

Judicial Deference to Legislative Delegation and Administrative Discretion in New Democracies: Recent Evidence from Poland, Taiwan, and South Africa

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Introduction

The tension between judicial control, legislative delegation, and administrative discretion is an ever-contested issue in administrative law. Many administrative law doctrines address this issue, either directly or implicitly, especially in the area of rulemaking. Whether approached from the perspective of common law *ultra vires* doctrine or from that of the continental *Rechtsstaat*, courts must ensure that an agency, in exercising its discretion, does not go beyond the scope of legislative delegation. Constitutional limits on delegation, in turn, go to the ultimately democratic nature of the system: only where the administrative body can claim to exercise authority flowing from a *constitutional* delegation of power from the legislature does that administrative body enjoy ultimate democratic legitimacy. However, as shown in the experience of Germany in interwar Europe in the twentieth century, overbroad delegations can pose a danger for democracy. The flood of broad enabling laws of the 1920s ultimately culminated in the Nazi's *Ermächtigungsgesetz*, or Enabling Act, of March 24, 1933, providing the legal foundation, if not the political and cultural cause, for the National-Socialist dictatorship (Lindseth 2004, 1341-71). As a consequence, the post-World War II German constitution clearly required the legislature to specify the “content, purpose, and extent” (“*Inhalt, Zweck und Ausmaß*”) of the legislative authorization in the statutes (Currie 1995, 126), as

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a means of preventing future legislative abdications.¹ This doctrine has become a constitutional paradigm for new democracies in dealing with the dilemma of legislative delegation and administrative rulemaking.

New democracies, the subject of this chapter, have usually suffered from the abuse of administrative power and excessive legislative delegation in the past. After democratization, these countries were understandably cautious about broad legislative delegations of rulemaking power to the executive branch, as well as about the exercise of unbounded administrative discretion. Some of the post-transitional countries have enshrined the postwar German constitutional principles into their own constitutions, as in Poland.² A more groundbreaking step can be seen in South Africa's attempt, in its 1996 Constitution, to constitutionalize the right to administrative justice, mandating that administrative action be reviewed by the court so as to ensure its lawfulness, reasonableness and procedural fairness.³ On the other hand, constitutional courts in some new democracies develop new jurisprudence to constrain the executive power. For example, the Council of Grand Justices in Taiwan frequently applies the "statutory reservation principle" (Prinzip des Gesetzesvorbehalt), a constitutional doctrine derived from Article 80(1) of the German Basic Law, in administrative cases. With enhanced legal institutions (administrative courts), rights-oriented legislation (Administrative Procedure Acts) and newly-adopted constitutional cannons (e.g. *Der Grundsatz der Bestimmtheit*), the judicial power in new democracies often asserts itself as a constraint on the executive power in order to prevent democratic breakdown during transition. Indeed, many of these courts have exercised extensive power over administrative policy-making in the last three decades (Tate and Vallinder 1996; Ginsburg 2003; Ginsburg & Chen 2008).

Nevertheless, what might intrigue scholars of comparative administrative law is the ambiguous trend in certain post-transitional countries toward what might be termed judicial self-restraint over both legislative delegation and administrative discretion.⁴ These courts seem to credit to the discretionary power of the executive branch to a sometimes surprising extent, given the recent experience with authoritarian rule. This paper explores evidence of this tendency in the cases of post-transitional Poland, Taiwan,

¹ In the following discussion, I use "the German style of intelligible principle" or simply "the intelligible principle" to refer to the German principle of determinacy "*Der Grundsatz der Bestimmtheit*" that flows from this constitutional requirement.

² Section 1, Article 92 of the 1997 Constitution of the Republic of Poland.

³ Article 33 of the 1996 Constitution of the Republic of South Africa.

