulu, Sotho). In 1816, the Zulus organized these chiefdoms into “kingdoms”; an arrangement that they believed was more suited for warfare (Thompson 1995, 23). These are the entities that the white people, led by Jan van Riebeeck were to meet in April 1652.

7.2.2 The Dutch Settlement in the Cape and Roman-Dutch Law

During the seventeenth century, the Dutch Republic ruled the seas. Its fleets dominated inter-continental business and trade (Crais 1992). Among the giants of the merchant world was the Dutch East India Company. For Thompson (1995, 33) the company was a “state outside the state”. By virtue of a charter from the Dutch States-General, the company enjoyed full powers in the Cape of Good Hope, now known as the Republic of South Africa. The Cape was a company recreation and refueling station for ships and personnel that are making the journey from Europe to the company’s trading center in Batavia, Java.

⁵⁵ White Africans would refer to the San as “Bushmen”, to the Khoikhoi as “Hottentots” and to the (Thompson and Prior 1982, 21).

Van Riebeeck and his crew were welcomed to the peninsula by the San and the Khoikhoi, but the relationship between them soon took a turn for the worse due to conflicts over cattle and the land (Riley 1991, 1). The two sides fought in the First Hottentot War which Van Riebeeck won convincingly. The members of the Dutch East India Company attempted to turn the San and the Khoikhoi into slaves but they were fiercely resisted. Since labor was needed by the white man to run their activities and business, slaves were brought in from the Malaya, Indonesia, India, and Sri Lanka (Worden 1985). Intermarriage among the Europeans, the slaves, and the Khoikhoi produced what is now known as the “Colored” community. The Dutch brought to the Cape its Roman-Dutch system of law, which was based on statutes and codified rules (civil law) rather than from rulings made by judges in consonance with local conditions and beliefs (common law).

7.2.3 British Conquest and the Introduction of Common Law

The conflicts in Europe soon brought the British into the Cape. The British sought control over the Cape in order to prevent it from falling into the hands of the French. Similar to the Dutch, the British considered the peninsula as its “stepping stone” to Asia (Thompson 1995, 52). They defeated the Dutch forces in the island in 1795 but were forced to give it back in 1803 to the Netherlands as part of the Treaty of Amiens. The British would take back the colony in 1806 (Keegan 1996).

Some of the very first laws that were laid down by the British were racist, leading historians like Riley (1991) to contend that the British “laid down some of the basic precepts of apartheid” (p. 3). For example in 1809, the first British governor, the Earl of

Caledon, proclaimed the rule that San and Hottentots must serve the white people. Members of these communities were forcibly taken from their homes and thrown to slavery (Ross 1982). The new colonizers brought a new language (English), as well as English common law. The Roman-Dutch system was allowed to remain as substantive law in the Cape, but the judicial processes and procedures followed the British system. In 1830, it was mandated that only English can be used in the courts, schools, and transactions with government.

Due to criticisms by the English missionaries in the peninsula as well as by liberals in London, the British eventually adopted “the transition from formal slavery to formal freedom” (Thompson 1995, 67). After the British Parliament prohibited slavery in 1807, the institution of slavery was slowly but steadily dismantled in the Cape. First, the limits on movement which were imposed on the Khoikhois were lifted. In 1834, all slaves in the colony were freed (Riley 1991, 3).

7.2.4 Afrikaner Republics and the Restoration of Roman-Dutch Civil Law

The entry of the British and their culture into the colony, as well as its policy on slavery brought resentment from the descendants of the original Dutch settlers, German Protestants and French Huguenots, who came to refer to themselves as “Afrikaners” or “Boers” (Stultz 1974). The liberation of the slaves in 1834 was the “final straw for many Afrikaners who resented the British attempts to dictate the structure of their society” (Riley 1991, 3). Thus, in 1840, around six thousand Afrikaners made the “Great Trek” into the interior of the peninsula in order to re-establish the traditional life in the Cape

colony, free from British rule. In 1838, they won a great victory over the Zulus in what is known as the “Battle of the Blood River”, and founded the Republic of Natalia.

The British authorities seized control of the Afrikaner colony of Natal. The migrants, revered as the *Voortrekkers* (vanguard trekkers) simply pushed further north and west of Natal. By 1850, the Afrikaners established a settlement east of Natal named the Orange Free State, and the South African Republic (Transvaal) in the north. The new settlements pined for a return to the “old ways”, one that is characterized by white domination. Thus, the constitution of the South African Republic sternly proclaimed that the new settlement desired “to permit *no equality* between colored people and white inhabitants” (Haynie 2003, 27. Emphasis added). The Trekkers also used the Roman-Dutch Law in all their transactions and dealings, with little regard for the tribal laws of the natives (Hahlo and Khan 1968, 571-8; Sachs 1973, 68-94).

The discovery of diamonds and other precious minerals in the Afrikaner territories (e.g. diamonds in Kimberly in Griqualand West and gold in the Witwatersrand at Transvaal) provided an incentive for the British to move against the Dutch settlements. The English occupiers at the Cape, led by Cecil Rhodes, decided to seize the new Republics. “At a time of growing economic and military competition from European rivals,” said Thompson (1995), “powerful British interests were concerned to prevent a region of great, newly discovered material resources from escaping Britain’s century-old hegemony” (p. 141). In the Anglo-Boer War of 1899-1902, English forces crushed the resistance of both republics, and absorbed them into the British Empire.

7.2.5 Politics and Law under Unified South Africa

In 1908, delegates from the British colonies of the Cape, Natal, Orange Free State, and Transvaal met in Durban to negotiate the creation of a unified South African state that would be linked to the Empire as a dominion (Ross 1992, 54-83). The four colonies became the four provinces of the new state. A constitution (the South Africa Act) was signed by the parties in 1909, and the Union of South Africa was born on May 10, 1910 after heated negotiations on the issue of race. The Boer republics were adamantly opposed to granting of any suffrage rights to Blacks and colored people. But the British settlements in Natal and the Cape extended limited voting rights to these groups.⁵⁶ Eventually, the Cape was allowed to keep its policies, but a proviso was inserted in the Constitution that these provincial laws may be abolished by a two thirds vote in Parliament (Sachs 1973, 142-3). The black and colored voters in the Cape eventually lost their voting rights in 1936 and 1956 respectively.

The South African Constitution established a parliamentary form of government with a bicameral legislature. It also created a single appeals court for all the four provinces, the South African Appellate Division. The goal was that through its rulings, the new Court can facilitate stability in the South African political system. The 1909 Constitution had no bill of rights nor did it expressly grant the court the power to invalidate acts of parliament through judicial review (Edwards 1995b).

⁵⁶ Due to educational and property requirements however, almost no black or colored person was able to vote in Natal and less than 5 percent of the electorate in the Cape satisfied the voting qualifications (Riley 1991, 7).

7.3 Source of Law and Structure of the South African Judicial System

7.3.1 Sources of Law

In resolving cases, South African courts draw from two sources: the common law and statutory law. “Common law” generally refers to writings of Roman-Dutch jurists (e.g. Johannes Voets, Cornelis van Bijkershoek), Justinian’s *Corpus Juris Civilis*, the *placaats* or statutes that were made in Holland, and the reported decisions of the superior courts (Du Plessis and Kok 1989, 25-7). Precepts from English common law are sometimes applied in trade and contract cases as well (Edwards 1995a, 356). Statutory law pertains to rules and legislations that were enacted by lawmaking institutions like the Parliament, provincial councils, and town councils. In practice, “rules of common law may be abolished by statute” (Edwards 1995b, 385). Unlike the civil law systems in Europe, the South African legal system strictly adheres to the principle of *stare decisis*. “All South African courts are bound by decisions of the Appellate Division” (Du Plessis and Kok 1989, 40).

7.3.2 Judicial Hierarchy and Jurisdiction

The South African Appellate Division sat at the top of the judicial hierarchy from 1950 to 1994.⁵⁷ From 1910-1949, the final court of appeal was the British Privy Council (Forsyth 1985, 3-5). The Appellate Division is a pure appeals court; it has no original jurisdiction. Unlike the United States Supreme Court, the Appellate Division did not

⁵⁷ The constitution of the democratic South Africa created a Constitutional Court. It is presently located at Johannesburg.

have discretionary jurisdiction. Cases were certified to it by the lower courts, namely the Provincial and Local Divisions (Du Plessis 1992).

Provincial Divisions have jurisdiction over a particular area in South Africa or over certain type of litigants. For example, Pretoria was under the jurisdiction of the Transvaal Provincial Division while Cape Town belonged to the Cape Provincial Division. Provincial divisions have both appellate and original jurisdictions. In theory, they can hear any case. Meanwhile, local divisions are courts of first instance. They have no appellate jurisdiction. They enjoy *concurrent jurisdiction* with the Provincial Division (Du Plessis and Kok 1975, 24-36). This means that a person who has been aggrieved in Durban may bring the case either to the Durban Local Division or to the Natal Provincial Division in Pietermaritzburg.

Situated below the Appellate, Provincial and Local Divisions are the Magistrates' Courts, of which there are two types: the *district* and *regional* courts. The district courts have a limited civil and criminal jurisdiction. For example, they cannot hear civil cases where the amount involved is more than R20,000. Meanwhile, the regional courts preside over a group of districts, or what is referred to as regional divisions. They have much broader criminal and civil jurisdictions. Judges in regional courts have the competence to hear cases that involved murder and rape, and impose punishment up to ten years imprisonment (Du Plessis 1992, 90).

7.3.3 The South African Appellate Division

The Appellate Division is composed of a Chief Justice (CJ) and the Judges of Appeal (JA). In 1950, the division had six members: one Chief Justice and five Judges of Appeal (Forsyth 1985, 2-3). But due to the constitutional crisis of 1950, its membership was expanded by the National Party to eleven. In 1990, it was composed of eighteen Judges of Appeal (Haynie 2003, 31-2).

In order for the Appellate Division to decide on a criminal case, the law requires a quorum of three; and five if it is a civil case (Du Plessis and Kok 1975, 36-7). The high court sits on panels when reviewing and deciding on cases. Decisions made by single-judge courts are handled by panels composed of three Appellate Judges of Appeal. Decisions rendered by collegial lower courts went to panels of five in the AD (Forsyth 1985, 6-7).

The Appellate Division possessed no formal power of judicial review. However, Section 34(2) of the Constitution permitted the Appellate Division to “inquire into and pronounce upon the question as to whether the provisions of this Act were complied with” in any action or legislation that is passed by Parliament (Carpenter 1995, 964). This means that while the court cannot inquire into the *substance* of the policy, it can review any act of Parliament to determine whether it is in consonance with the procedure and any other requirements that are stated in the Constitution.

7.3.4 Recruitment and Appointment

Members of the South African Appellate Division were selected and appointed by the Prime Minister and his Cabinet (Forsyth 1985, 1-7). After South Africa became a Republic in 1961, the members of the high court were chosen by the State President in consultation with the Chief Justice of the Appellate Division and the Cabinet. The bar in South Africa is similar to the British system: they are divided between advocates, lawyers who appear and argue before the courts; and attorneys, who prepare the documents for the advocates as well as other forms of support. Members of the Appellate are still largely drawn from advocates, and they usually belong to the legal community's elite (Du Plessis and Kok 1975, 32). Justices of the AD can serve up to the age of seventy and can only be removed before retirement by Parliament for conduct unbecoming of a judge (Dugard 1978, 10).

7.4 Regime Duration, Mechanism Selection, and Judicial Negation in South Africa, 1950-1994

This section provides a theory-driven qualitative study of the phenomenon of judicial negation in the Republic of South Africa. Using the framework in Chapters Two and Three, it systematically analyses the relationship between the government and the Appellate Division from 1950 to 1994 using the categories of authoritarian regime phase, central challenge, and mechanism selection (See Part 3.3). Finally, through process tracing (Munck 2004; George and Bennett 2004) this part demonstrates how the factors which were discussed in Chapter Two (e.g. division in the ruling elite, court preferences), shaped the ability of the Appellate Division to control and limit the actions of government.

7.4.1 National Party Rule and the Challenge of Justifying the Apartheid State (1950-60)

The first election in the unified South African state in 1911 was won by Louis Botha and Jan Christian Smuts of the South African Party (SAP) who generally favored the establishment of a unified White African nation through the gradual blending of the British and Afrikaner races (Thompson and Prior 1982, 100). However, a more nationalist, exclusive Afrikaner line was being developed and asserted by James Barry Munnik Hertzog, who founded the National Party in 1914. He advocated for the

“separate development” for the Afrikaners, the British, the colored and black communities (Riley 1991, 8). However, Hertzog realized that he cannot rule effectively without British support. The SAP and NP parties came together in 1934 to form the United Party (UP), with Hertzog at the helm as Prime Minister.

The mantle of leadership of the Afrikaner nationalists fell to Daniel Francois Malan. He took over the NP and championed the policy of *apartheid* (“apartness”) in 1946. It mandated for the separate development of the races (Clark and Worger 2004, 35-61). Through skillful mobilization of the Afrikaner population, Malan’s NP emerged victorious in the 1948 elections. He proclaimed to the Afrikaner community that “for the first time since Union, South Africa is our own. May God grant that it always remains our own” (Thompson 1995, 186).

The NP government immediately implemented a series of regulations with the express intent of keeping the white race pure. One such act was the Immorality Act of 1950 which made it illegal for people belonging to different races to engage in sex or marriage. However, it was hard to implement the law because of the difficulty involved in ascertaining a person’s race based simply on personal appearance. Thus, the Population Act of 1950 was passed to clarify the identity of races by laying down the particulars on how to classify a person (Dugard 1972, 53-106; Kotze 1975, 3-22).

The avowed goal of the NP was the creation of an all-white South Africa with an Afrikaner majority. It adopted a three-stage approach to accomplishing the goal. After categorizing people according to races, the NP proceeded into partitioning them into different areas through the *Group Areas Act of 1950* (See Table 7.1). In this way, the party was able to limit their movement and interactions. Socialization among the races

was further limited by the *Separate Amenities Act of 1953*, which provided for the creation of separate facilities for whites and non-whites in public areas like parks, restaurants, and theaters, among others (Deegan 2001, 24-5).

