

Structure and Context of Judicial Institutions in Democratizing
Countries:

The Philippines and South Africa

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

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

Concomitantly, American scholars of judicial behavior have essentially refused to test their theories outside the United States legal system (Tate 1987). Only 14.1% of dissertations in the last five years (35 of 249) included a focus on courts outside the United States. Only five articles were published in the *American Political Science Review* or the *American Journal of Political Science* that at least in part explored courts abroad (Epstein 1999, 1).

The assumption that courts are largely unimportant political institutions ignores the fact that as societies become more complex, formal adjudicative mechanisms emerge that are delegated

significant powers to resolve political, social and economic conflicts within society. For appellate courts, these determinations of legal rights have broader public policy consequences and decisions are motivated by factors beyond merely the facts and the law.

Ignoring courts in political science research has led to an appalling ignorance of courts and their role and function within societies generally, and their importance in democratization specifically. What role can or do courts play in democratization?

We simply do not know. While a number of single nation studies exist, these studies, as critics note, cannot lead to broader generalizations about legal actors and political systems. Judicial scholars must bridge the gap between the extensive research on American courts and the absence of truly comparative research. Only then can we understand the "significance of alternative institutional structures or contexts to the judicial decision" (Hall and Brace 1992, 148), and I would argue the importance of structure and context to establishing the rule of law.

Unfortunately, these programs of research are only beginning to flourish. The law and courts' subfield is beginning to recognize the importance of comparative judicial research. Recently, the Conference on the Scientific Study of Judicial Politics, funded by the National Science Foundation, was devoted to comparative judicial research. Additionally, the most recent address of the President of the Law and Courts section of the American Political Science Association, Lee Epstein, was entitled "The Comparative Advantage." In it, Professor Epstein argues that

it is "time to think about the steps we can take to fill the enormous void that has been created from years, even decades, of neglect of courts abroad" (1999, 3).

Because of this vacuum, this paper will be limited as well.

I will introduce the major function of courts, and focus on two case studies involving the ways in which governments in democratizing countries have structured their judiciaries, and the context within which these structures emerge. The first will focus on the Supreme Court of the Philippines in the wake of the People Power Revolution in 1986. The second will focus on South Africa in the transition from apartheid to democracy.

The Function of Courts.

Becker asserts that government is the "monopolized force of society organized to distribute some values authoritatively and to maintain internal order" (Becker 1970, 18). Dhavan (1985, 20) argues that the State, as a matter of necessity, must delegate this power to various functionaries, among them - courts. Shapiro (1981) similarly maintains that as societies modernize, the state substitutes a formal adjudicative machinery for the informal method of the mediation of conflicts. Modern courts represent the imposition of the authority of the regime within the allocation of gains and losses. The function of resolving conflicts is fulfilled in modern courts not by consent, but by a forum of compelled adjudication where a third party (the defendant) is forced to participate by the actions of the other two (the claimant and the courts). In general, Shapiro argues, the losing party agrees to the decision because it is *believed* to have been achieved by an independent and impartial arbiter. Though the courts are clearly

a component of the state, the structure of the courts can nonetheless retain the appearance, if not functioning, of independence. Independent courts are those that are free to resolve conflicts without interference from the government. This independence is crucial in establishing the rule of law.

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

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

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

It is through the resolution of conflicts in the judicial process, that the rule of law is established and maintained.

Ultimately, courts are one component of the "power filter" (Dhavan 1985, 26) through which social and economic forces gain recognition and legitimacy.

Understanding the functioning of the rule of law within societies requires the analysis of the gains and losses distributed by the structure assigned the responsibility of settling social, economic and political conflicts that emerge through the formal rules of the State. Much debate focuses on defining that "structure" which resolves these disputes. Shapiro argues that a mediating continuum exists within societies, with "go-betweens" on one end, and "formal judges" on the other (Shapiro 1981, 3).

Though I focus on the latter end of the continuum, I do not ignore the existence or the importance of the former. Rather, I suggest that formal appellate court structures are significant for several reasons. Appellate courts have a high profile existence. In their interpretation of the rules (and thus the values they allocate), their reasoning must be articulated and publicly expressed, two essentials for empirical evaluation. Moreover, as Dhavan notes, "the higher we climb in the echelons of the judiciary, the closer we are to an important part of the constitutional nerve centre of the State" (Dhavan 1985 24). By studying the highest appellate courts within a society, we can examine the relationship between the regime's allocation of the values through "law" and the judiciary's response in its establishment of the "rule of law," through its determinations of who wins and who loses.

Governments vary in the authority they are willing to designate to courts. Governments intent on establishing the rule of law establish strong judicial institutions with measures to protect independence, such as tenure, judicial review, established rights, and to protect impartiality, again through such measures as secure tenure and salary protection. These governments must be willing to lose in the resolution of conflicts. Judges who wish to protect or enhance the institutional status of the judiciary must feel confident that their ruling will be enforced and that there will be no retaliation for it, or that at least the retaliation will come through legal means.