⁴ By "post-transitional contexts" or "post-transitional countries", I refer to nascent democracies that have just transited from political regimes of communism, fascism, authoritarianism, military dictatorship, apartheid, genocide and massive racial conflicts etc and have already entered a relatively stable and enduring political condition which may enable these countries to initiate their state-building processes. I use this minimalist term to avoid the ambiguous notion of "democratic consolidation", since there is no stable criteria to judge whether a country has consolidated its democratic regime or not. A stage of "post-transition" starts when a country has been able to run popular election nationwide and a democratic constitution is in use.

and South Africa. All three countries experienced democratic transitions since the late 1980s. In the process, their constitutional courts have all struggled establish judicial supremacy over constitutional interpretation. However, between 2004 to 2006, a series of cases in these countries suggested that constitutional courts are prepared to defer to legislative decisions delegating broad amounts of regulatory power to the administrative sphere, as well as to administrative agencies for its day-to-day experience and expertise. By focusing on these three cases, this paper explore two questions: first, why constitutional courts in post-transitional countries display deferential attitude in administrative law cases? Second, what happened after its embrace of judicial deference?

I begin by examining each particular case in greater detail. The first two cases focus on the degree of deference owed a legislature in choosing to delegate broad regulatory power to administrators; the third one deals with judicial deference to administrative decision-making. The intensity of judicial deference escalates with the three cases. The first one, the Polish Constitutional Tribunal, presents a less deferential case among the three courts, though it did loosen its rigid standard for legislative delegation in the judgment. The strongest type of deference can be found in the South African Constitutional Court's judgment. After the case studies, I try to provide some explanations for the deferential turn, focusing on the historical heritage of administrative law from the authoritarian regime and the political function of the court in post-transitional democracies. I argue that judicial review of administrative action before democratization has bestowed the courts some credibility to retreat from judicial intervention. Meanwhile, desperate needs of political and socio-economic restructuring also press the courts to finetune their rigid control of administrative action. In so doing, the courts are responding to a greater challenge of democratic governance in post-transitional contexts: to what extent and in what way a court can participate in the process of state-building. Meanwhile, what is the reaction from political branches to the courts' engagement in policymaking? The backlashes seem to prompt the courts to employ procedural safeguard of administrative procedure as means to counterbalance the challenge from the administrations. Whether the proceduralization of policy dispute can cope with the demand of effective governance turns out to be another challenge for the functioning of democracy in these countries.

I. Poland: vacillating deference and the freedom of economic activity

The Polish Energy Law (*Prawo energetyczne*) of 1997 obliged energy companies to purchase electricity generated from renewable sources as well as “combined heat and power” (CHP) (Nilsson et al. 2006, 2269). In case a company did not comply with the purchase obligation, the Energy Regulatory Office (Urząd Regulacji Energetyki, URE) would ask the company to pay a “compensation fee.”⁵ On December 15, 2000, the

⁵ Article 9 (3) of the Energy Law stipulated that, “[T]he Minister of Economy shall, by way of a regulation, impose upon energy enterprises engaged in the trade in, or transmission and distribution of, electricity or

Minister of Economy issued a directive concerning the obligation to purchase energy from unconventional renewable resources. (Oniszk-Popławska 2003, 101) In fact, the EU also issued a directive regarding the promotion of renewable energy sources in 2001 (“2001 Directive”), which was based on its 1997 White Paper on renewable energy. (European Commission 1997)⁶ Although Poland was not a member state of the EU then, it was already in the process of negotiating its accession to the EU. It is therefore argued by scholars that Poland’s ambitious renewable-resource policy was a response to Poland’s bid for EU membership. (Wohlgemuth 2003, 112) Nevertheless, the Polish electricity industry was dominated largely by state-owned companies. It is reported that PSE (Polskie Sieci Elektroenergetyczne S.A.) played a leading role in the process of reform (Wohlgemuth 2003, 116-17). As a transmission system operator, PSE was also a state-owned company controlled by the Ministry of Treasury. It was also obliged to purchase electricity generated from renewable sources under the Polish Energy Law.

However, PSE did not comply with the requirement and was therefore charged a “compensation fee” by the URE. PSE then challenged the URE’s decision in the Regional Court for Competition and Consumer Protection in Warsaw, but the Regional Court ruled in favor of the agency. PSE then appealed the case to the Warsaw Court of Appeal, arguing that the purchase-quota requirement was unconstitutional because it violated the constitutionally protected freedom of economic activities. Article 22 of the 1997 Constitution provides: “Limitations upon the freedom of economic activity may be imposed only *by means of statute* and only for *important public reasons*” (emphasis added).