Table 7.1 Key Apartheid Legislation of the South African Government

Year	Legislation	Policy Intention
1949	<i>Immorality Act</i>	Prohibited inter-racial sexual relations.
1950	<i>Suppression of Communism Act</i>	Banned all types of organizations that the government had declared to be “communist”.
1950	<i>Population Registration Act</i>	Law that classified South Africans into racial groups.
1950	<i>Group Areas Act</i>	Partitioned the country into different areas according to race. Areas were designated for certain groups to the exclusion of others.
1951	<i>Bantu Authorities Act</i>	Established a separate system of government for blacks.
1952	<i>Abolition of Passes and Coordination of Documents Act</i>	Imposed punishments for Africans in the towns without permits signed by their employers.
1953	<i>Separate Amenities Act</i>	Announced a policy of racial separation in public structures like parks, movie houses, transport, even drinking fountains and toilets. It was later extended to include segregation in all school levels.
1953	<i>Bantu Education Act</i>	Schools that served the black African population were brought under the control by the government in order to enforce a curriculum that prepared them for manual labor.
1954	<i>Natives Resettlement Act</i>	Allowed the government to legally displace Africans from their residence into separate townships.
1955	<i>Natives (Urban Areas) Amendment Act</i>	Announced further limitations on African movement. Africans cannot stay for more than three days in cities without a pass.
1958	<i>Promotion of Self-Government Act</i>	Legislation that established certain parts of South Africa as black “homelands”.
1967	<i>Physical Planning and Utilization of Resources Act</i>	Directed the government to assist in the development of the “homelands” with the intent of relocating the blacks to these areas.
1970	<i>Black Homeland Citizenship Act</i>	Legislation that effectively declared that inhabitants of the homelands were no longer citizens of South Africa.

Sources: Deegan (2001, 24); Clark and Worger (2004); McKinnon (2004).

In the second stage, the National Party restricted the ability of the blacks to stay in areas apportioned to whites with the *Abolition of Passes and Coordination of Documents Act of 1952 and the Urban Areas Amendment Act of 1955* (See Table 7.1). They made it difficult for blacks to stay in white areas without passes which were signed by their employers. Blacks were allowed to stay in white areas no longer three days without a permit. The law provided for severe punishments in cases of violation (Clark and Worger 2004).

In the third stage, the government forcibly removed the remaining blacks in the white areas and forced them back into territories which were euphemistically called “homelands”. The *Natives Resettlement Act of 1954* allowed the National Party to forcibly remove non-whites from their residences and into separate townships. The *Promotion of Self-Government Act of 1958* established separate territories for the black Africans⁵⁸: Boputhatswana (for the Tswanas), Transkei (Xhosa), Gakanzulu (Tsonga), KwaZulu (Zulus), Ciskei (Xhosa), KaNgwane (Swazi), Lebowa (Padi), QwaQwa (S.Sotho), and Venda (Vanda). In 1970, the South African government declared that inhabitants of the homelands who chose to be independent were no longer citizens of the Republic of South Africa (Deegan 2001, 35-42).

Transkei chose “independence” in 1976, and Boputhatswana followed in 1977. Afterwards, Venda and Ciskei accepted the South African offer of in 1979 and 1981 respectively. The term independence is qualified since given the scarce resources in these territories; they were largely dependent on the Republic of South Africa for economic support; a fact that effectively compromised the ability of their leaders to

⁵⁸ The ethnic community for whom the homeland is reserved for is in parentheses.

venture courses of action free of Pretoria. Thus, McKinnon (2004) remarked that “not surprisingly, the rest of the world did not recognize these puppet moves” (p. 229).

As a program, the National Party defended the policy of “separate development of the races” on the grounds that they will allow the white and the black communities to determine their own courses of action on the basis of their own respective identities, traditions, and beliefs. The Department of Foreign Affairs (1968) contended that:

South Africa does not believe that the objective of self-determination for all her peoples is to be achieved by attempting to force all the national entities within her borders into an artificial unit, to be ruled on the basis of majority vote...*it is clear that attempts at establishing integrated societies in conditions where substantial differences obtain amongst groups in a geographical area, have been disastrous...* (p. 36. Emphasis added).

Due to the criticisms which were harped by the United Kingdom and its dominions on its apartheid policy, South Africa left the Commonwealth and became a Republic in 1961. The National Party contended that apartheid is not only a politically acceptable policy, but is also allowed legally valid. It is in line with the traditional Roman-Dutch precepts that governed life the early Dutch settlements, its customs, and statutes.

7.4.2 Procedural Judicial Review and the Composition of the Appellate Division

Given the doctrine of parliamentary supremacy that existed in South Africa, the *substantive* content of its policy cannot be challenged (Carpenter 1995, 963-4). Section 34(3) of the South African Constitution stated that “No court of law shall be competent to inquire into or pronounce upon the validity of an Act of Parliament”. However, the South African judiciary was not entirely powerless to restrain the actions of government.

Section 34(2) of the Constitution permitted the Appellate Division to “inquire into and pronounce upon the question as to whether the provisions of this Act were complied with” in any action or legislation that is passed by Parliament (Carpenter 1995, 964). This means that while the court cannot inquire into the substance of the policy, it can review any act of Parliament to determine whether it is in consonance with the *procedure* and any other requirements that are stated in the Constitution. “In other words, the court can give an authoritative judgment on the *manner* and *form* of the act” (Du Plessis 1992, 155. Emphasis in text).

In the hands of creative judges, any legislation may be struck down for being defective in form. Policies that implement legislation can also be invalidated for not falling within what the courts construed to be the “true meaning” of a legislative enactment. That is why Dugard (1987, 49) contended that judges in British-influenced systems like South Africa has almost the same level of discretion as their colleagues in the United States (p. 49).⁵⁹

On the early years of apartheid, the NP had a reason to be wary that the Appellate Division might “creatively” interpret the provisions of the Constitution against its separate racial development policy. Three of the members of the Appellate Division were appointees of the NP’s political opponent: the more liberal United Party (UP) under J.C. Smuts: Chief Justice Albert Centlivres, Leopold Greenberg, and Oscar Schreiner (See Table 7.2). The UP espoused a platform that was favorable of Britain, and of English common law precepts that protected some fundamental human rights (Dyzenhaus 1991, 39-40; Thompson and Prior 1982, 99-105).

⁵⁹ In an earlier work, Dugard criticized South African judges for their unwillingness to interpret the law towards greater protection of human rights (1971, 1972).

Table 7.2 Judges in the Appellate Division During the Early Years of National Party Rule (1950-55)

NAME OF JUSTICE	APPOINTMENT YEAR	APPOINTING PARTY
Albert Centlivres	1939-50 JA 1950-57 CJ	United Party
Leopold Greenberg	1943-55, JA	United Party
Oscar Schreiner	1945-60, JA	United Party
Francois Van Den Heever	1948-56, JA	National Party
Oscar Hoexter	1949-63, JA	National Party
Brian Fagan	1950-57, JA 1957-59, JA	National Party

Since there are six members in the AD, it was the duty of the Chief Justice to determine who among the judges will comprise a three or five-person review panel (See the discussion on 7.3.3). Centlivres had the option of having his two fellow UP-appointed members with him in reviewing any legislation or act of government. *Together, the three can dominate any review panel of an apartheid directive.*

7.4.3 The National Party's Apartheid Policy and the Need for Legality

Despite the composition of the Appellate Division from 1950-55, the NP allowed its policies to be challenged before the court system. The party sought the legal validation offered by the AD to its policies in order to counter the criticisms of white and black opponents and increase the cost involved in fighting the regime (Dyzenhaus 1991, 42-7). With a favorable ruling from the court, the NP can frame the issue in terms of a struggle between *authorities* and *outlaws*. The NP government argued that it only employs coercive means to defend the rulings of the court and maintain the rule of law.

The Department of Foreign Affairs (1968) exclaimed that the government only goes after those who are against the “democratic form of government, and sought to bring about change by creating disorder and anarchy. This the Government cannot tolerate” (p. 67). Court trials and procedures have a ritualistic dimension that often gives the sense that the output was objectively and judiciously produced (Shklar 1986, 146-8). The NP used the legal support to its apartheid policy to justify the use of heightened, almost brutal, force against its adversaries (Dugard 1972, 205-73; Lobban 1996, 160-93).

Legality was also a political capital that the NP utilized to obtain the support, political or financial, of external actors (Erwin 1985). The government often brought up the professionalism and independence of its judges to assure trade partners and investors that the rule of law exists in South Africa (Abel 1995; Mathews 1972). The NP contended that it cannot act arbitrarily because an autonomous, fearless, judiciary exists to check it. “This is why it is convenient for the government”, said Corder (1987), “to

point to spectacular reversals of government policy through the legal process” (pp. 108-9). Given the dominance of the NP in the formation of public policy, it was imperative for the party to point out to the world that it was not without restraint. The Minister of Justice, H.J. Coetsee remarked that:

Our legal system cannot be outclassed...I am convinced and satisfied we can boast and also be thankful we had men who not only maintain our legal system but also expanded and improved the system...To say that our courts are just and impartial is not saying much. *The truth is that there are no courts anywhere in the world whose judges' and magistrates' integrity is higher than ours* (cited in Corder 1987, 94. Emphasis added).

Finally, the NP sought legal validation from the courts in order used to increase the *cohesiveness* of the ruling coalition. The Appellate Division's approval of the actions of the government enabled the party to unify the Afrikaners behind its platform and win over British supporters to its side (Dyzenhaus 1991, 42-5). The NP was able to draw adherents to its side by arguing that apartheid is not only politically sound, but also legally valid as well (Stultz 1974, 161-90; Thompson and Prior 1982, 100-6).

7.4.5 Court-State Relations and the Constitutional Crisis, 1950-55

Given the NP's apartheid policy and the AD's more liberal predisposition the clash between the two branches of government became inevitable (Dyzenhaus 1991, 53-63; Dugard 1992, 28). The battle was waged in two set of cases. The first involved administrative acts made by supporters of the NP that provided for unequal amenities for whites and non-whites. In *R v. Abdurahman* (3 SA 126 (A) [1950]), the issue was the railway regulations in Cape Town. When the NP came to power in 1948, its apartheid

policy was challenged in Cape Town through civil disobedience campaigns. Non-whites would deliberately violate practices that they have deemed to be manifestly unjust. After they are apprehended, they would then go to the courts and challenge the legality of the local policies.

In *Abdurahman*, the defendant was a member of a group known as the “Train Apartheid Resistance Committee” that challenged unfair railway regulations. In this case, the target was the Cape Town policy of delineating certain parts of first-class coaches as “For Europeans Only”. No part of the train was reserved for blacks alone. In its decision, the AD reversed the decision of the lower court and struck down the practice as invalid because the Cape in effect allowed whites to sit wherever they may please while the blacks were confined to half of the train. It allowed the “European” to avoid sitting with non-whites, but it did not provide for an *equal* facility for non-Europeans. Judge Centlivres, writing for the court, held that judges must always consider:

[The] duty of the courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community (p. 145. Emphasis added).

In effect, the AD was directing the lower courts to apply a higher standard when looking at administrative practices that were made to implement Parliament regulations. The lower court considered the Cape Town railway regulation to be valid because the judge did not view the practice to be “manifestly unjust and oppressive”. In *Abdurahman*, the Court laid down the standard that separation among the races can be allowed as long as *equal facilities* are provided. It came to be known as the “separate and equal” doctrine of racial relations.

The AD would follow the same principle in two other railway cases. In *Tayob v. Ermelo Local Road Transportation Board* (4 SA 440 (A) [1950]), the court invalidated the Board's refusal to grant an Asian a license to drive a "first class" taxi simply because of his race. The case is important not only because it allowed the AD to reiterate the doctrine that it set out in *Abdurahman*, but it also enabled the Court to forcefully reject the argument of the lower court that changes in "public opinion" (e.g. the ascendance of the NP into power due to its commitment to apartheid) should be considered when assessing the validity of state practices. Judge Centlivres wrote that the court cannot adopt public opinion as a legal standard given the difficulties that are involved in identifying the opinion that should be considered controlling since African society "consists of both Europeans and non-Europeans" (p. 446).

The NP strongly reacted against the opinion of the court, intensifying the already tense relations between the NP and the AD. G.F. van Froneman, a senior member of the NP in Parliament declared that the party needed to "put matters right". He asserted that since the NP's victory in 1948, there was "no doubt what public opinion in this country was" (cited in Dyzenhaus 1991, 70).

The NP tried a different tack in *R. v. Lusu* (2 SA 484 (A) [1953]). It amended the statute in order to grant government agencies broader discretion on the use of public facilities. In *Lusu*, the railway administration implemented a policy of delineating waiting rooms exclusively for European use. When challenged in the lower courts, the practice was invalidated on ground of the AD's precedent that was laid down in *Abdurahman*. The government appealed, citing the amendments that were made to the statute by Parliament. The AD sustained the lower court decision, holding that while

separation itself was not *substantively* invalid; the state should ensure that races are treated *equally*. Since equal waiting rooms were not provided for blacks, the policy was illegal.

The National Party could have struck back at the court by threatening to increase the size of the AD, and packing it with supporters. It could also have resorted to threatening the judges with removal or physical threats. However, I argued in Chapter Three that authoritarian regimes do not attack the independence of the courts during the period of *emergence*. They usually resort to *institutional* means to deal with recalcitrant courts at the beginning of dictatorial rule.

In the face of AD resistance to its policy of discrimination in favor of the whites, the NP-led Parliament passed the *Reservations of Separate Amenities Act of 1953*, which allowed public authorities to reserve public facilities *fully* or *partially* to certain races. “Separate and unequal” facilities were allowed and it became the official public policy. “Thus at a time when the United States Supreme Court was about to strike down the ‘separate but equal’ doctrine as invalid, the South African Parliament entrenched not only separation but inequality” (Sachs 1973, 142).

The central issue in the next set of cases was whether the South African Parliament were still bound by the provisions of the 1909 Constitution that protected the suffrage rights of the black and colored communities in the Cape. The rights were retained in the 1909 compromise and can only be removed by a two thirds vote in Parliament. The National Party contended that since Parliament was now sovereign, it had the power to remove the rights of the blacks and colored people by passing

legislation (the *Separate Representation of Voters Act of 1951*) through *simple majority*.⁶⁰ A colored man challenged the NP's position on procedural grounds. The case eventually reached the Appellate Division. The case was *Harris v. Minister of Interior* (2 SA 428 (A) [1952]).