However, courts can be provided powers that are too broad and expansive which can undermine their legitimacy. If courts are

incapable of carrying out all of the functions assigned to them, or if those functions assigned to them increase the visibly political role of the court, this can decrease the court's institutional stature essential for establishing the rule of law. Citizens must accept the right of the court to rule in order to accept the court's ruling. If the court becomes perceived as behaving overtly politically, it can damage the court's capacity to function.

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

The Philippines.

Much has been written about the pre-Marcos court and it will not be reiterated here (but see Araneta and Carroll (1968) and Grossholtz (1964) as well as Tate and Haynie (1993, 1994)) except to note that the pre-Marcos court was considered a powerful institution with a reputation for independence and integrity. The court enjoyed broad jurisdiction over a number of important public policy issues including economic, political and social issues (Tate and Haynie 1993). The court also had extensive powers of constitutional review over all governmental and political actors.

It was considered one of the most powerful and politically respected appellate courts in existence (Becker 1970; Wurfel 1964).

With the declaration of martial law in September 1972, Marcos began to lay the groundwork for his "constitutional authoritarianism," a process which over time would politicize the court. Though Marcos cited economic problems as well as the communist insurgency as motivations for his declaration, his inability to seek a third term as president provided sufficient motivation in and of itself. Immediately following the declaration of martial law, violence and crime were dramatically reduced. Concomitantly, Marcos abandoned all pretense of democratic processes with one exception: the capacity of the courts to review his actions. Marcos disbanded Congress, detained oppositionists, suspended the rights of *habeas corpus*, speech, press and assembly and imposed strict censorship requirements, but all of this was accomplished by legislative fiat under the guise of martial law.

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

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

Marcos allowed his actions as benevolent dictator to be challenged in court, but never considered such challenges as serious threats to his capacity to rule. Interviews with justices who served on the Supreme Court during this period suggest the futility of any real challenge by the court to Marcos. One justice noted:

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

In all major challenges, the Supreme Court favored the Marcos

regime. Though the court eventually did decide against Marcos in a number of cases,¹ the Supreme Court never presented any real threat to Marcos' rule.

By the end of martial law, the reputation and prestige of the Supreme Court had decreased dramatically. It was perceived as subservient to Marcos and incapable or unwilling to limit the effects of his dictatorship. But not only were the prestige and popularity of the Supreme Court declining precipitously, so were Marcos'. Marcos destroyed the rule of law for the struggling democracy. Attempts to legitimize his dictatorial rule through the use of "constitutional authoritarianism" merely destroyed the role of the court as a true arbiter of political conflict in the eyes of the population at large.

Marcos' politicization of the Supreme Court did not go unrecognized by those who sought to strengthen the constitutional foundation of the emerging democracy in the hopes of returning to, or at least creating, a rule of law. Immediately following the relatively peaceful People's Power Revolution in 1986, Corazon Aquino accepted the resignations of all members of the Supreme Court and reconstituted it according to her own ideological preferences. Because the court was staffed largely with

¹For example, the court ruled that authorities must show a clear and present danger of a substantive evil to deny a permit (Reyes v. Bagatsing 125 SCRA 553); the government was prohibited from summarily closing a radio station without demonstrating a clear and present danger (Eastern Broadcasting Corp. v. Dans 137 SCRA 628); the court nullified the closure of a newspaper critical of Marcos (Burgos v. Chief of Staff 133 SCRA 800); military officers were prohibited from intimidating members of the media (Babst v. National Intelligence Board 132 SCRA 316); individuals could not be criminally indicted for political discussions (Salonga v. Pano 134 SCRA 438; among others (Cruz-Pano and Martinez 1989:46-47).

individuals who had been at least minimally defiant of Marcos, it was perceived publicly as a bastion of independence and its reputation soared immediately following Marcos' departure from the archipelago. A survey of the Makati Business Club, an association of business executives asked to rate the performance of government agencies, placed the court at the top. Under the leadership of Chief Justice Teehankee, considered a protagonist of Marcos in the latter years of his rule, the court was extremely popular. The new constitution placed the courts in a critical position of guarding the excesses of future personalities who might also wish to undermine the rule of law, creating a genuine bulwark of the democratic ideal.

But alas, paradise lost. A decade later, a similar survey by the Makati Business Club ranked the court 19 of 32 bodies, below the generally unpopular military and labor departments. The court system generally ranked 30 of the 32, not even able to rate higher than garbage collection. A critical opportunity to enhance and strengthen the legitimacy, independence and reputation of the court in the post-Marcos era was lost. What led to this decline in the court's reputation over such a short span of time? I argue a number of structural and contextual effects contributed to the court's demise. Among the most important factors were: the expanded power of the court and the internal structure of the court itself.