In June 2005, the Court of Appeal decided to stay the proceeding and referred the case to the Constitutional Tribunal on the question of the constitutionality of the authority granted under Article 9(3) of the Energy Law, which provided the legal basis of the obligation to purchase CHP. At issue in this case was whether the Energy Law could delegate the legislative power to the Ministry of Economy in Article 9 para. 3, since the purchase obligation might constitute a limitation upon the freedom of economic activity,

heat an obligation to purchase electricity from unconventional and renewable energy sources, as well as electricity co-generated with heat, and heat from unconventional and renewable sources; and specify the detailed scope of this obligation, including, taking account of the technology applied in energy generation, the size of the source and the method by which the costs of the purchase are to be reflected in tariffs.” The English translation of this clause is quoted from the English summary of the Constitutional Tribunal’s Judgment of 25th July 2006 P24/05.

⁶ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001. The EU’s 2001 Directive provided that all member states should set their national indicative targets for future energy consumption of renewable sources in the next ten years. The European Commission would thereafter evaluate whether these national quotas had been consistent with the “global indicative target” of 12% of gross national energy consumption by 2010.

which should only be imposed by law. The Tribunal heard the case and summoned the Attorney General, members of the Sejm, and the Minister of Economy to present their opinions before the Tribunal. It rendered its judgment on July 25, 2006.⁷

The PSE seemed to have a recent, favorable precedent on its side. In 2004, the Constitutional Tribunal had decided a very similar case in which legislation obliged fuel producers to add certain levels of bio-components to fuels and set forth the pecuniary punishment for non-compliance.⁸ The Ombudsman challenged the statute on the same grounds of freedom of economic activity. Although the Tribunal admitted that it was not competent to decide whether the policy of bio-energy was sound or reasonable, it held that the provisions in dispute were unconstitutional because they could not be justified on the ground of public interest and because they were not the least burdensome measure by which to achieve the goal of environmental protection. The Tribunal's judgment constituted a major set back to the government's bio-energy development agenda (Nilsson et al. 2006, 2268).

The case regarding the Energy Law, however, presented a narrower question of law. PSE argued that, because the purchase obligation restricted economic freedom, it needed to be specified in the statute, rather than in a directive issued by the Ministry of Economy. Bolstering the argument drawn from Article 22 of the constitution was the language of Article 31(3), which states: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute." Given its prior decision in the Bio-fuel case, the Tribunal could easily have held Article 9(3) of the Energy Law unconstitutional. Indeed, from its birth in 1986, the Constitutional Tribunal had applied a strict standard to cases involving delegated legislation (Brezewski and Garlicki 1995, 30). Whenever the executive branch took regulatory action that interfered with people's fundamental rights, the Tribunal had required that the regulation be based on express legislative delegation, whose scope and content should be clearly defined in statute.⁹

Notwithstanding its earlier decision in the Bio-fuel case, the Tribunal ruled for the Ministry of Economy in the Energy case. Citing several legal treatises on economic law, the Tribunal reasoned that the freedom of economic activity must be balanced against other constitutional values, like the security of the citizens as well as the principle of sustainable development (Article 5) and environmental protection (Article 74). The court

⁷ Judgment of 25th July 2006, OTK ZU no. 7A, entry 87, ref. P 24/05. Original document:

http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2006/P_24_05.pdf; English summary is available here:

http://www.trybunal.gov.pl/eng/summaries/documents/P_24_05_GB.pdf (Last access: April 16th 2009.)

⁸ Judgment of 21st April 2004, OTK ZU no. 4A, entry 31, ref. K 33/03. Original document:

http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2004/K_33_03.pdf; English summary is available here:

http://www.trybunal.gov.pl/eng/summaries/documents/K_33_03_GB.pdf (Last access: April 16th 2009.)