Sachs (1973) noted that “had the voting been on strictly party lines, the Court might have voted three to two against the Government” (p. 144). Three of the Justices were appointees of the United Party (Centlivres, Greenberg and Schreiner) while two were named by the NP (Hoexter, van den Heever). However, a unanimous court came down hard against the position of the ruling party. The AD ruled that the legislation had no binding force since it did not follow the *procedural* requirement that was laid down in the 1909 Constitution. The *Voters Act of 1951* was invalid due to the defect in the *manner* through which it was passed. Forsyth (1985, 66-7) noted that the court could have chosen to decide the case narrowly, but decided to negate Parliament's legislation. He considered the Court's decision in the case to be an “outstanding demonstration of the Court's willingness to resist, on legal grounds, the legislation of a determined Parliament” (p. 61). For Dugard (1992), it showed that the court will not “acquiesce meekly to the new apartheid legal order” (p. 28).

In Chapter Three, I argued that during the period of emergence, authoritarian leaders attack the scope or depth of judicial decision-making. In the case of South Africa, Parliament struck back by passing a law in 1952 that created a “High Court of Parliament”. The “Court” was composed of the all members of Parliament and had jurisdiction over all decisions made by the AD that involved an Act of Parliament. The

⁶⁰ The NP was unable to procure the numbers needed to excise the rights of the colored people in Parliament (Forsyth 1985, 62).

“court” decides through a majority vote. In its rather short life, only one case was brought before it: the AD’s decision on *Harris*. Quite predictably, the new court ruled that the AD’s judgment in the Voter’s Act was wrong and that Parliament was right (Forsyth 1985, 67).

The High Court of Parliament Act was challenged before the courts and in the case of *Minister of Interior v. Harris* (4 SA 769 (A) [1952]), it was invalidated by the Appellate Division. In another unanimous decision, the Court ruled that Parliament’s creation was not a court but is “simply parliament functioning by another name” (p. 784). The Parliament had to swallow another bitter loss in the courts. Prime Minister Malan bitterly stated that “the government would win this battle because with all the implications of this matter, we as a Government cannot afford to lose” (cited in Riley 1991, 33). The NP avoided engaging the high court in another legal skirmish until it had the numbers in *both* Parliament and in the Appellate Division.

The NP won the 1953 elections decisively, getting 60.3 percent (94/156) of the seats in the legislature. Thereafter, it focused its attention towards bending the Appellate Division to its will. In the words of one Minister of government, they intended to “reinstate the sovereignty of Parliament” which they believed were compromised in the Vote cases (Forsyth 1985, 20).

In Chapter Three, I argued that once authoritarian rulers have moved from the period of emergence towards consolidation, they will resort to *selection* mechanisms.⁶¹ We expect dictators to begin seeking to influence the outcomes that are produced by the judiciary by changing the composition of its personnel. Rulers can accomplish this by

⁶¹ Had the NP lost, instead of gaining, seats in Parliament, it would not have been able to adopt a court-packing scheme to control the courts.

simply replacing recalcitrant judges with more reliable agents. They can also increase the size of the court and then name loyalists to the judiciary, a process that is known as “court-packing”.

The NP took the court-enlargement route. In 1955, it passed the Quorum Law that increased the membership of the AD to 11 members. The law specifically provided that in cases that involved the validity of an Act of Parliament, the required quorum was now 11. Since the AD had six current members, the NP was able to name five reliable members to the high court. Speaking for the majority of the court, Justice Centlivres decried the scheme as “reprehensible and censurable” (cited in Forsyth 1985, 15), though he was powerless to stop it.

The NP then passed a law that enlarged the size of the Senate (*The Senate Act of 1955*). This had the effect of giving the party the required two thirds majorities to remove the voting rights of the colored people when it enacted the *South Africa Amendment Act of 1956*. When the law was challenged in the case of the case of *Collins v. Minister of Interior* (1 SA 552 (A) [1957]), the NP was confident that the Court will resolve the case in its favor. The packed Court did not disappoint. By a resounding 10-1 vote (with only Justice Schreiner dissenting), the AD upheld the Act to be in consonance with the *procedural* requirement of the 1909 Constitution.

For several analysts, the government sent a very strong message to the judiciary in *Collins*. For example, Haynie (2003) remarked that “the swiftness with which Parliament reversed the Court’s decisions made the inability of the courts to run interference painfully clear” (p. 34). The National Party was able to convey that given the popular support to its position, it will not allow the judicial department to be an obstacle to the

realization of its policy of segregation and separate development of races. The increase in political power enabled the executive to strike back against a courageous court. It led Sachs (1973) to conclude that “the Appeal court’s firm stand in defense of its limited testing right gained it an international repute, but hastened its demise as a small body of venerated jurists” (p. 144). From then on, the NP will control the AD not with institutional alterations but through the appointment of judges with similar predispositions.

7.4.6 Appellate Division Jurisprudence and Regime Consolidation, 1960-82

The court-packing scheme of the NP in 1955 enabled it to slowly gain control of the AD. Through the 1955 Quorum Law, the party was able to add five supporters to the highest court of appeals. While Chief Justice Centlivres could still dominate a three or five person review panel with his two other UP-appointed colleagues, the NP was able to push their adversaries to the minority in cases where the validity of an Act of Parliament was challenged. Under the new law, a quorum of 11 was needed to strike down legislation due to procedural defects (Dyzenhaus 1991, 50).

Eventually, the NP would bring the AD in line with its position through the process of *selection*. The party's domination of South African elections from 1950 to 1989 enabled it to place people to the AD that shared its political beliefs and mentality. When Chief Justice Centlivres retired in 1957, the NP named its man, Brian Fagan, as successor⁶², bypassing the more senior but UP-appointed Oscar Schreiner, who in the words of Forsyth (1985), "had not endeared himself to the National Party government" (p. 25). It is worth noting that Schreiner's was the lone dissenting vote in the *Collins* case where the NP removed the voting rights of the blacks and colored people in the Cape. Schreiner would again be bypassed in 1959, when NP loyalist L.C. Steyn was elevated to the top judicial post (Haynie 2003, 2).

⁶² Actually, Judge Oscar Hoexter, an NP-appointee, was more senior than Fagan. However, he insisted that Schreiner be named Chief Justice due to seniority. Fagan was similarly distressed when Schreiner was bypassed but agreed to the NP's insistence that he take the post out of fear that dire things may happen to him (Forsyth 1985, 26).

The NP's successful attack against the independence of the AD in the Vote cases served as a strong reminder to AD Justices of what the NP was capable of doing if the court failed to support its policy in cases which were politically-important to the party in power. In the Vote cases, "the government has shown how it would react to judicial opposition to its plans" (Forsyth 1985, 228). After *Harris*, the "Indian summer of the early fifties" was followed by a "harsh executive-minded judicial winter" (Corder 1988, 11).

During the period of authoritarian consolidation, the judiciary is usually used by the regime to transform the dictator's further actuations as *authoritative* and dissent to his rules as *felonious* (Kirchheimer 1961; Shklar 1986). The hope is that obedience to his directives becomes routine and ordinary through judicial approbation of his actions as *legal*. The aim of the rulers is to portray their enemies as ordinary criminals and bandits who are engaged in unlawful and disorderly behavior. The "rule of law" becomes equated with "law and order" (Dugard 1978, 43-44).

When the NP seized control of the AD after Chief Justice Centlivres stepped down in 1957, the court wasted no time in turning back some of the decisions that were laid down by the more liberal Centlivres court on race relations. In *Mustapha v. Krugersdorp Municipal Council* (3 S.A. 343 (A) [1958]), the Court limited the application of the principle of "separate *but* equal treatment" of the races that was laid down in *Abdurahman*. The issue in *Mustapha* was whether the Minister of Native Affairs can remove Indians from a trading site simply because of their race. In this matter, the AD focused on the relationship between the Minister and the Indians. They contended that since the Minister acted under a statute, the relationship between him and the Indians

was merely *contractual*. Thus, *Abdurahaman* do not govern the case, and the Minister can remove the Indians. Justice Schreiner, writing in dissent, asserted that the statute that was relied upon by the Minister to oust the Indians cannot be interpreted to authorize unequal treatment. The Court had made that clear in *Abdurahaman*. Since the Minister wrongly construed the statute, his action was in effect, *ultra vires*, and should be annulled.

In *R. v. Pitje* (4 S.A. 709 (A) [1960]), the NP-controlled AD found a way to erode *Abdurahaman*. The issue in this case was the decision of a magistrate to have a separate table for non-European lawyers in his own court. Pitje refused to occupy the table. The magistrate thereafter punished him with a five pound fine or five day imprisonment for contempt of court. Pitje appealed his conviction to the AD. He contended that there was no statute that sanctioned the practice. Without a controlling law, both Roman-Dutch Law and English common law mandated that individuals should be treated fairly and equally (Haynie 2003, 2). Thus, the decision of the magistrate to have a table for “non-European practitioners” was unlawful.

Chief Justice L.C. Steyn, writing for the Court, contended that the action of the magistrate was allowed by law. While there was no statute in support of such practice, Steyn contended that Parliament was “unlikely to oppose” such practice. In *Pitje*, the AD seemed to have articulated a new standard to govern race relations. Races may now be treated differently, even without a statute, even if some inequality is produced, as long as it is not “unreasonable”; meaning, parliament is unlikely to disagree with it (4 S.A. (A) at 710 [1960]).

Finally, in *Minister of the Interior v. Lockhat and others* (2 S.A. 587 (A) [1961]), the AD seized the opportunity to further emaciate *Abdurahman*. In this case, the government coercively ousted some Indians from their lands in order to create separate zones for the different races under the Group Areas Act. However, the forced removal pushed the Indians into poverty and destitution. Judge Holmes, writing for the Court, stated that since the Great Areas Act was a “colossal social experiment” (p. 602), substantial inequality in its effects was necessary and *implied* in the law (Dugard 1978, 320). In effect, the judgment was the deathblow to *Abdurahman* because now any statute can be construed to implicitly permit the unequal treatment of the races.

Dugard (1992) intimated that the largely pro-government decisions of the AD in the beginning the 1960’s was a testament to just how successful was the NP strategy vis-à-vis the high court. He asserted that as early as 1959, the NP had already brought the judiciary into line (p. 28). His perspective was shared by Corder (1989) who stated that in the 1960’s and 1970’s, the “judiciary has abdicated its role as a source of legal control over executive power” (p. 52). Haynie (2003) provided some empirical evidence to these jurisprudential analyses. She showed that the percentage of pro-government decisions *increased* sharply in the 1960’s when the NP seized control of the AD, and L.C. Steyn took over as Chief Justice. However, she also demonstrated that the support for the government actually *declined* in the 1970’s and that the downward trend persists even when we deal only with apartheid and criminal cases (pp. 97-8).

Another way through which authoritarian consolidation is advanced by rulers through the courts is the *political trial* (Abel 1995, 10-11, Pereira 2005, 32-6). In this scheme, adversaries of the regime are detained or punished only after a public assessment

of their guilt and innocence through the court system. For Lobban (1996), these trials helped frame “what was acceptable and unacceptable by *stigmatizing* the opponents of apartheid, thereby educating both white and black audiences” (p. 7. Emphasis added).

In a political trial, the dictator hopes that the ritual of litigation will hide what is essentially a very political process, and make the expected outcome more palatable to the public. While political trials have the potential of triggering mass discontent, both the South African and Philippine cases tend to support Dugard’s (1978) contention that “the imprisonment of a political opponent of the regime by a judge *seldom* raises a critical eyebrow” (p. 207). The dictatorial regimes in both the Philippines and South Africa tried and incarcerated Benigno Aquino Jr. and Nelson Mandela after landmark court decisions have legitimized their rule (*Javellana* for the Philippines and *Collins* for South Africa). One of the foremost scholars of political trials, Otto Kirchheimer (1961) contended that:

Judicial proceedings serve to authenticate and thus to limit political action...Authentication removes the fear of reprisals or liquidation from multitudes of possible victims...In proceedings to which the public has some access, authentication, the regularizing of the extraordinary, may under favorable circumstances, be transformed into a deeper popular understanding and political participation (pp. 6-7. Emphasis added).

The NP largely persecuted their opponents through the Suppression of Communism Act of 1950. The law defined “communism” so broad that almost any political or social action that was viewed by the government to be undesirable can fall within its ambit. For example, the campaign of the National Council of Women to reform the legislations on property relations within marriage was declared “communist” by the Appellate Division in *R. v Sisulu* (3 S.A. 276 (A) [1953]). The law was renamed the “Internal Security Act of 1950” in 1976. Under the statute, the property of any

organization that was determined to be communist was to be confiscated and donated to a charity or a science group. Furthermore, any person who was involved in actions that endanger the state may be subjected to preventive detention (Clark and Worger 2004, 77-83).

Other crimes like “sabotage”⁶³ or “terrorism”⁶⁴ were also defined so broadly that any action that the NP came to consider as negative can be prosecuted as a criminal offense. These laws were implemented harshly. Any person suspected of violating the Communism Act or the Sabotage Law can be detained for 90 days without trial. In some instances, the Terrorism Law required that it is the accused that must prove *beyond reasonable doubt* that his actions did not endanger the Republic (Forsyth 1985, 132-4).

The regime publicly tried opponents of all color. Nelson Mandela and Walter Sisulu were tried and convicted in 1962 to send a message to members of the African National Congress (ANC) and other black groups that have embraced the armed option (e.g. Poqo, African Resistance Movement) that their actions were futile and will be dealt with harshly (Thompson and Prior 1982, 197-99). White Africans who belonged to the National Union of South African Students (NUSAS) were hauled to court in 1976 to deter members of the white community from sympathizing with the blacks and their causes (Lobban 1998, 80-110). Meanwhile, eleven people were brought to trial in 1978 for the riots in Soweto, considered to be one of the “worst racial violence in South African history” (Riley 1991, 145). The series of riots was triggered by the decision of the police to shoot at schoolchildren who were marching against the government’s

⁶³ The General Law Amendment Act of 1976 defined ‘sabotage’ as any “wrongly or willful act” that damages or decimates a public service (e.g. power plant).

⁶⁴ In the Terrorism Act of 1967, “terrorism” was defined as “any act committed with intent to endanger the maintenance of law and order in the Republic or any part thereof” (Sec 2 (1) (a)).

decision to make Afrikaans as a medium of instruction in black schools. In this trial, the government hoped to send the message that any armed resistance to the state will be crushed (Albertyn 1991; Lobban 1998, 219-248).