Expanded power of the court. The excesses of the Marcos regime and the nostalgia for the independence of the Supreme Court prior to martial law combined to fuel a constitutional convention which

dramatically increased the power of the courts generally, and the Supreme Court in particular.

First, under the 1987 Constitution the court was given administrative supervision of the lower courts, including all judges and employees. Moreover, the Supreme Court is completely responsible for the administration and discipline of the bar. While this increases the bureaucratic power of the court over a wide range of resources, it also increases the complexity of remaining independent while supervising a vast governmental agency with its own constituencies and political brokers. Previously, the Justice Department had been responsible for the administration of the bureaucracy. Removing the courts from the supervision of the Secretary of Justice was seen as a positive step in removing the politics from the political process. Unfortunately, the change merely shifted the politics of the judicial process from one branch of the government to the Supreme Court itself.

A number of political confrontations have ensued highlighting the political nature of the legal system as well as that of the court. The court has become embroiled in a number of investigations of alleged corruption. By assuming the role of investigator, as well as administrator, and ultimately adjudicator, the court appears to be protecting its own when demanding due process and subsequently determining there is insufficient evidence of malfeasance. If the Justice Department were to conduct the investigation and determine there was insufficient evidence to bring criminal charges or discipline various judges and attorneys, the court would be above the fray. Under the current

organizational setting, the court is perpetually drawn into the political quagmire of every accusation. Moreover, the inability to resolve many complaints, which remain mere allegations and gossip, inevitably leads the court to appear administratively inadequate at best and corrupt at worst.

Second, the Constitution expanded the jurisdiction of the court. During the Marcos era, the court refused to decide a number of cases citing the political question doctrine. Though the justiciability of many of these issues may have been questionable, the court was perceived as avoiding ruling by deciding not to decide, thus averting a political confrontation with Marcos. The 1987 Constitution eliminated that avenue of deference. According to Article VIII Section 1, the court has the power "to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of Government." While the court retains the capacity to interpret what amounts to a "grave abuse," it was clear that the writers of the constitution specifically intended to prevent the court from avoiding politically sensitive cases.

Regardless of intent, the court has clearly interpreted the phrase broadly, accepting virtually every opportunity to decide presented to it. In an increasingly litigious society, almost every political issue ultimately reaches the court. With the lack of discretionary jurisdiction and the requirement to review alleged abuses of discretion, the court's approval has become a necessary hoop through which all congressional and executive actions must pass. As a result, the Supreme Court in many ways is no longer

perceived as an arbiter of serious constitutional questions, but a third component of the legislative process.

Internal court structure and norms. The structure of the appointment process to the court and the requirement that the court sit in divisions, along with the sheer volume of cases the court decides has increased the evidence of the political nature of the court. The 1987 constitution established a Judicial and Bar Council (JBC) comprised of the Secretary of Justice, one Senator, one member of Congress, an academic, a member of the private sector, a representative of the Integrated Bar of the Philippines, one retired justice and the Chief Justice of the Supreme Court. This body is responsible for reviewing potential candidates for the bench and nominating at least three names. The President is then required to select one of the three to fill a vacancy or reject them all. Previously, appointments to the bench were made by the President and approved by a constitutional body, the Commission on Appointments. Though appointments to the judiciary have always been politically motivated, as either rewards for past political favors or expectations for future ones from ideologically compatible nominees (or both), the JBC is criticized for the increasingly evident political nature of its appointment process.

The JBC was created specifically to avoid politics in the appointment process, and to increase the role of merit in the selection of judicial candidates, thus increasing the independence and competence of the judiciary. But just as the role of the governor looms large in the Missouri Plans of the states, the President is influential in the composition of the JBC and thus its

ultimate nominees. Politicians continue to dole out judgeships with reciprocal expectations, and nominations to the Supreme Court have been increasingly filled by individuals believed to be loyal to Ramos or more recently to President Estrada.

While these results are clearly no different from those of past administrations, the fact that the Chief Justice and a retired justice sit on the JBC draws the Supreme Court into the political fracas. Previously, the President was presumed to be politically motivated in his or her appointments. Now, the Chief Justice comprises at least a small component of an increasingly contentious judicial appointment process.

In addition to this, the requirement that justices retire at 70 ensures a number of turnovers on the court. Concomitantly, there is an expectation that the most senior justices of the Court of Appeals should be appointed to the Supreme Court as reward for toiling in the judicial bureaucracy. This leads to more senior members being appointed to the court, many with only a few months to a few years of service remaining prior to mandatory retirement age. Stability in terms of court membership is practically impossible. With court personnel in constant flux, it comes as no surprise that precedent is often overturned. The ideological biases of the court shift as its membership does. With natural courts changing literally within months of each other, stability among precedents is often short-lived. The concept that the policy decisions of the court can be altered depending upon the court's personnel is considered a truism for judicial politics scholars.