The AD, especially the Steyn Court (1959-71) strongly supported the NP cases that involved criminal violations of national security laws (Dugard 1978, 361). Forsyth (1985) stated that on security matters, the AD was “not only reluctant to challenge the executive, it was reluctant to even to *inconvenience* it” (p. 179. Emphasis added). He expressed disappointment with the AD’s “failure to keep the executive within the law” (p. 236). This view was shared by Corder (1987) who stated that “the evidence up to 1980 points to a judicial approach firmly in line with the overall strategy of the government of the day” (p. 99).

However, Abel (1995) contended that the record of the AD in those decades is uneven, with the individual winning some important criminal cases against the government. This has some support from the empirical study of Haynie and Devore (1996) who demonstrated that the number of pro-government decisions in criminal cases *declined* in the 60’s until around 1974 when it went into a steady rise until 1982 (p. 254-55). They noted that while the Court deferred to the rulers on politically-sensitive criminal cases, it was willing to negate the state’s position on duration of incarceration as well as on the imposition of the death penalty. This led the authors to contend that research that focus only on salient cases may end up providing “an incomplete, if not distorted picture of the Court” (p. 252, 256).

7.4.7 The Appellate Division, Judicial Negation, and Authoritarian Decay, 1983-1994

By 1983, the South African state was in severe crisis (Dugard 1992, 116; Price 1991, 153-89). In fact, a keen scholar of South African judicial politics, Stacia Haynie (2003), considered 1983 as the “beginning of the end” (p. 40). The development of political division within the NP, international pressure, and the inception of a more aggressive and violent anti-government insurrection by the blacks eventually forced the authoritarian rulers to “adapt or die” (Clark and Worger 2004, 87-101; Deegan 2001, 50-82).

Division emerged within the NP as to how to deal with the political and economic cost of maintaining apartheid. Professionals, businessmen, and absentee landowners (the “Afrikaner bourgeoisie”) pushed for the restructuring of state policies on black and colored labor in order to lessen the economic cost of maintaining apartheid (Thompson 1995, 223). They called for the relaxation of the pass laws to allow more black laborers into the cities. They also supported the limited participation of the colored and Indian communities in the political process with the intent of turning them into political allies against the blacks. They expected the implementation of these reforms to appease the criticisms of other countries and international investors, actors whose support they critically needed.

The Afrikaner bourgeoisie seized control of the NP with the victory of P.W. Botha as prime minister in the 1978 elections (Charney 1987, 9-10). Upon his ascension into office, Botha sought the transformation of the South African polity from a

parliamentary to a presidential system. In 1983, a new constitution was presented and approved by the white community in a referendum. Its most significant feature was the introduction of a tricameral parliament. The new legislature was now composed of three houses: a 178-member House of Assembly (for the whites), an 85-member House of Representatives (Coloured) and a 45-member House of Delegates (Indians). The distribution meant that as long as the white community remained united, they can easily defeat the two other communities in any policy vote (178-150). The new charter continued to deny blacks political power and representation.

Meanwhile, the state president had a five year term and was to be chosen by an electoral college. The college had 88 members: 50 from the House of Assembly, 25 from the House of Representatives and 13 from the House of Delegates. The distribution of the delegates also ensured white control of the selection process for the state president. P.W. Botha was easily elected as state President under the new system (Deegan 2001, 52-7). He immediately moved for the dismantling of apartheid laws (e.g. separate theaters, restaurants for the races) which hindered South African economic development but he deemed unnecessary for the maintenance of white supremacy (Schrire 1991).

The Afrikaner bourgeoisie's political and reform programs were seriously challenged by forces *within* the NP. Afrikaner farmers and urban laborers feared the loss of their privileges once the colored and the blacks were included in the political process (Lipton 1986, 66). They vigorously campaigned for the intensification, not the relaxation, of apartheid policies. They called for the continuation of harsh police treatment of regime opponents and exclusive political privileges for the white elite (Gilliomme 1983; Wolpe 1988, 76). In 1982, right-leaning members of the NP, led by Andries Triurnicht,

broke away, and formed the Conservative Party (CP) (Deegan 2001, 54). In the elections of 1987, the CP won 22 seats, while the NP held 123 seats of the 166-seat House of Representatives. In 1989, the NP won only 94 seats (56.6%) while the CP's number of seats rose to 39 (23.5%) as the chasm within the Afrikaner community became even more pronounced.

Meanwhile, some Afrikaner churches and intellectuals believed that the reforms of the bourgeoisie were not radical enough. Among these were clerics like the Anglican Archbishop Desmond Tutu in Cape Town and Allan Boesak of the World Alliance of Churches. Some theologians of the Dutch Reformed Church, a strong supporter of apartheid, called for the church to side with the "victims of the system" and wrote a "confession of guilt" (Charney 1987, fn. 64). By 1983, "a unified Afrikaner community, the traditional base of the NP, no longer existed" (Wilmot 1987, 5).

Investors were also alienated by Pretoria's insistence to maintain its racist policy despite the economic expense and the growing unacceptability of racial discrimination in the international community (Lowenberg and Kaempfer 2001). In 1986, the United States Congress passed the Comprehensive Anti-Apartheid Act (CAA) which banned the importation of a number of South African goods. It also prohibited American companies from entering into any financial agreements with the South African government (Thompson 1995, 234-5). Commonwealth countries (except the United Kingdom) and Nordic countries also banned direct investments and loans to South Africa. Japan, which emerged as the apartheid state's main trading partner after the actions by the United States and European states, began to turn against Pretoria (Price 1991, 223-25).

The imposition and intensification of these sanctions meant that South Africa's companies have less available capital. It also made it harder for them to procure the products that they need for their business. These foreign actions made the white community in South Africa to seriously consider whether it was feasible to maintain apartheid in the long term (Wintrobe 1998, 194-5).

Besides the split within the NP and the international pressure, the South African state was also confronted by a more vigorous and violent black insurrection. For Robert Schrire (1991), the exclusion of the blacks from political power in the 1983 Constitution "inadvertently made it clear that that African political rights were the central issue in the political debate" (p. 123). The NP decision to continue to deny voting rights to the blacks triggered severe uprisings from the black community. For Thompson (1995), "black resistance soon became more formidable than before" (p. 228).

The insurrection was facilitated by the establishment of the United Democratic Front (UDF) in August 1983. The UDF was a coalition of 575 organizations that included trade unions, women's organizations, civic society associations, and youth groups. "In the history of black resistance to white rule in Africa," said Lodge and Nasson (1991), "the United Democratic Front was a movement of unprecedented pervasiveness and depth" (p. 34). It committed itself to the Freedom Charter, which was enunciated by the ANC in 1955, and called for a "South Africa for all races".

The task of the UDF was to coordinate the actions against the government and the new Constitution. The UDF organized school boycotts and labor strikes (Deegan 2001, 58; Thompson 1995, 229). It also fomented fierce, violent insurrectionary actions against

local authorities and councilors. The fighting in the communities was so violent that White (1995) reported that in places like Soweto, there were areas that:

Bore all the marks of a war zone: streets were patrolled at night, fire was exchanged with fire, nobody could enter or leave hostels, money was collected from houses to finance the purchase of food and ammunition, women cooked collectively and fed the “troops” and young men walked openly parading arms (p. 11. Emphasis added).

The South African government under Botha reacted to these anti-government actions in two ways. On one hand, the government responded *fiercely* against the UDF-led insurrection (Charney 1987, 19-20). A state of emergency was declared in 1985 which allowed any officer, however junior to arrest and detain a person without trial. In addition, all military and police personnel and official were given security for any actions that they have committed that later turned out to be unlawful. The reporting of incidents, as well as the photographing of military actions, was severely curtailed (Schrire 1991, 89).

However, Botha also seized every opportunity to convey to the Afrikaner community the message that these events demonstrate the urgent need for them to “adapt or die” (Lipton 1986, 50). Eventually, the NP came to believe that the white’s economic survival necessitated negotiating with the leaders of the ANC, notably Nelson Mandela (Deegan 2001, 67-71). This position would be advanced most forcefully by F.W. De Klerk, who ascended to the leadership of the NP when Botha suffered a stroke in January 1989. It became clear to De Klerk that the best way for the Afrikaner community to secure their standing was to “negotiate a settlement from a position of strength, while his government was still the dominant force in the country” (Thompson 1995, 245).

Beginning 1983, the jurisprudence of the South African Appellate Division began to show a tendency to treat the claims of the government more negatively (Dyzenhaus 1991; Ellmann 1992, Chap. 4). However, it must be noted that this was an uneven trend: It was a case of two steps forward, one step backward (Corder 1987, 99-101; Mureinik 1987, 137). Part of this is attributable to the fact that the NP, due to the bitter schism within the party, began to produce incoherent signals about apartheid (Cherney 1987, 19-23).

The rise of a liberal faction in the NP (headed by Wynand Malan and Kobie Coetsee) gave the AD the ability to restrain the executive. Initially, the court did not disappoint (Mureinik 1987, 136-7). At the end of the term of Chief Pierre Rabie in 1986, a known NP supporter, two decisions indicated a change in direction in the predisposition of the Court. In *Nkondo and Gumede v. Minister of Law and Order* (2 S.A. 756 (A) [1986]), the appeals court declared that the legal requirement for police officers to give reasons for the detention of a person is *not fulfilled* by the mere citation of a relevant statute. The concerned official must provide a reasoned account of why a person's right to liberty was abridged. This curtailed the broad discretion that was given to officials by the security statutes.

The case of *Minister of Law and Order v. Hurley* (3 S.A. 568 (A) [1986]) provided an opportunity to the AD to further erode the discretion of the government in security issues. In this case, the appeals court asserted that it has the right to review regulations which were enunciated by the government during a State of Emergency, even when a section within the regulation disallowed the courts from doing so (the so-called

“ouster” clause). In *Hurley*, the Archbishop of Durban was ordered to be released after the court, upon review, stated that the government did not pass the test of “reasonableness” and must release the cleric.

However, the intensification of the black insurrection eventually forced Botha to ally with the right flank of his party (led by Magnus Malan) and enact even fiercer measures against the blacks. Worried about the direction of the AD, the NP manipulated the appointment system to keep Pierre Rabie as Chief Justice after he had reached the retirement age of 70. His term was extended for two more years to prevent the rise of Justice M.M. Corbett, a known supporter of civil rights, from obtaining the top post (Dugard 1992, 30).

During Rabie’s two year extension, the court took a reverse course (Corder 1989, 53). In the case of *Dempsey v. Minister of Law and Order* (3 S.A. 19 [1988]), the burden of justifying abuse of discretion was placed by the court to the complainant. *Dempsey* involved the arrest of a nun for forcibly trying to stop a police officer from assaulting a mourner in a funeral gathering. The court held that the detention of the nun was valid because she was unable to prove that it was “unreasonable” for the police officer to physically attack the mourner. In *Staatspresident v. Release Mandela Campaign* (4 S.A. 903 [1988]), the court ruled that the state may not only detain a person without a trial, but that it also had the right to prohibit the right of any person to denounce the government (e.g. through a placard, a shirt, or a demonstration) for the manner through which an individual had been arrested.

With the rise of De Klerk and the collapse of apartheid imminent, Corbett was eventually named to the position of Chief Justice in 1989 (Dugard 1992, 30). Under his

leadership, the AD embarked on a course to restrict governmental discretion and protect fundamental rights (Mureinik 1994). In *Visagie v. State President* (3 S.A. 859 [1989]), the court held that the limitations imposed by emergency regulations on a detainee's right to move or associate in order to be released from prison were illegal. In a strong defense of civil liberties, the Corbett court upheld the right to the privilege of the habeas corpus in *Minister van Wet v. Matshoba* (1 S.A. 280 (A) [1990]). Finally, In *NO v. Boesak* (3 S.A. 661 (A) [1990]), the AD emphatically overruled its precedent in *Dempsey* and shifted the burden to justifying the validity of an arrest and detention back to the government. Amidst the background of NP-ANC negotiations for a democratic South Africa, the court held that "an incorrect earlier decision should not be followed where individual liberty is at stake" (Dugard 1992, 30). With apartheid on its last gasps, the gavel was no longer content with deferring to the authorities. It was aspiring for justice.

7.5 Judicial Negation in the South African Appellate Division: An Empirical Analysis

The analysis that was presented in the preceding parts of this chapter provides qualitative as well as jurisprudential evidence that certain political and economic factors enabled the South African Appellate Division to treat the claims of the government more assertively and negatively. In this section, I subject the decisions of the high court to a quantitative examination in order to determine whether the general theory that was developed in Chapter Two is able to significantly explain judicial negation in the South African setting. The use of multiple methods to study the empirical puzzle provides this research with greater leverage on understanding the political phenomenon of interest (Denzin 1978; Tashakkori and Teddlie 1998, 41-2).

7.6.1 *Source of Data*

The data for this empirical study was taken from the South African Dataset (SAD) (Haynie 2003, 123-134). It contains all the published decisions of the South African Appellate Division which appeared on the *South African Law Review* (SALR) from 1950 to 1990. The dataset currently contains 3,043 observations. It considers every docketed case number as a separate decision. It provides details on the various aspects of a case, from basic information (e.g. month and year of decision), to its substantive issue and directionality of the decision, among others. It also contains records of the votes of the Justices on each case.

7.6.2 Variable Operationalization

In the operationalization of the variables, I attempted to adopt similar measures for the Philippine case and South African cases as far as possible. For example, to measure economic development, I used values for each country from the same source: the “GDP per capita growth” variable in the *World Development Indicators* (World Bank 2005). The same holds true for the repression and foreign investment variables. However, in some instances, similar measures cannot be adopted due to country-specific differences. For example, to measure court preferences in the Philippines, I took the percentage of non-Marcos appointees in the Supreme Court. I contended that the higher the number of people in the court who were not beholden to Marcos for their appointment, the greater the likelihood of an anti-government decision.

For the period under consideration for South Africa, *all* of the Justices were appointed by the NP. In this instance, I took a contextually equivalent measure (Van Deth 1998; Sartori 1994). Experts on the South African Appellate Division contended that judges in the AD divide in terms of ethnicity and language: Afrikaan-speaking judges tended to be pro-NP compared to English-speaking judges (Corder 1984, pp. 224-5; Forsyth 1985, 44-5; Haynie 2003, 71-2). Thus, my measure of court preferences considered the ethnicity of the Justice instead of the appointing power.