For the population at large, the reversals of the court in

politically sensitive cases reinforce the allegations of corruption and incompetence.

In addition to the revolving door of justices at the court, the mandatory retirement at age 70 poses another delicate problem.

Many justices who leave the court at 70 do not retire from the profession. Many return to very lucrative private practices, necessarily so considering the paltry (by western standards) retirement pensions provided them. Companies often scramble to hire former justices, most of whom were among the brightest legal minds in the country. Moreover, the perception abounds that hiring a former justice provides access to the current members of the court. And indeed, former justices roam freely in and out of sitting justices' offices, even those assigned to cases for which the former justice is counsel. Often, former justices will be hired in an unofficial capacity and not listed as counsel of record. While there is no evidence that these "intermediaries" actually alter votes, the interactions of former justices with the current members of the court have not gone unnoticed by the press.

Moreover, attorneys reiterate the perception that these types of access influence votes. Attorneys will charge clients fees to "facilitate access." If these efforts prove unsuccessful, the losing party merely claims that the other side paid more. Because the justices are reluctant to turn away former colleagues, the actions of the retired justices continue to fuel the allegations of influence peddling.²

²It should be noted that similar criticisms are made of relatives and former law clerks and partners, etc. of sitting justices who similarly approach justices who are handling cases to

which they are a party.

Second, the court has elected to sit in three divisions of five to hear its cases. It is required to sit in divisions by the 1987 constitution, and the court elected to create three divisions.

The court also hears and decides formally more than a thousand cases annually, with several thousand others disposed of through minute resolutions, short dispositions of a few sentences dismissing the case for lack of merit. Each division is responsible for three to five hundred cases. This creates a number of problems. Because there are so many cases, the individual determined to write the opinion is crucial. As in the US Supreme Court, reading thoroughly through thousands of petitions is not feasible. Petitions are "raffled" to each division and a specific justice within each division will be designated to handle the opinion. A few cases, due to importance or at the suggestion of the division, are assigned to the court *en banc*. Law clerks read through the petitions and draft memos concerning the cases which are discussed during conference. In general, the justice initially assigned to the case will draft the opinion. Dissenting and concurring opinions follow the receipt of the draft, though the vast majority of all opinions are decided unanimously.

With each justice assigned such a heavy caseload, there is great deference given to the *ponente*, and his or her opinion generally becomes the decision of the court. The critical importance of a single justice creates a belief that influencing the *ponente* can determine the outcome of a case. Rumors abound concerning the amount of money that changes hands with attorneys and court staff to obtain the name of the *ponente*. Allegations are

made to clients concerning the capacity to influence the outcome of the case through either an intermediary respected by the justice or through outright bribes.

In 1992 the Supreme Court reversed the government's decision to allow a competitor of the Philippine Long Distance Telephone (PLDT) company to operate an international gateway. Allegations surfaced in the leading broadsheets that the counsel for the PLDT had actually authored the opinion of the court. A local paper hired a foreign writing analyst to compare the PLDT opinion with those of *ponente*³ Gutierrez's previous decisions and determined the differences were too striking for the PLDT decision to have been authored by Justice Gutierrez. Though Gutierrez denied any impropriety and insisted he was indeed the author, he subsequently took early retirement from the court, citing his unwillingness to bring further negative attention on the institution. His resignation was viewed in the press as confirmation of corruption in the court. The Chief Justice at the time, Narvasa, actually created an ad hoc committee to investigate the Gutierrez case, as well as other allegations of impropriety. Though a few lower court justices were eventually chastised, no evidence of corruption was found by the committee, not surprisingly many critics argued.

Though no hard evidence of these accusations has surfaced, the reality of the influence of the *ponente* fuels the gossip. For the United States Supreme Court, even if one were able to bribe a single justice, it would have little effect on the outcome. The impossibility of successfully bribing a minimum winning coalition of five is a sufficient deterrent to any foolish enough to

³The *ponente* is the justice assigned to write the majority opinion for the court.

believe the court capable of corruption. For the Philippine Supreme Court, successfully persuading the *ponente* could in fact greatly affect outcomes.