7.6.2.1 DEPENDENT VARIABLE

The dependent variable in the study is “judicial negation”, operationally defined as those instances when the government was conferred a defeat in litigation. It was taken from the variable “winner” in the SAD (Haynie 2003, 124). It contains information on the outcome of the case for the appellant (e.g. wins, loses, partly wins and loses). The dependent variable is a binary term that is coded “1” if government loses in the Appellate Division and “0” otherwise. Cases in the SAD which were coded as “other”, “not ascertained” and “system missing” were excluded from the analysis

I selected *only* those cases that involved the “government” defined as all federal agencies and officials (Haynie 2003, 125). Due to unavailability of data on critical variables,⁶⁵ the temporal domain of the study was limited 1971 to 1990, which was the last year in the SAD. The year 1990 is important to the history of South Africa because it was the year that President F.W. De Klerk lifted the ban on the ANC and freed Nelson Mandela. After robustness and outlier diagnostics, a total of 665 observations were included in the analysis.

7.6.2.2 INDEPENDENT VARIABLES

7.6.2.2.1 FRAGMENTATION

For the purposes of this study, I considered the level of support for the NP in the elections as proxy for the unity of the white community over apartheid. More seats for the NP after an election meant greater cohesion among the whites over state policy.

⁶⁵ Data on foreign investments were only available for the years 1970-90 (World Bank 2005).

However, when the NP lost seats to the rightist Conservative Party (CP) or to the more liberal Democratic Party (DP), I took that to mean that other policy positions were adopted by members of the ruling elite. I considered that to be a sign of political fragmentation.

Given this objective, I adopted the standard Laakso-Taagepera Index (LTI) of political fragmentation as my measure of the political division variable (Laakso and Taagepera 1979; Herron and Randazzo 2001). The LTI takes into account the proportion of seats that a particular party has in the legislature to determine the number of effective parties in the system. It is computed using the formula:

$$N \text{ (Number of effective parties)} = 1 / \sum_{i=1}^n P_i^2$$

P_i^2 is the proportion of seats of the i th party squared.

Thus, in a situation where five parties obtained 20 percent of the seats each, the index is computed as $1/((.20)^2 + (.20)^2 + (.20)^2 + (.20)^2 + (.20)^2)$ which equals to 5. This means that a five party system exists. *The bigger the LTI value, the more fragmented is the polity.* A one party system has a LTI value of 1.

Consider the 1966 elections where the LTI value for South Africa was 1.6. This meant that during this juncture, the country had a “one and a half party system”. After the 1989 elections, the LTI value rose to 2.4, which corresponded to a “two and a half party system” as the rightist Conservative Party and (to a lesser extent) the liberal Democratic Party began to take support among the whites away from the NP. The white was

community was more fragmented in 1989 than in 1966. The data for the elections in South Africa were taken from Engel (1999).

7.6.2.2.2 FOREIGN INVESTMENTS

Data on foreign direct investments (FDI) were taken from the *World Development Indicators* (World Bank 2005). Information on South Africa was available for the years 1970 to 1990. The data contained information on FDI net inflows as percentage of the country's Gross Domestic Product (GDP). Following Kohler and Kreuter (2005, 221), this variable was centered. This means that the mean was subtracted from each value. The regression constant now becomes the mean predicted value of foreign direct investments, instead of 0, which is unlikely to be of any substantive interest. Centering is also important when working with models that have interaction terms (Aiken and West 1991).

The variable was also lagged by a year. Thus, the first year in the series was 1971. This was undertaken to address the problem of possible endogeneity (King, Keohane and Verba 1994, 185-96). By lagging, we discount the possibility that it is the negative decisions of the courts that actually causes the increase or decrease in investments.

7.6.2.2.3 COURT PREFERENCES

The preferences of the AD cannot be measured by simply looking at the appointing power as almost all members of the high court from 1950 to 1990 were chosen by the NP. As a measure of court preference, I followed Corder (1984) who

provided some evidence that the judge whose home language was English tended to be more negative of the government than those who spoke Afrikaan (p. 224). This was supported by Forsyth (1985) who contended that “it can hardly be denied that Afrikaans-speakers tend to support the present governing party” (p. 45). Following Haynie (2003, 71-2), I measured the preferences of the Court in terms of the percentage of the English-speaking judges that sat on a panel that decided on a case. I hypothesize that the greater the number of English speakers, the higher the likelihood of an anti-government decision.

7.6.2.2.4 *IMMINENCE OF POLITICAL TURNOVER*

In the case of South Africa, there is a convergence among scholars that 1983 was the “beginning of the end” (Haynie 2003, 40; Dugard 1992, 116; Price 1991, 153-89). The deterioration of the economy and the intensification of violence and labor strikes sent clear signals to the white community that apartheid has become unworkable (Deegan 2001; Ross 1999, 151-62). After 1983, the NP began to lose popular support, and became increasingly unable to maintain peace and order. In 1989, F. W. De Klerk was already convinced that the days of NP dominance was at an end (Thompson 1995, 245). Thus, I operationalized this variable as a binary term coded “1” if the decision was rendered on or after 1 January 1983 and 0 otherwise.

7.6.2.2.5 *ISSUE AREA: THE “DUAL STATE” THESIS*

The “dual state” thesis that was formulated by Fraenkel (1960) held the dictatorship is likely to allow the rule of law to exist in the economic realm (which he

referred to as the “normative” state) while maintaining maximum discretion in matters of public order (the “prerogative” state). To secure its survival, the dictatorship keeps tight control on issue areas that involve national security and safety (e.g. criminal cases) but considers it to its benefit to allow the courts much discretion in business regulation or labor issues. *Ceteris paribus*, courts are more likely to negate in economic issues.

I operationalize this concept similar to way I did it with the Philippine case. I constructed a dichotomous variable coded “1” if the substantive issue of in a case that involved the government was:

1. Government regulation of business;
2. Government regulation of natural resources/land reform;
3. Taxation;
4. Labor issues;
5. Worker’s compensation.

All other cases that did not fall into the above-mentioned categories were coded as “0”.

7.6.2.2.6 ECONOMIC GROWTH

In order to measure the South Africa’s economic condition, I took the GDP per capita growth from the *World Development Indicators* (World Bank 2005). It captures the growth in GDP per capita from the previous year (in percentage). Following Kohler and Kreuter (2005, 221), this variable was centered. The regression constant now becomes the mean predicted value of GDP per capita growth.

7.6.2.2.7 *REPRESSION*

The Banks' Cross-National Time-Series Dataset has a variable for purges, defined as “any systematic elimination by jailing or execution of political opposition within the ranks of the regime or the opposition”. This measure has the advantage of focusing on state action against the political opposition as well within its own ranks. Thus, this variable maps nicely with the theory that was developed in Chapter Two. I constructed an interval variable, with the number of purges ranging from 0 to 3. This was lagged a year since a purge usually affects an institution *after the fact*.

7.6.2.2.8 *CASE SALIENCY*

I controlled for the saliency of a case.⁶⁶ The contention is that the more politically important is a given case for the government, the *less likely* is the judiciary to negate. In the context of South Africa, cases that involve the government regulation of races were considered central to the interests of the regime. Challenges to the government statutes that criminalized and punished certain actions against apartheid (e.g. sabotage, terrorism) were also considered politically salient (Corder 1984; Dugard 1992; Haynie 2003).

To operationalize this concept using the SAD, I constructed a dichotomous variable coded “1” if the substantive issue of a case involved:

1. Criminal statutes and their interpretation;
2. Civil rights;
3. Government regulation of races.

⁶⁶ I thank Professor Stacia Haynie for her assistance in with this section (Haynie interview, 2007).

All other cases that did not fall into the above-mentioned categories were coded as “0”.

7.6.2.2.9 INTERACTION OF COURT PREFERENCE AND FRAGMENTATION

In order to capture the joint relationship of court preference and political fragmentation, an interaction term was created by multiplying the two variables. This captures the possible non-monotonic effect of Court ideology. Substantively, this represents the theory that courts negate only when they have seen the fracturing of the governing elite.

7.6.3 Methodology

I tested three separate models of judicial negation. The baseline model included all the variables except for case saliency. It evaluated the impact of the independent variables on all type of cases. In the second model, I controlled for case saliency. Finally, in the third model, I included an interactive term. The paper employed logistic regression to test its conjectures given the dichotomous nature of the dependent variable (Menard 2002; Powers and Xie 2000, 3-85).

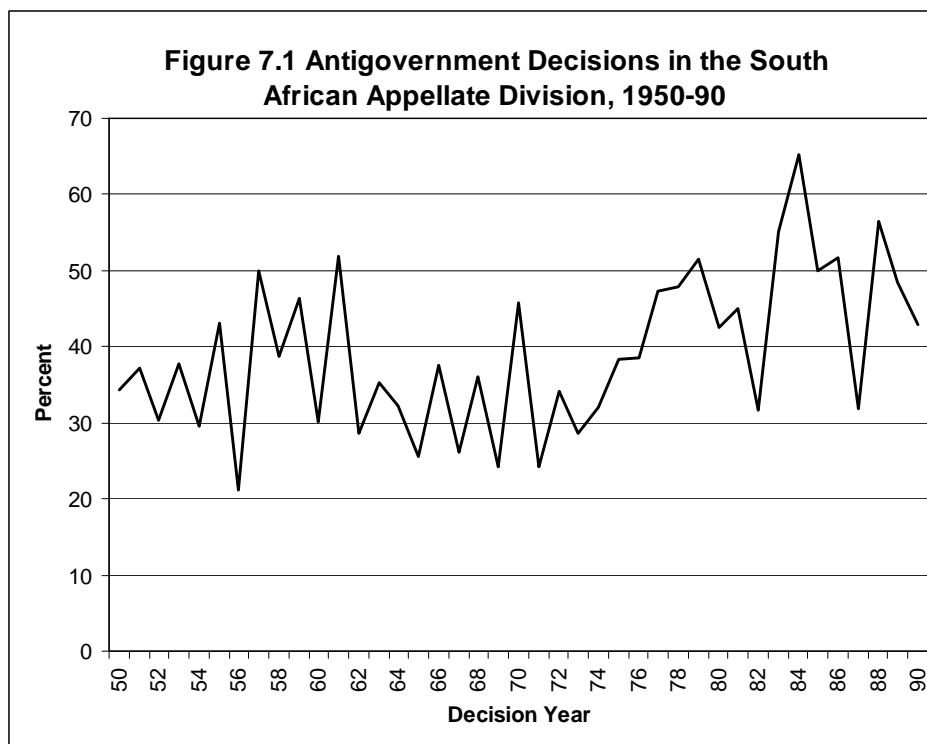
Logistic regression has some desirable properties that facilitate ease in interpretation including the reporting of effect sizes in terms of odds ratios, which is not available in the probit (Hosmer and Lemshow 2000, 47-85). All regression estimates were computed with robust standard errors. All statistical analyses in this paper were accomplished through *Stata 9*.

7.6.4 *Results and Discussion*

7.6.4.1 DESCRIPTION OF VARIABLES

Descriptive longitudinal analysis of the dependent variable from 1950 to 1990 demonstrated that the court was generally deferent to the claims of government (See Figure 7.1). For most of the years in the series, anti-government decisions rarely went above 40 percent. The series validates the critical insights which were produced by qualitative methodology in the preceding part. For example, after the NP's attack on the court in 1955, judicial negation dove to 21% in 1956. Chief Justice Centlivres then fought back by making sure that the new members have as few cases as possible which accounted for the increase in negative decisions on his last year in Court (1957). But his allies on the Court, like Oscar Schreiner, saw the writing on the wall. "Schreiner eventually conceded" said Forsyth (1985), "that on the retirement of Centlivres, the boycott has to go" (p. 23).

Scholars have also stated that during the term of L.C. Steyn as Chief Justice (1959-71), the AD facilitated the consolidation of the apartheid regime by consistently voting for the position of the government (Cameron 1982; Haynie 2003). The series provides support to this contention as Steyn's years at the helm showed some of the lowest levels of judicial negation in the court's history. Corder (1989) described the period as one that was characterized by "an overweening and pliant willingness to acquiesce in the most stringent and unjust executive action" (p. 52).



Finally, one readily notices the sharp increase in judicial negation in 1983 when the apartheid state entered into its crisis period, what Haynie (2003) described as the beginning of its demise. From 32% in 1982, the court's negative decisions rose to 55% in 1983 and 65% in 1984. However, when Rabie's term was extended in 1987, the court's trend took a sharp downward course. Thereafter, the series once again took an upward trend upon the replacement of Rabie as Chief Justice by M.M. Corbett. Judicial support was the modal category for the series, accounting for more than half of the decisions (See Table 7.3).

Table 7.3 Appellate Division Decisions, 1950-90

Value	Frequency	<i>Percent</i>
Progovernment	805	54.61
Antigovernment	575	39.01
Partly pro, partly anti	94	6.38
Total	1474	100

The table provides evidence to the contentions of most scholars on the South African judiciary that the high court shared the sentiments of the NP (Dugard 1978; Corder 1984; Dyzenhaus 1991). In general, the court had taken the pro-government position “with little protest and little sign of regret” (Forsyth 1985, 236).

7.6.4.2 Descriptive Statistics and Data Diagnostics

As I have discussed in 7.6.2.1, the unavailability of data on certain critical variables⁶⁷, limited my temporal domain for statistical analysis to 1971-90. The last year in the series was historic because it was the year that President F.W. De Klerk lifted the ban on the ANC and freed Nelson Mandela. After robustness and outlier diagnostics, a total of 665 observations were included in the analysis. Table 7.4 contains the breakdown of the AD decisions. Pro-government decisions were the modal category accounting for more than half of the decisions. The category “partly wins, partly loses” were removed from the analysis because of their very small number. Logistic regression was utilized for statistical analysis given the dichotomous nature of the dependent variable.

⁶⁷ Data on foreign investments were only available for the years 1970-90 (World Bank 2005).

Table 7.4 Appellate Division Decisions, 1971-90

Value	Frequency	<i>Percent</i>
Progovernment	357	53.7
Antigovernment	308	46.3
Total	665	100

Table 7.5 presents a descriptive summary of the variables which were included in the general model of judicial negation. Variable diagnostics were implemented to account for missing data. Statistical techniques were also implemented in order to identify influential observations and outliers (Kohler and Kreuter 2005, 268-77).