The "raffling" process has also been criticized. Though cases are randomly assigned to *ponentes*, circumstances can intervene to limit the "randomness" of the process. The court has a long-standing policy that all incidents related to a case are assigned or referred to the originally designated *ponente*. For example, motions for reconsideration or even similar petitions subsequently filed are treated as extensions of the original case and consolidated with it and referred to the *ponente* initially assigned to the case for disposition. While the logical benefits of the assignment are clear, the justice would already be familiar with the case and attendant pleadings, the departure from the random assignment of the case allows for opportunities, or the perception of opportunities, for manipulation in opinion assignment. The Supreme Court has been criticized in a number of cases for such machinations.⁴

The deciding of cases in divisions is also problematic because the court appears to reverse itself too often. When the court reverses itself in cases decided by a division that are subsequently elevated to the court *en banc*, the apparent "flip-flopping" is usually attributed to political influence by "the Palace" or to bribery by the ultimate winner in the case. But imagine if the United States Supreme Court sat in three divisions of three. Depending on the three justices comprising the panel, one could imagine cases where the division would often be overruled when the entire court decided the same issue. Similarly, for the Philippine Supreme Court, the ideological composition of the division may differ sufficiently from the majority of the court that

⁴The lower courts have been particularly castigated for the questionable assignments of cases to judges. Numerous media investigations suggested that cases could be assigned to particular judges for a price. Sufficient proof emerged resulting in public raffling in most courts.

decisions made *en banc* will reverse the division. Students of judicial politics find nothing earthshattering about the concept that politics influences decisions. But for an institution that bases its right to rule on impartiality and mere "interpretation" of the law, the blatant evidence of ideological influence in the process of that interpretation undermines the important legal myth of the apolitical nature of adjudication. The belief in an impartial and independent judiciary, free of personal bias in its judges, is critical to establishing respect for the rule of law. Though that goal is never truly feasible, the belief in it is. The structure of the Philippine Supreme Court undermines the perception of independence on the part of the court.

South Africa.

The apartheid government of South Africa established and followed legal rules; the legality of its actions was never questioned in so far as the government technically followed its constitutional framework in establishing its political, social and economic statutes. However, legitimacy does not focus so much on "whether the activities of government are lawful as whether they accord with what are generally perceived to be or what have for long been held up to be, the fundamental principles ... to which government is or ought to be conducted" (McAuslan, Patrick and John F. McEl downey 1985). Governments can act lawfully, without acting legitimately. The legal system of the South African apartheid regime universally was considered illegitimate by all but the minority Nationalist Party government and its sympathizers.

A truly legitimate legal system is only beginning to emerge in South Africa. To that end, the Constitutional Assembly passed the new constitution on May 8, 1996. Following the requisite certification by the Constitutional Court, Mandela signed the new constitution into law on

December 10, 1996.⁵

Without doubt, a comprehensive legal structure already existed prior to the passage of the new Constitution. Though massive shifts have occurred in the power structure of the South African government, the new Constitution makes incremental adjustments in the existing adjudicative structure. The court system, by and large, remains intact. This is both part of the solution and part of the problem. It would be almost impossible for the South African government to both structure and staff an entirely new legal system. And yet the apartheid legacy casts doubt on the legitimacy of the existing judicial structure created by and staffed largely with Afrikaners. The challenge for the new regime was to alter the existing legal structure sufficiently so that the entire population of South Africa accepts it as just and legitimate. Fundamental principles must be specified to protect rights and liberties, and the existing judicial system must be enhanced to give it the capacity to enforce the rules.

Expanding the Power of the Court.

The new South Africa Constitution increases the independence of the judiciary in a number of ways. First, it creates a large number of entrenched rights that are supreme and justiciable. Second, the Constitution provides the courts with the right of judicial review. Third, the Constitution creates a Judicial Service Commission to nominate judicial candidates.

⁵The Constitutional Court required adjustments to the document, most of which were technical and all of which were ultimately resolved.

Fundamental Rights and Judicial Review. The new South African Constitution secures a broad range of "fundamental rights."⁶ These rights represent the first time in the history of South Africa that individual rights and liberties have been specified and protected by law. This certainly increases the capacity for an independent judiciary to emerge, especially considering that these fundamental rights can be challenged with a court that now has the power of judicial review for the first time in the history of the nation. A new Constitutional Court was established both to ensure the permanent Constitution's adherence to entrenched principles, and to resolve all constitutional challenges as the final arbiter of legal disputes.

⁶Among these are equality, human dignity, life, freedom from servitude and forced labor, religion, belief and opinion, privacy, expression, assembly, demonstration and petition, association, political rights, freedom of movement and residence, labor protections, economic activity, property protections, housing rights, health care, food, water, and social security rights, language and culture protections, cultural, religious and linguistic protections, rights of the accused, environmental rights, children's welfare protections, and education

The Constitution also addresses the independence of the courts. The courts are deemed "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."⁷ Moreover, "No person and no organ of state may interfere with the functioning of the courts...", and the "organs of state" are required to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."⁸ The Constitution also establishes that the Constitutional Court is the final arbiter over issues relating to the "interpretation, protection and enforcement of the Constitution."⁹ Constitutional Court decisions are binding on all legislative, executive, and judicial organs of state.¹⁰ The salaries of all judges are protected from reduction, and judges can only be removed by "the President on grounds of misbehavior, incapacity, or incompetence" which is determined by the Judicial Service Commission discussed below.¹¹

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

⁷Chapter 8, Section 165, 1996 Constitution

⁸Chapter 8, Section 165, 1996 Constitution

⁹Chapter 8, Section 167, 1996 Constitution

¹⁰Chapter 8, Section 165 & 167, 1996 Constitution

¹¹Chapter 7, Section 176 & 177, 1996 Constitution

Judicial Service Commission. The creation of the Judicial Service Commission¹² also is intended to enhance the independence of the courts by creating a separate nominating body. Prior to this, the Minister of Justice basically was responsible for appointments to the bench.¹³ When the National Party gained control in 1948, it quickly filled the bench with ideologically compatible, and thus conservative, judges. One judge of the Supreme Court assured me that the practice of appointing more senior members to the bench occurred only when the Nationalists were confident of a predominately conservative bench. Then, it "risked" the appointment of more liberal judges of opposition parties.

¹²Chapter 8, Section 178, 1996 Constitution

¹³While the Minister of Justice technically selected the appointees, these were generally the preferred candidate of the Chief Justice of the Appellate Division.

The Judicial Service Commission is composed of 22¹⁴ members, including the Chief Justice of the Appellate Division, the President of the Constitutional Court, one Judge President of the Supreme Courts, the Cabinet member responsible for the administration of justice (or a designated alternate), two practicing advocates,¹⁵ two practicing attorneys, one professor of law, six members of the National Assembly,¹⁶ and four permanent delegates to the National Council of Provinces.¹⁷

Through a lengthy, detailed process, the Judicial Service Commission identifies a list of nominees from whom the President will select the bench.¹⁸ The Judicial Services Commission identifies meritorious candidates, rather than simply providing the President with straight appointment power.

As in the Philippines, this is intended to increase the independence of the courts by decreasing the role of political patronage in appointments and increasing the role of merit. And as in the Philippines, members of the courts, the President of the Constitutional Court and the Judge

¹⁴ When considering matters specifically relating to a provincial or local division of the High Court, the Judge President of that division and the Premier, or an alternate designated by the Premier, of the province concerned will also sit.

¹⁵South Africa divides its Bar similar to the English system of advocates who appear in court and attorneys, the side-bar, who work directly with the client. However, there is currently a move to integrate the bar and side-bar, and attorneys are allowed now to appear in court.

¹⁶At least three of the six must be members of opposition parties. The National Assembly is the legislative body of parliament comprised of 350 to 400 popularly elected representatives.

¹⁷The Council of Provinces is the legislative body of Parliament consisting of 10 delegates from each of the nine provinces.

¹⁸A similar process is provided for the appointment of magistrates, who handle the bulk of the criminal and civil litigation. The JSC nominates only for courts above the magistrate and regional magistrate courts.

President of the Supreme Courts, are members of the commission.

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

As in the Philippines, there has been some criticism of the Commission. One Appellate Division judge suggested that the hearings have become opportunities for "inquisitions" of past apartheid judgments, and as a result, many of the best candidates will not allow themselves to be nominated in order to avoid appearing before the Commission. It was also suggested that those who "survive" the hearings and are appointed are "tagged" as having "passed through the ANC machinery," which destroys the credibility of the individual with the older, more established white legal fraternity. If you fail the test of the Commission, "You're okay."

However, one senior judge, who has been openly opposed to the National Party while on the bench, suggested that the hearings were a positive step toward public evaluation and thus increased legitimacy for those who eventually serve. The judge noted a recent individual who had failed to be nominated after it surfaced during the hearings that he had been a member of the Broederbond, the secret Afrikaner association of white males organized to ensure Afrikaner dominance. The judge indicated that this was a valid criterion by which a judge could, and should, be evaluated. Unlike the Philippines, the Commission has not come under attack for judges' involvement in the selection process, and the Commission appears to be functioning more positively than in the Philippines.

Enhancing Legitimacy.

Three specific avenues have been pursued to enhance the legitimacy of the legal system. First, the Constitutional Court was created with full authority to resolve legal disputes. Second, a

strong affirmative action policy was initiated to diversify the judiciary and, in fact, the entire public service. Third, a system of lay assessors will provide members of the community at large a chance to participate directly in conflict resolution.

The Constitutional Court. The creation of the Constitutional Court was intended to enhance the legitimacy of the legal system in several ways. First, the Court provides a foundation for the supremacy of the constitution itself. All laws deemed in conflict with the Court are subject to the court's review and subsequent determination of validity. The concept of judicial review is important in enhancing the legitimacy of the courts in the eyes of the minority white population who favored specific protections of individual rights.