Table 7.5 Descriptive Statistics

<i>Variable</i>	<i>Obs.</i>	<i>Mean</i>	<i>Std. Dev.</i>	<i>Min.</i>	<i>Max.</i>
Negation	665	.463	.499	0	1
Fragmentation	665	1.79e-9	.251	-.201	.734
Foreign Investments	665	1.37e-8	.750	-1.12	1.69
Court Preferences	665	.326	.257	0	1
Turnover	665	.370	.483	0	1
Economic Case	665	.174	.380	0	1
Economic Growth	665	-6.23e-9	2.41	-4.78	3.71
Repression	665	.384	.867	0	3
Case Saliency	665	.150	.358	0	1
Fragmentation * Court Preferences	665	.009	.068	-.240	.494

7.6.4.3 ANALYSIS OF MODEL 1 (BASE MODEL)

7.6.4.3.1 REGRESSION DIAGNOSTICS

Logistic regression diagnostics of Model 1 (the base model) provide us with confidence in the empirical results (See Table 7.6). Model 1 had a Wald χ^2 of 14.62 which is statistically significant (Prob>chi2 = 0.05). The model correctly classifies 56% of the cases. Finally, Long's (1997) Adjusted Count R^2 tells us that including the independent variables in the model slightly lowers our error rate (6%) compared to a prediction that was based solely on the modal category of the observed dependent variable.

The results of the logistic regression provided empirical support to two key variables in the model. When we consider all types of cases that went before South Africa Appellate Division, the propensity of the court to negate increases when there were more English-speaking judges in a given panel. In addition, the closer it was to the end of apartheid and the transition to a democratic South Africa, the court was more likely to treat government contentions negatively. The outcomes for political fragmentation, foreign direct investments, economic cases, repression, and economic growth were not statistically significant.

**Table 7.6 Logistic Estimation of Judicial Negation
At the South African Appellate Division, 1971-90
(Model 1)**

Variables	Expectation	Coefficients (SE)^a	p-value^b
Fragmentation	+	-.147 (.404)	.358
Foreign Investments	+	-.206 (.130)	.056
Court Preferences	+	.527 (.316)	.048*
Turnover	+	.418 (.243)	.042*
Economic Case	+	.060 (.217)	.390
Economic Growth	+	-.003 (.046)	.370
Repression	-	.035 (.110)	.373
Case Salience	-	-----	-----
Fragmentation X Court Preferences	+	-----	-----
Constant		-.502 (.178)	.002**
Observations		665	
Wald χ^2		14.62	
Log Likelihood		-451.58	
Percent Correctly Predicted		55.94	
$R^2_{adjCount}$		.058	

^a Robust standard errors.

^b One tailed test. * = significant at $p < .05$; ** $p < .01$

7.6.4.3.2 DISCUSSION OF RESULTS

7.6.4.3.2.1 Negation and Political Turnover

The logistic estimates for the political turnover variables converges with the qualitative analysis that have been presented above: the Appellate Division was more likely to negate after 1983, when the apartheid state entered into a severe crisis. This is indicated by the positive coefficient of the political turnover variable (+.418) which was statistically significant at the .05 level (p-value = .048). If all the variables in the model are held either at their mean or modal category, the probability of the high tribunal negating the contentions of the state increases by 10 percent (see Table 7.7).

Table 7.7 Changes in Predicted Probabilities⁶⁸ of Judicial Negation (Base Model)

<i>Variables</i>	0 → 1⁶⁹	Δsd^{70}
Court Preferences	n.a.	.03
Turnover	.10	n.a.

⁶⁸Changes in predicted probabilities are calculated based on parameter estimates reported in Table 7.6, with all variables set at their mean or modal values unless otherwise specified.

⁶⁹Change in predicted probability as variable value changes from 0 to 1 (for dichotomous variables).

⁷⁰ Change in predicted probability as variable value changes from one standard deviation below the mean to one standard deviation above the mean (for continuous variables).

The result from this statistical analysis provides some evidence in support of the theory of strategic defection that has been advanced by Helmke (2002, 2005). She contended that judges who were appointed by the previous regime are more likely to vote against their appointers once the latter begins to lose power. This seems to be what we have found here. After 1983, it became apparent to the white community that apartheid was unworkable. P.W. Botha attempted to save the system by introducing reforms which while continuing the policy of denying political rights and participation to the blacks. The result was a strong and violent black insurrection under the UDF (Price 1991; Deegan 2001). Botha's successor, F.W. De Klerk knew that he had to work out a negotiated settlement as white property and lives became increasingly threatened by a revolution.

Given the change in the political environment, the Justices in the Appellate Division took a more critical turn of the government's positions. At the individual level, some of the Justices may have increasingly become negative of the apartheid government in hopes of securing re-appointment to the Court once the dominance of the NP has ended. Negation was also facilitated by the inability of the NP to attack the court because of its losses in the polls and the division within the party (Dugard 1992; Engel 1992, 837). Finally, by providing more victories to those who were challenging the government, the AD offered a signal to regime opponents that the law has become a suitable site for its struggle; a parallel path to the fight on the street (Abel 1995). In this interpretation, the court sought to provide some stability to a system that was being shaken by political events.

7.6.4.3.2.2 Negation and Court Preferences

Consistent with the contentions of Corder (1984, 223-4), logistic estimates indicated that the higher the number of English-speaking judges in a given panel, the greater the likelihood that the court will produce a negative decision on a government claim. This is indicated by the positive coefficient of the court preferences variable (+.527) which was statistically significant at the .05 level (p-value = .048). If all the variables in the model are held either at their mean or modal category, a standard deviation change in court preferences, centered on the mean, increases the probability of negation by 3 percent (see Table 7.6).

It was Corder (1984) who first noticed that Afrikaans-speaking judges tended to vote for the government more than those whose home language was English (pp. 222-224). This was supported by the work of Forsyth (1985, 44-45). Haynie's study (2003) also showed that the two groups differ significantly in the consideration of tort cases (p. 83). The causal mechanism that is involved here is the political socialization of the judge: those who were born and raised in the Afrikaan language world are more likely to develop a positive predisposition to the NP, the party of the Afrikaner. However, it is important to consider this result with utmost caution since Haynie (2003) noted that most of the Justices of the Appellate Division were bilingual (p. 21-22). Caution is warranted here since the increase in the predicted probability of judicial negation when there were more English judges in the court was relatively modest.

7.6.4.3.2.3 Counter-Hypothesis Relationships

The results for political fragmentation went against the predictions of the theory. The existing literature contended that a positive relationship between judicial negation and political fragmentation exists (Barros 2002; Rios-Figueroa 2004). However, this was not supported in the South African case. The coefficient for political fragmentation was in the opposite direction (-.147), and it was not statistically significant at the .05 level (p-value = .358). It is possible that the more crucial division was not the division between the Afrikaner and British communities, the cleavage line around which the political parties in South Africa developed, but the division within the National Party itself over the future of apartheid. This transpired in 1982, when rightist members of the NP broke away to establish the Conservative Party in protest over the reforms suggested by the Afrikaner bourgeoisie (Deegan 2001, 54; Charney 1987).

The logistic estimates also indicated that the flow of foreign investments was not positively related to judicial negation. The coefficient for the variable was in the negative direction (-.206). It was close to being within the traditional level of statistical significance (p-value = .056). This meant that the propensity of the Appellate Division to undertake greater scrutiny of the policies of the NP was not affected by the entry of foreign investors, even if these investors were democratic countries with good human rights records (e.g. the United States, United Kingdom, Nordic countries). The statistical results suggested that the AD became more assertive against the NP when these countries began to pull out their investments. This outcome is consistent with the strategic defection hypothesis. The Justices may have taken the disinvestment as a signal of the

imminent demise of the apartheid state. Thus, they started treating the claims of the government more negatively to earn the good graces of those who are coming into power.

Contrary to the strong results in the Philippines, the South African Appellate Division actually deferred to the government in economic cases. The coefficient for the variable was in the right direction (+.060) but it was not statistically significant (p-value = .390). Corder (1989) noted that in the sphere of labor relations, the judiciary has been able to be a “protector of worker interests” (p. 50), especially after 1980. However, the logistic estimates indicated that the court was more likely to side with the contentions of the government in cases that involved labor and business regulations. The outcome suggests that judicial power was not used to advance the ends of some ideology of social justice. This is more in line with the positivistic philosophy, which had been embraced by most South African Justices, to generally leave the economic realm to the “wisdom” of those who make public policy (Dugard 1971; Haysom and Plasket 1988).

The estimates on the base model indicated that the AD did not follow the economic growth charts. The coefficient for the economic development variable was in the negative direction (-.003) and it was not statistically significant (p-value = .370). Similar to the Philippine case, the estimates also showed that *declining* economic performance facilitate negation, though in both instances they did not pass the significance threshold. Given the structure of South African society, it was likely that the high court only became more negative of the government contentions when deteriorating economic conditions began to affect white laborers and farmers.

Finally, repression by the NP government did not affect the Court's propensity to render negative decisions. Theory holds that courts are likely to be deterred from going against the government after a demonstration of the state's willingness and capacity to detain and execute opponents within or outside its ranks (Pereira 2005; Mueller 1991; Kirchheimer 1961). However, the coefficient for the economic development variable was in the wrong direction (+.035) and it was not statistically significant (p-value = .373). This was probably because the violence of the NP regime was usually targeted to the other races. Thus, the white judges had no reason to be really concerned with the state's employment of its repressive apparatuses.

7.6.4.3 ANALYSIS OF MODEL TWO (WITH CASE SALIENCE)

7.6.4.3.1 REGRESSION DIAGNOSTICS

The statistical analysis of the second model, one that included a term controlling for case saliency, demonstrated that the high court was *less likely* to rule against the contentions of government when a case was deemed to be politically sensitive. Regression diagnostics indicated that adding the variable increases our capacity to predict the instances of judicial negation (See Table 7.8). Model 2 had a Wald χ^2 of 20.03, which is statistically significant (Prob > chi2 = 0.01). The decrease in the log likelihood (-448.68) conveys that Model Two has a better “goodness of fit” (Menard 1995, 18-36; O’Connell 2006, 14). It correctly classifies 55.94% percent of the cases. The value on the Adjusted Count R^2 indicates that a model with a case salience term reduces the error rate slightly (5%) compared to prediction based on the modal category.

**Table 7.8 Logistic Estimation of Judicial Negation
At the South African Appellate Division, 1971-90
(Model 2)**

Variables	Expectation	Coefficients (SE)	p-value
Fragmentation	+	-.119 (.406)	.384
Foreign Investments	+	-.203 (.130)	.058
Court Preferences	+	.502 (.316)	.055
Turnover	+	.407 (.246)	.049*
Economic Case	+	-.033 (.220)	.440
Economic Growth	+	-.002 (.046)	.422
Repression	-	.044 (.111)	.345
Case Salience	-	-.554 (.234)	.005**
Fragmentation X Court Preferences	+	-----	-----
Constant		-.396 (.183)	.015*
Observations		665	
Wald χ^2		20.03	
Log Likelihood		-448.68	
Percent Correctly Predicted		55.94	
$R^2_{adjCount}$		.050	

^a Robust standard errors.

*p < .05 (one-tailed test); ** p < .01 (one-tailed test)

7.6.4.3.2 DISCUSSION OF RESULTS

7.6.4.3.2.1 Negation and Case Salience

Scholars who have written on judicial decision-making in authoritarian regimes have argued that the courts in such context are unlikely to go against the state in cases that are politically important (Fraenkel 1960; Barros 2002; Tate 1993). This is because “courts in non-democratic or authoritarian regimes are particularly vulnerable if they directly challenge those in power through activist decisions” (Haynie and Devore 1996, 252). The logistic estimates on the decisions rendered by the South African Appellate Division provide empirical evidence to such contention: the saliency of a case to rulers *decreases* the likelihood of negation.

The parameter estimate in Table 7.9 was in the right direction (-.554) and it was statistically significant at the .01 threshold (p -value = .005). If all the variables in the model are held either at their mean or modal category, the probability of the high tribunal negating the contentions of the state decreases by 13% when a dispute is politically important to the state (see Table 7.9).

In the South African context, the manner in which the NP attacked the independence of the Centlivres court through expansion and court-packing became a stern reminder to its members as to what the party can do if the Justices became overly activist or liberal (Dyzenhaus 1991; Haysom and Plasket 1988). Judges who did not endear themselves to the ruling party were bypassed for important posts (e.g. Schreiner, Corbett). This is a strong causal mechanism that explains the reluctance of the high court to rule against the rulers when the case was deemed of core interest to the regime.

Table 7.9 Changes in Predicted Probabilities of Judicial Negation (Model 2)

<i>Variables</i>	0 → 1⁷¹
Turnover	.10
Case Salience	-.13

7.6.4.3.2.2 Negation and Political Turnover

The proximity to political turnover remained a good predictor of judicial negation in the second model. The parameter estimate for the variable remained in the positive direction (+.407) and was statistically significant (p-value = .049). If all the variables in the model are held either at their mean or modal category, the probability of the high tribunal negating the contentions of the state increases by 10% if the case was decided after 1983 (see Table 7.9). This means that even when we control for the saliency of the cases, the perceived imminence of regime demise provides a strong incentive for the court to negate.

7.6.4.3.2.3 Counter-Hypothesis Relationships

When case salience was introduced into the model, the effect of court preferences was no longer significant if we remain strictly at the .05 threshold (p-value = .058). If all the variables in the model are held either at their mean or modal category, a standard

⁷¹Change in predicted probability as variable value changes from 0 to 1 (for dichotomous variables).

deviation change in court preferences, centered on the mean, increases the probability of negation by 3 percent. The estimate for foreign investments was close to the significance threshold but it was contrary to the hypothesized direction. The outcomes for political fragmentation, foreign direct investments, economic cases, repression, and economic growth were not statistically significant.