Moreover, the Court represents a new structure separate from the old legal system, which had been responsible for "interpreting and applying" the statutory edifice of apartheid. The Constitutional Court has the distinct advantage of having no apartheid "legal baggage." The creation of a new court allowed the new majority-led government, through the new Judicial Services Commission, with the appointment of the entire Constitutional Court, thus ensuring more liberal jurists than the current bench. This was critical in enhancing the black majority's perceptions of the judicial system's legitimacy. While one obvious avenue would have been to simply incorporate constitutional adjudication into the Appellate Division's existing jurisdiction, every Appeal Judge I spoke with¹⁹ asserted that the Constitutional Court was the direct result of the perceived illegitimacy of the Appeal Court. The new majority was unwilling to rest critical decisions with a bench comprised largely of conservative, white Afrikaners.

¹⁹Five sitting Judges of the Appellate Division were interviewed.

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

The Constitutional Court began hearing cases in 1995. It is comprised of a President, a Deputy President and nine other judges.²⁰ Clearly, one of the primary considerations in the appointments to the Court was the acceptability of the political ideologies of the judges to the current ruling majority. While politics has clearly played a role in judicial appointments in the past, for example during the National Party's packing of the courts in the 1950s, the appointment of individuals with little or no judicial background stood in stark contrast to recent practice and accentuated the political nature of the Constitutional Court itself. Indeed, in several interviews with current Appellate Division judges, each conceded that the creation of the Constitutional Court was clearly intended to remove political challenges under the new Constitution from the Appellate Division. The Appellate Division judges unanimously agreed that the Constitutional Court was the result of three circumstances. First, the Court was created from the desire to establish a new court outside the old "illegitimate" one. Second, the Court would provide the opportunity to immediately shape, through ideologically compatible appointments of an entire bench, the policy outcomes of judicial decisions. Third, it would increase the legitimacy of the legal system by the insertion of a

²⁰ Chapter 8 Section 167 of the 1996 Constitution

new final arbiter above the old apartheid structure, which would additionally, and many judges of the Appellate Division argued intentionally, reduce the stature and influence of the Appellate Division in particular.

Thus far, the decisions of the Constitutional Court have been respected, and implemented without overt efforts at undermining the Court's rulings. Indeed, in *S v. Makwanyane* (1996) the Court ruled that the death penalty violated the constitutional guarantees of life, equality, and dignity. The decision was met with intense opposition by a significant portion of the population, but was immediately implemented. The Constitutional Court is enjoying a honeymoon of sorts currently that is helping to establish its independence as well as its legitimacy.

Affirmative Action. The second avenue to increase the legitimacy of the legal system has been the use of affirmative action to increase the diversity and representativeness of the bench in terms of color and gender. The new Constitution asserts that every person will be treated equally before the law and prohibits discrimination in any form on the basis of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."²¹ However, the Constitution also provides that discrimination "is unfair unless it is established that the discrimination is fair."²² This provides tremendous judicial discretion in evaluating discrimination claims, particularly in relation to government affirmative action programs.

A massive program has been initiated by the government to rapidly increase the numbers of nonwhites in the public sector. Everyone interviewed, from professors of law, to Afrikaner public

²¹Chapter 2, Section 9, 1996 Constitution

²²Chapter 2, Section 9, 1996 Constitution

prosecutors and judges, to magistrates, attorneys, and advocates were all sympathetic to the need for affirmative action. Apartheid strictly prohibited the economic advancement of nonwhites, reserving skilled positions for whites and "allowing" nonwhite labor opportunities that enhanced the economic position of whites. Moreover, the so-called Bantu education programs prohibited the education of blacks beyond the minimal level to ensure they were capable of only non-skilled jobs (Beinart 1994).

Assessments of these affirmative action programs vary and often by the skin color of the evaluator. Without doubt, the program has been successful in diversifying the prosecutor's office, and to a lesser, but still significant extent, the bench. When interviewing a black prosecutor in the Witwatersrand Provincial Division of the Supreme Court in Johannesburg, I was given a positive impression of the capacity of nonwhites to handle the job, as well a positive assessment of gains in the prosecutor's office. In the first two post-apartheid years, the office went from being overwhelmingly white, to 50% black; women have achieved impressive gains as well. Subsequent discussions with a "more established and experienced" prosecutor were much less optimistic. The prosecutor was particularly critical of affirmative action, arguing that being a "transvestite, bushman with a clubbed foot" would greatly increase your chances of appointment. Moreover, it was asserted that the possibility for an Afrikaner male to advance in the Department of Justice, through either the courts or the prosecutor's office, is greatly diminished. However, in the Cape Provincial Division, discussions with judges, prosecutors, and magistrates were much more positive. While all individuals agreed that there were more senior, experienced white males who have been "passed over" in favor of less senior, experienced nonwhite, the focus remained on competence and trainability versus color. It was a common assertion in the Cape Provincial Division that the individuals appointed have all been capable and will assimilate easily into the judiciary. It should be noted that this reflects the

more liberal attitude prevalent throughout the Cape, both now and historically. Johannesburg, and the Transvaal generally, are more conservative and have been slower to implement affirmative action, whereas the Cape began several years before the official government policy to identify and train qualified individuals. It also should be noted that the Cape has generally been more tolerant of racial integration between the large Cape-coloured population²³ and whites. Coloureds have generally identified more closely with the white Afrikaners or the English than with blacks, and in fact their voting in alliance with these individuals allowed the National Party to retain control of the Cape in the 1994 elections.

Lay Assessors. A third avenue to increase the legitimacy of the legal system has been the introduction of "lay assessors." The South African legal system abandoned the jury system in the 1960s and created the assessor system. Trials are conducted in the presence of a single judge acting generally with two assessors. These individuals, also predominately white and male, are retired magistrates, advocates or attorneys who have a great deal of experience within the legal system. They assist the judge in assessing the facts of the case while the judge is responsible for the determination and application of the law. Lay assessors, by contrast, are lay persons from any number of backgrounds drawn directly from the community. They assess the evidence as well, as jurors do in the United States, with the judge ultimately determining the guilt or innocence according to the law. The assertion is that this will increase the link with the community and thus increase the legitimacy and representativeness of the courts. This is seen as a transitory measure necessary until the "apartheid leftovers" on the bench can be replaced.

²³The term "coloured" is used within South Africa to identify individuals of mixed-race, as opposed to the term "blacks" used to identify indigenous Africans. The term does not carry the derogatory history that it does in the United States.

There is a great deal of resistance to this concept at the Supreme Court and regional court levels. The judges believe it will simply increase their workload by requiring them to "educate" the assessors so that they can sufficiently assess the facts in the case. At the magistrates courts, at least within Cape Town, the use of lay assessors is already in place and working well, according to the Cape Town Chief Magistrate. There has certainly been less resistance to the lay assessors in the magistrates' courts. It should also be noted that judges at the Supreme Court level consider their caseload considerably more complex than that of judges in the magistrates courts, who handle the less difficult civil cases and less serious criminal cases.

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

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

First, I briefly will explore the similarities between the two transitions and then evaluate the differences. In both countries, the newly drafted constitution increased the power of the court on paper. Both established clearly the power of the courts to review national legislation and to declare null and void those deemed in conflict with the constitution. Both established a broad set of fundamental rights and made them justiciable. Both constitutions provided

judges with tenure and salary protection. Both established judicial commissions that would recommend appointees following public evaluations of the candidates.

Several important differences also exist. In South Africa, judges serve longer periods of time, particularly on the newly formed constitutional court. Justices of the Constitutional Court are appointed for non-renewable 12 year terms and must retire by the age of 70. Members of the Appellate Division, now known as the Supreme Court of Appeal, are still drawn from the lower appeals courts, but the justices of the Constitutional Court are drawn from a variety of legal and political elites. Thus South Africa's Constitutional Court has avoided the revolving door syndrome of the Philippines and has maintained stability in its membership. South Africa's court also does not sit in panels. At least eight justices must hear a case. This avoids the problems associated with both panel assignment and composition and has provided greater predictability and stability in the law. Moreover, the court decides fewer cases than the 1,500 or more decisions decided annually by the Philippine Supreme Court. While the Philippine Supreme Court certainly does not give full attention to all of the cases docketed, fully half are determined by formal opinion. The South African Court's jurisdiction is much narrower focusing only on questions of constitutionality. The lower appeal courts hear the broader disputes routinely decided by the Philippine justices. Thus, South Africa has created a division of labor. While this division is often more fiction than fact, it nonetheless eliminates routine appeal questions heard by the Supreme Court of Appeal.

While the Supreme Court of Appeal may rule on questions of constitutionality, these must be confirmed by the Constitutional Court to have the force of law. Placing the Constitutional Court outside the former apartheid system allows the Court to remain above the illegitimacy of the older legal system, while performing a "watchdog" function of sorts over it.

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

While these are not the only structural differences between the two courts, they are certainly among the most striking. Additionally, the informal context differs significantly between the two courts. The informal norms that have become so problematic are not part of the adopted norms for the Constitutional Court, or at least not at this point. The behavior of the Philippine Supreme Court's justices makes them an easier target for corruption accusations than the judges in South Africa.

Moreover, the democratization efforts in South Africa included a greater focus on the lower courts. For the Philippines, the greatest focus was in strengthening the Supreme Court and

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

Conclusion.

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

esteem in terms of training and deemed beyond corruption. While the judges were criticized for serving within an oppressive and racist regime, their qualifications and professionalism were beyond reproach.

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

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