7.6.4.4 ANALYSIS OF MODEL THREE (WITH INTERACTION TERM)

7.6.4.4.1 REGRESSION DIAGNOSTICS

Regression diagnostics indicated that adding the interaction variable did not augment our capacity to predict the instances of judicial negation (See Table 7.10). Model 3 had a Wald χ^2 of 20.03, which is statistically significant (Prob > chi2 = 0.02). However, the log likelihood of the third model did not decrease in comparison to the second. This means that adding the interactive term did not increase the fit between the data and the model (Menard 1995, 18-36; O'Connell 2006, 14). Model Three correctly classifies 56.69% percent of the cases. The value on the Adjusted Count R^2 indicates that a model with a case salience term reduces the error rate slightly (6.5%) compared to prediction based on the modal category.

7.6.4.4.2 DISCUSSION OF RESULTS

The coefficient of the interaction term that was created by multiplying the court's preferences and political fragmentation was in the wrong direction (-.043) and it was not statistically significant (p-value = .485). Substantively, this tells us that judicial negation was not conditional on the fragmentation of the rulers or on the number of English-speaking judges on the Court. Courts with English-speaking majorities negate independently of political fragmentation. They do not look for opportunities offered by political division. In the lexicon of judicial politics, they tend to negate *sincerely*.

**Table 7.10 Logistic Estimation of Judicial Negation
At the South African Appellate Division, 1971-90
(Model 3)**

Variables	Expectation	Coefficients (SE)	p-value
Fragmentation	+	-.114 (.421)	.392
Foreign Investments	+	-.201 (.130)	.058
Court Preferences	+	.502 (.315)	.055
Turnover	+	.406 (.246)	.049*
Economic Case	+	-.033 (.220)	.440
Economic Growth	+	-.003 (.046)	.471
Repression	-	.044 (.112)	.347
Case Salience	-	-.555 (.234)	.009**
Fragmentation X Court Preferences	+	-.043 (1.19)	.485
Constant		-.396 (.183)	.015*
Observations		665	
Wald χ^2		20.03	
Log Likelihood		-448.6	
Percent Correctly Predicted		56.69	
$R^2_{adjCount}$		.065	

^a Robust standard errors.

*p < .05 (one-tailed test); ** p < .01 (one-tailed test)

The variables which emerged as statistically significant in Model Two (Table 7.8) continued to do so in the interactive one. The proximity to political turnover continued to be a good predictor of judicial negation. It was still in the right direction (+.406) and it was statistically significant (p-value = .049). In the third model, case saliency still decreases the likelihood of judicial negation (-.555), and it is significant at the .01 threshold (p-value = .009). The estimates for political fragmentation, economic cases, repression, and economic growth still failed to reach statistical significance.

7.5 *Gavels and Swords: Insights from the South African Case*

My examination of executive-court relations in South Africa during the period of apartheid demonstrated the difficulties that confront the court in a system that is dominated by a party or by a strong president. The executive has a powerful array of weapons at its disposal to bring a recalcitrant court in line with its policy direction. The case of South Africa provide support to Tate's (1993, 319) contention that it is hard for the judiciary to resist the coercion of a determined ruler.

However, the objective of this research is to identify the factors that enable the judiciary to control and limit the prerogatives of the state. In the case of South Africa, one of the variables that enabled the high court to go against the rulers was the composition of the court. The presence of a majority of Justices who were not beholden to the NP for their appointments in the early 1950's allowed the Centlivres Court to aggressively strike down the actions of the NP that it deemed procedurally unlawful. The quantitative sections of this chapter provided some evidence to the notion that the preferences of the Justices matter (see Table 7.11).

Judicial negation is a game that is played on an ever shifting political landscape. When the NP won overwhelmingly in 1953, the AD could have acted more *strategically*. However, it chose to act assertively, even in cases that were critical to the core interests of the NP. Eventually, it found itself subjected to a court-packing scheme. While the Court gained international reputation for its actions, it eventually lost its independence as "a small body of venerated jurists" (Sachs 1973, 144).

**Table 7.11 Logistic Estimation of Judicial Negation
At the South African Appellate Division, 1971-90**

Variables	Expectation	Model 1 (Base)	Model 2 (With Salience)	Model 3 (With Interaction)
Fragmentation	+	-.147 (.404)	-.119 (.406)	-.114 (.421)
Foreign Investments	+	-.206 (.130)	-.203 (.130)	-.201 (.130)
Court Preferences	+	.527 (.316)*	.502 (.316)	.502 (.315)
Turnover	+	.418 (.243)*	.407 (.246)*	.406 (.246)*
Economic Case	+	.060 (.217)	-.033 (.220)	-.033 (.220)
Economic Growth	+	-.003 (.046)	-.002 (.046)	-.003 (.046)
Repression	-	.035 (.110)	.044 (.111)	.044 (.112)
Case Salience	-	-----	-.554 (.234)**	-.555 (.234)**
Fragmentation X Court Preferences	+	-----	-----	-.043 (1.19)
Constant		-.502 (.178)**	-.396 (.183)*	-.396 (.183)*
Observations		665	665	665
Wald χ^2		14.62	20.03	20.03
Log Likelihood		-451.58	-448.68	-448.68
Percent Correctly Predicted		55.94	55.94	56.69
$R^2_{adjCount}$		.058	.050	.065

^a Robust standard errors.

*p < .05 (one-tailed test); ** p < .01 (one-tailed test)

The statistical results showed that the AD learned its lesson. Logistic regression analysis of the decisions rendered by the AD from 1971 to 1990 indicated that the high court was less likely to negate in a politically salient case (See Table 7.11). The institutional attack that was made by the NP to the Centlivres Court became a stern reminder of what may happen if the AD grants the government a defeat in politically important cases (Haynie 2003; Corder 1989; Dugard 1992). Eventually, the NP controlled the AD through the mechanism of *selection*. Through its dominance of the succeeding elections, the party was able to name judges to the court who shared its political predispositions. Justice Didcott remarked that “the capacity of the courts to assert and protect the Rule of Law...is so attenuated as to be, for all practical purposes, insignificant” (cited in Mureinik 1989, 135).

Meanwhile, qualitative analysis demonstrated that the imminent collapse of apartheid provided the AD with the opportunity to go against the Court more assertively. In 1983, the rise of the Afrikaner bourgeoisie divided the NP (Charney 1987), and enabled the AD to produce decisions which were more negative of the government (Mureinik 1987; Corder 1988, 12). Two other developments signaled to the courts of law in South Africa that the end of apartheid and NP dominance was near. The South African economy sharply deteriorated in the 1980's as international sanctions and capital flight took its toll (Price 1991, 220-236). The black insurrection has also become very violent, coordinated, and widespread (Price 1991, 190-219; Deegan 2001, 57-60). The NP under De Klerk eventually came to the conclusion that it was not feasible for the white minority

to keep apartheid. In the words of Pik Botha, “it was just too expensive” (cited in Wintrobe 1998, 163).

These political and economic developments foreshadowed the demise of apartheid in South Africa and provided the AD with an environment that is conducive for a jurisprudence that is more critical of the state (See Table 7.11). Statistical analysis provided evidence that the AD was more likely to negate after 1983, which was considered by Haynie (2003, 40) as the beginning of apartheid’s demise. With the system moving towards a negotiated settlement and democratization, a judge with known liberal views, Justice M.M. Corbett, became Chief Justice. Under his leadership, the court seized the opportunity to prepare the polity for democratization by developing a jurisprudence that tended to limit governmental power and protect human rights (Dugard 1992; Ellman 1992). Finally, the high court has come to champion the notion that making a law properly does not necessarily mean that it is just (Dugard 1992). Between the intent of the lawgiver and basic fairness lies a space, an opportunity. To embrace it is to be a judge.

CHAPTER EIGHT

GAMES, GUNS, AND GAVELS: CONCLUSION AND IMPLICATIONS

The social service which the judge renders to the community is the removal of a sense of injustice. To perform this service the essential quality that he needs is impartiality and the next after that the appearance of impartiality...*The judge who gives the right judgment while appearing not to do so may be thrice blessed in heaven, but on earth he is of no use at all.*

---**Lord Devlin** (1979, 3. Emphasis added)

8.1 Introduction

The cardinal task of the social scientist is to make explicit what has been only implied; to reveal what has not been apparent. For a long time, we have known very little about judges and judiciaries; both on what they *claim* to do, and what they *actually* do (Becker 1970; Haynie and Tate 1998, 6-9). Big parts of the problem are the magistrates themselves who rarely grant interviews nor provide details on the operation of the judicial process. Thus, “we don’t quite know what to make of judges or the legal institutions in which they operate” (Shepsle and Bonchek 1997, 405). However, given the central role that the courts play in the authoritative allocation of values in society, it is of most import that we pierce through their mysteries and understand their inner workings. By helping unlock the puzzle of judicial behavior, society obtains a better sense of the utility and limitations of the legal system. By making plain to others what

they do and appear to do, political scientists may be also helping the judges to be thrice blessed in heaven.

The objective of the final chapter is to provide a summary of the key theoretical and empirical results produced in the study. The chapter is divided into four parts. The first section recapitulates the reasons that motivated the study. It is followed by a short summary of the theoretical argument that has been made throughout the dissertation.

In the next part, the chapter compares the findings in the studies of South Africa and the Philippines and discusses the implications of those results. These findings are linked into the broader questions of the rule of law, economic development, and democratization. The chapter concludes with a discussion of the areas where the dissertation can be extended, and how the design of the study can be further improved.

8.2 Studying Dictatorships

The scientific study of law and courts has gained considerable momentum in recent years, though much of the work has been done on the study of Western democracies. Baum (1997) provides a concise summary of research that has been done on American courts. In recent years, empirical works have appeared on the judicial institution in European and Asian democracies (Robertson 1998; Ramseyer and Rasmusen 2003; Stone Sweet 2000; Vanberg 2005). However, the modal category for existing research remains the advanced industrial state. This was probably due to the availability of information and accessibility of key informants. In developed countries,

data on the judicial system are well-kept and organized. Furthermore, researchers are able to interview persons who work in the legal system with little to fear from public officials.

Such is not the case when one attempts to study dictatorial systems. Often records are missing, data are destroyed, access is difficult, and important people are dead. While important accounts of the legal process in non-democratic settings have been produced over the years (Fraenkel 1960; Kirchheimer 1961; Toharia 1975; Das Gupta 1978; Hazard 1984; Muller 1991), they have been largely qualitative and jurisprudential in nature. While these efforts are important, they must be complemented with studies that are based on replicable data and statistical analysis. Writing in 1998, Stacia Haynie and C. Neal Tate, two pioneers of comparative judicial politics, despaired about the lack of empirical studies on authoritarian regimes, asserting that “there simply are no studies for court outcomes in non-democratic nations” (p. 16). The employment of multiple methodologies grants us considerable leverage on the puzzle that we are studying (Tashakkori and Teddlie 1998; Creswell and Plano Clark 2007).

The paucity of research on authoritarian systems may be attributed to the prevailing notion that judicial actions matter very little in contexts of concentrated power (Loewenstein 1946; Hedley 1996). They cannot resist determined rulers. They are only allowed to survive because they can minimize the extent of coercion that is needed by the government in order to dominate society (Pereira 2005, 33; Toharia 1975). They facilitate regime acceptance by stigmatizing regime opponents as “outlaws” and those who rule as “authorities” (Lobban 1996, 8; Shklar 1986). In dictatorships, the court has long been considered the handmaiden of the state. To expect the courts to be independent

in these settings, paraphrasing the renowned historian Theodor Mommsen, is similar to wishing for an immaculate conception: “one may wish for it, but one cannot produce it” (cited in Kirchheimer 1961, 304).

8.3 *The Gavel Strikes Back: Summary of Theoretical Argument*

The dissertation has been motivated largely by the paucity of works that study the relationship between law and dictatorships. Even Brooker (2000), one of the most influential studies of non-democratic regimes in the political science literature, paid very scant attention to judges and their relationship with the rulers in authoritarian, totalitarian, and sultanistic polities.¹ For most of human history, the modal form of government was non-democratic (Huntington 1991; Przeworski et al. 2003). It is of most import that we understand what kind of justice is produced and dispensed in these types of polities. Even in settings where power flows from the center, spaces for contention can exist (Foucault 1980). Thus, I became interested in the question of determining the conditions that allow the law to discipline power. Thus, the dissertation focused on the phenomenon of *judicial negation*. The aim was to know what motivates courts to go against the state, and to examine the effects of negation, both intended and unintended, to the duration of the regime.

Bereft of the institutional protections enjoyed by judges in advanced democracies, I hypothesized that jurisprudence in dictatorships is *strategic*. While the strategic approach has not been able to explain decision-making in the courts in the United States

¹ Pereira (2005) wryly pointed out that the term “law” did not even appear in the Index (p. 6).

well (Segal 1997; Lindquist, Hettinger, and Martinek 2006), it can provide considerable theoretical leverage in studying judicial behavior in authoritarian contexts. In the United States, formal protections as well as the cost of overriding judicial decisions provided the Justices with the ability to vote their *sincere* preferences (Spaeth 1995; Segal and Spaeth 2002).

However, these protections are usually absent in dictatorships. Judges under military or sultanistic rule operate in very insecure settings. They can be removed, they can be ignored, and they can be shot (Hendley 1996; Vejerano 1999). Thus, I expected judges in these polities to be more sensitive to their political environment. Helmke (2002) contended that “because such institutional protections are in short supply in many parts of the world, the separation of powers approach should prove particularly compelling for analyzing judicial behavior beyond the American context” (p. 291).

I surmised that judges invalidate state action only when it is *viable* to do so; when they believe that they can withstand a political assault. If such mechanisms are absent, we expect them to uphold the state’s position or refuse to take on the case. The general model that I developed included a set of contextual, attitudinal, and case variables to account for when and why judges limit the exercise of state power. The model focused on the *political risk* that is involved in judicial decision-making.

The state has two primary means to control the court: *sanction* and *selection*. I evinced that the opportunity to negate can develop when political and economic events attenuate the ability of the state to sanction. This can happen when the ruling elite fragments politically (Barros 2002; Rios-Figueroa 2004). The coordination problem brought about by division is the mechanism that enables the courts to constrain the state.

Meanwhile, increasing flows of foreign direct investments can also deter state reprisal on the judiciary because of the negative signal it sends to investors, who may respond to such an attack by pulling out (Moustafa 2005; Smith 2005).

Another way for the opportunity to negate to develop for the court is when events change the incentive structure of the political system. This can happen when the rulers begin to lose power. “To the extent that the preferences of the outgoing and incoming government diverge, said Helmke (2000), “judges who wish to avoid sanctions will face an incentive to begin ruling against the government as long as it begins to lose power” (p. 19).

However, it is necessary to control for the saliency of a case. The contention in the literature has been that negation is unlikely in cases that are politically sensitive to the regime (Tate 1993; Haynie and Devore 1996). Meanwhile, Fraenkel’s (1960) contribution to the literature is his contention that under dictatorship two realms of law exist. On the one hand, there is the “prerogative state”, the area of the law that involve the security of the state (e.g. criminal cases) and the “normative state”, the area of the law where the interests of capital take precedence (e.g. economic regulation).

From this, I drew the contention that even if a case is salient to the state, the court is likely to negate if it is economic in nature. Moustafa (2003) provided evidence that the autonomous space for the court can be carved by the presence and actions of business and other professional groups with interests that have developed around the court’s jurisprudence. They can produce a “protective belt” around the judiciary, supporting its jurisprudence against arbitrary action by government. This makes it very difficult for the

government to reverse and attack the judiciary without paying a high cost in “the eyes of international capitalism” (Corder 1987, 108).

After a thorough consideration of the literature, I controlled for both state repression and economic growth. When judges fear less about losing their lives (or limbs), the setting is more amenable to judicial negation. Haggard and Kaufman (1985) also suggested that economic development should be positively related to the exercise of judicial negation. We expect the state to be more tolerant of dissent when things are going well economically. “When economic conditions deteriorate,” said Herron and Randazzo (2001), “the political branches of government are potentially more inclined to constrain opposition, even from the courts” (p. 426).

8.4 *Comparative Conclusions: Summary of Findings and their Implications*

The empirical analyses on judicial decision-making in the high courts of the Philippines and South Africa provide evidence that events that attenuate state power or alter the incentive structure enhances the ability of the judiciary to constrain and invalidate governmental actions. This finding has theoretical implications to themes that are broader than judicial politics. It is relevant to answering the question of whether it is possible for the “rule of law” to emerge in authoritarian systems. It also provides critical insights on the role of foreign economic assistance to the protection of private property and human rights. Finally, the study “brings the courts back in” to the studies of democratic transition and democratization.

8.4.1 The Rule of Law and the Authoritarian Regime

The establishment of the “rule of law” demands that legal rules tell us where we stand (Fried 1991). This means that the precepts for human conduct should have some sense of *stability*: it should be a reliable guide to human action. When it constantly shifts in form and content, persons cannot decide on future actions or make credible commitments (Tamanaha 2004; Neumann 1986). The stability of the legal system is established when the courts *consistently* apply the law (i.e. by following their own precedents). It is also enhanced when governments follow the rulings of the court.

The concept of the rule of law also requires *equal treatment*. It means that persons who are similarly situated must be treated the same (Fuller 1964, Chap. 2). Ideally, legal precepts should govern the actions of the strong and the weak, the individual and the state. In the second definition, the rule of law exists when no one is above or beyond the law. If certain individual, group, or institution can act arbitrarily, then society is said to be governed by the “rule of person” not the “rule of law” (Raz 1979).

In the judicial process, the rule of law as equality is implemented by the court’s abstraction of a litigant’s specific characteristics (e.g. gender, age, job, etc.) and her designation as simply the “petitioner” or the “defendant”. The contention is that in the dispensation of justice, evidence and logic should be the only things that matter (Lempert and Sanders 1986, 414). Justice has a blindfold; she relies on a scale. Only the weight on the balance, and where they tilt, should determine the way a case should be disposed.

In the context of authoritarianism, the “rule of law” gets equated to the “law of rules”. I contended in Chapter Three that dictators tend to clothe their domination with the trappings of legality. In the case of the Philippines, Marcos made sure that everything

that he did has some legal justification (Del Carmen 1979; Fernandez 1999). In South Africa, the policy of apartheid was executed through a series of laws that have been assiduously upheld by the courts (Dugard 1978; Deegan 2001). If the rule of law simply means *stability*, then the legal systems under dictatorships fit the description best. In these settings, the law is indeed predictable: it is predictably pro-government.

Maravall and Przeworski (2003) contended that “the rule of law is conceivable only if institutions tame or transform brute power” (p. 8). Thus, the concern of this dissertation was to identify the conditions under which courts gain the ability to *equally* apply the law to the actions of government; to identify the factors that allow it to tame the power of the state. This study demonstrates that the court is able to do that when the ability of the rulers to attack the court is weakened or when political developments provide incentives for the court to defect. *It is the changes in the distribution of power that allows the rule of law to emerge in authoritarian regimes.*

In both the Philippine and South African cases, the fragmentation of the ruling elite allowed the court to constrain the exercise of governmental power. When Marcos finally re-established the National Assembly in 1978, it provided some of the more liberal members of Marcos’ coalition, like Arturo Tolentino, Salvador Laurel, Cesar Virata, Blas Ople, and Vicente Abad Santos to have some influence on the formation of government policy. In 1984, it also allowed some prominent members of the political opposition, like Francisco Sumulong and Eva Estrada Kalaw to consider and criticize state actions. Statistical results document that the entry of these actors emboldened the Supreme Court into striking down some of the contentions of the dictatorship (See Table 6.10).

Similarly, in South Africa, the bitter split *within* the National Party into the right, left, and Afrikaner bourgeoisie in 1983 made it harder for the Afrikaner community to cohesively respond to the coordinated actions of the black insurrectionary movement (Charney 1987; Price 1991). Chapter Seven demonstrated that beginning in 1983, the South African Appellate Division embarked on a more anti-government, pro-individual direction (Section 7.4.7). However, the political fragmentation variable did not reach statistical significance in the statistical analysis. This is probably because it was not the division among the white community among the pro-Afrikaner or pro-English parties (which was captured by the L-I index) that enabled the high court to tame the state, but just the split within the Afrikaner community itself. Negation began to significantly happen when the Conservative party split from the NP in 1982 (Chapter 7, pp. 278-80).

8.4.2 Foreign Economic Assistance and Economic Development

The subject of judicial negation is also important to the question of economic development and the protection of property rights. The existence of a court that routinely succeeds in going against the state is often taken as a sign of the existence of the rule of law (Widner 2001; Tamanaha 2004). When the rule of law operates, financial institutions tend to develop (Beck, Demirguc-Kunt and Levine 2003) and a country's GDP per capita becomes more likely to increase (Henisz 2000; Maskin and Tirole 2004).

Statistical results from the Philippine case demonstrated that increasing amounts of foreign investments can grant the judiciary the space to provide some check to the authoritarian government (See Table 6.10). *Thus, if a foreign country seeks to strengthen*

judicial institutions in a given polity, the better policy is to engage the authoritarian state. Investments or aid may be tied to judicial training or to keep the government from attacking or threatening the judges. This is in line with the formal model of Wintrobe (1998) who indicated that investments or aid should be linked to benchmarks on human rights (pp. 68-76). The resources from external actors will make it more difficult for the state to attack the judiciary (Moustafa 2003; Smith 2005). The hope of course, is that judicial liberalism in matters economic will “spill over” to the political realm (Jayasuriya 2000).

8.4.3 *Judicial Negation and Democratic Transition*

Finally, what role are courts likely to play as the authoritarian regime gets closer to the transition to democracy? The results from the South African case suggest that the high court will prepare the way for democratization by subjecting the contentions of the government to greater scrutiny. *The closer it gets to the date of transition, the more likely it is for the high court to negate* (See Table 7.10). The South African Appellate Division, especially under M.M. Corbett, was willing to overturn its precedents and creatively interpret the law in order to tame the harshness of the security laws and apartheid (Chapter 7, Section 7.4.7). In other words, it was willing to allow a certain degree of *unpredictability* in the law in order to subject the government to the governance of legal rules. The works of Helmke in Argentina (2002; 2005), and Scribner in Chile (2003) corroborate this finding in South Africa.

The qualitative study of Philippine jurisprudence demonstrated that after the assassination of Benigno Aquino Jr., the Supreme Court went against the state in a

number of politically salient cases that involved freedom of speech and criminal due process (Chapter 6, Section 5.6). However, the statistical results did not provide confirmation to such contention. The Supreme Court supported the government unless the case was economic in nature (See Table 6.10). In economic cases, the Supreme Court was willing to negate in order to win some legitimacy from the population. It sought to prove that it was not simply a handmaiden of the dictator, but a champion of social justice (Gupit and Mendoza 1993, 103).

The support of the Supreme Court for Martial Law can be attributed to the largely personalistic nature of the Filipinos, especially to the value of *utang na loob* (gratitude) (Melo Interview 2007). Even at the very end, most of the Justices could not go against their benefactor. It would really have been difficult for Marcos' law classmates and golf buddies to decide against him (Haynie and Tate 1994). Such was the case even when the dictatorship was on its last, dying gasps.

8.5 Future Research

Judge Cardozo (1924) once said that the person who does theoretical work “has a hard time to make his way in an ungrateful world” and that the only thing that brings his heart consolation is the “that the action of his favoured brothers would be futile unless informed and inspired by thoughts that came from him” (pp. 21-2). After the brief summary of the theoretical argument, the key findings, and their broader implications, the objective of the final section is to map the areas where the “thoughts” of this research, both the inspired and the mundane, can be expanded. These include: 1) Constructing and testing a theory of judicial negation at lower levels of analysis; 2) Developing better

measures of legal variables and incorporating them into the general model; 3) Expanding the universe of cases that are covered by the analysis.

8.5.1 Theorizing and Testing at Lower Levels of Analysis

A most fruitful area where the research can be extended is theory construction and empirical analysis of judicial negation at levels lower than the court (e.g. individual Justice or coalitions). The court-centered approach has a certain intuitive appeal. To dispose of a case, what matters is the aggregate number of votes for and against the government since it determines whether doctrine becomes controlling and how the case is to be disposed. The margin of difference becomes interesting when the number tips to the other direction.

But by moving the study to lower levels of analysis, like the level of the individual judge, additional leverage is gained in tracking the effects of the independent variables. For example, when voting in civil liberties cases that are usually decided by 12-3 majorities (in favor of government), begins to decline to 11-4, 9-6, and then 8-7 votes in favor, certain variables are influencing the judges in the decision-making process. This influence may not be adequately captured by a court-centered approach which would code all these cases in the same way (as a “0”).² A dependent variable that is judge-centered may be a more fine-grained way for studying the subject matter, and would provide additional depth to the analysis of the phenomenon.

Besides the inclusion of the key variables in this study, theory formation at the individual judge level would include a thorough consideration of the background

² The effect of a variable is captured in a court-centered approach when it shifts the decision from a “0” (in favor of the government) to “1” (against the government).

characteristics of the Justices. Analysis conducted at the level of the judge necessitates much care in theory formation: the large number of potentially significant personal attribute variables demands that theory is tightly constructed and well grounded. A useful tool for this type of analysis is game theory (Shepsle and Bonchek 1997, 405-431; Helmke and Sanders 2006). The endeavor must also give ample consideration on the cultural and linguistic differences on personal attributes when analysis of judicial behavior is attempted *across* countries (Haynie and Tate 1998, 11).

8.5.2 Development and Incorporation of Improved Measures of Legal Variables

When they are interviewed, judges and lawyers point to the centrality of legal variables, like precedents and case facts, in the way a case is decided. However, the facts of the case do not speak by themselves. Attitudinalists contend that they are organized by the judge in order to support a conclusion that has been reached on other grounds (e.g. ideology). The information is actually arranged by the judge in such a way “so that they tell the story his way” (Levy 1938, 84).

In addition, it been contended that judges do not defer but rather simply refer to precedents. “Reputedly, when one is hard beset,” said Justice Cardozo (1928) “there are principles and precedents and analogies *which may be pressed into service of justice* if one has the perceiving eye to use them” (p. 59. Emphasis added). Even the venerable Lord Coke, contended Powell (1918), invented Latin maxims if he was unable to find any satisfactory precedent to support the outcome that he wanted (p. 653).

However, understanding judicial decision-making demands good measures of legal variables in order to assess their impact. Currently, scholars working on the American Supreme Court have developed new sophisticated methods to operationalize and assess the influence of precedents. For example, Fowler et al. (2007) used network analysis in order to measure “case centrality” and legal importance of a precedent. Meanwhile, Kastellec (2007) proposed the use of “classification trees” (Sutton 2005; Ripley 1996) to test how patterns of case facts increase or decrease the likelihood that a case will be decided in a certain direction. These are some of the methodological advances that can be employed in order to better estimate the effects of legal variables in the general model that was developed in this research.

8.5.3 Adding More Countries to the Study

A third way to gain additional leverage in understanding the phenomenon of judicial negation is the inclusion of more countries. Countries that have congruent or divergent features with the Philippines and South Africa may be introduced. In this way, analyses based on the “most similar”, as well as “most different systems” research designs can be employed (Frendreis 1983; Landman 2003; Przeworski and Teune 1970).

Variation among the cases may be introduced in terms of legal tradition, region, and type of authoritarian regime. The Philippine legal tradition is an amalgamation of Hispanic civil law and American common law traditions. Peru and Mexico are suitable candidates to be included in the analysis given certain similarities with the Philippines. While they are from other regions (Peru is in South America while Mexico is in North America), both have Hispanic cultures and civil law systems. Peru endured

authoritarianism under Alberto Fujimori (a regime similar to Martial Law under Marcos), while Mexico was dominated by a single party, the *Partido Revolucionario Nacional* (National Revolutionary Party).

Countries that belong to another region other than Asia or Africa, or another legal tradition are also suitable candidates for inclusion into the analysis. For example, Turkey is an attractive country to study because it is in Europe, has an Islamic culture, and has a French civil law tradition. The South African legal system is a civil law country, but it of the Roman-Dutch sub-type. It has also been influenced by English common law. The contrasts enable us to construct an analysis based on the “most different systems design” (Przeworski and Teune 1970; Perry and Robertson 2002).

The dissertation began with a theoretical puzzle: *When can courts control the state? When can the gavel defy the gun? Is it possible for the rule of law to emerge in dictatorships?* The results that emanated from the analysis suggest that the judiciaries go against the state when political and economic events change the distribution of power and the incentive structure of the political system. These developments give courts the opportunity to constrain state action and uphold their policy vision. Thus, the study contends that even in repressive situations, judges will have the opportunity to curb governmental excesses. It demands of judges to rise to the occasion. Courage conjoined with condition enables judicial negation.

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