⁹ Judgment of 26th June 2001, OTK ZU no. 5, entry 122, ref. U 6/00, p. 8, original document:

(http://www.trybunal.gov.pl/OTK/teksty/otkpdf/2001/u_06_00.pdf).

further argued that although the language of Article 22 is very similar to that of Article 31(3), they are not identical. According to Article 31(3), any limitation on constitutional freedoms and rights must be imposed *only by statute* (*tylko w ustawie*). However, the limitation on freedom of economic activity, according to Article 22, should be imposed “*by means of statute*” (*w drodze ustawy*). According to the Tribunal’s explanation, the phrase “by means of statute” indicates a “limitation on freedom may be achieved by using statute. In the absence of statute, the construction of limitation cannot take place at all. Only a statute can legitimize limitations introduced by way of administrative directive issued thereunder.”¹⁰ In contrast, the Tribunal noted that “the term ‘only by statute’ represents the will of constitutional framers, which expressly excludes the [interpretive] possibility one can find in the term of ‘by means of statute’.”¹¹ The scope of the limitation should also be intelligible so that one can easily conceive of the limitation through statutory language. However, in the case of freedom of economic activity, Article 22 of the Constitution does not set the same requirement. In other words, “by means of statute” allows the legislature to delegate regulatory power to the executive in statute. Accordingly, the government can issue a directive to limit freedom of economic activity on the basis of statutory delegation.

The Constitutional Tribunal confirmed that the purchase obligation satisfied the criteria for public interest in that the decision reflected an effort to balance environmental development, energy security, and sustainable development, and further accorded with an earlier EU directive from 2001. The Tribunal also found that the law presented clear instructions essential to issuing an executive directive on the issue of purchase obligation.¹² In addition, Article 9(3) of the Energy Law required the Minister to consider the technology of energy generation, the size of the energy source, and the methods by which costs of purchase are to be reflected in tariffs. The Tribunal reasoned that, in terms of state-controlled markets like the energy industry, these legislative considerations had fulfilled constitutional requirements of “essential elements reservation.” Moreover, the Constitutional Tribunal indicated that “[i]t is up to the legislator to decide whether the delegation clauses should be more specific (detailed).”¹³ According to the Tribunal, it is the legislature’s job to evaluate whether it is possible and in accordance with constitutional understanding to specify the delegation, which would further shape the content of this regulation. As long as Article 9(3) covered the essential elements of obligation, it passed constitutional scrutiny.

II. Taiwan: dejudicialization of environmental regulation

¹⁰ Judgment of 25th July 2006, OTK ZU no. 7A, entry 87, ref. P 24/05, see supra note 35.

¹¹ Ibid.

¹² Ibid.

¹³ Id., “Do ustawodawcy należy rozstrzygnięcie, czy upoważnienie powinno być bardziej szczegółowe.”

Judicialization of governance is an emerging phenomenon in post-democratization Taiwan. Since its political liberalization in the late 1980s, the Council of Grand Justice (Taiwan's analogue to a "constitutional court") has worked the authoritarian state by recourse to the German concept of the *Rechtsstaat*, especially its component relating to legislative delegation. The Council's effort arguably culminated in its Interpretation No. 443 (1997)¹⁴, introducing the German doctrine known as *System des Abgestuften Vorbehalts* (literally, the "differentiated system of reservation" of power belonging to the legislature, which cannot be delegated). To some extent, the Council's full-fledged application of the *Rechtsstaat* in the realm of administrative law has facilitated Taiwan's democratic transition based upon the rule of law. (Chang 2001) However, twenty years after democratization, the Council began to articulate an approach of self-restraint in the judicial review of administrative action. The most important decision in this regard was its Interpretation No. 612 (2006),¹⁵ which gives more deference to the environmental agency's regulatory power.

Handed down five and a half years after Taiwan brought into effect a new Administrative Procedure Law, Interpretation No. 612 concerned governmental supervision over waste management companies. The threshold question was the constitutionality of the delegation of power contained in Article 21 of the Waste Disposal Act. This question in fact merged, however, with the more detailed question of how much deference the administrative actor should properly receive in the interpretation of gaps and ambiguities in the statute. Article 21 provided in pertinent part that, "the regulatory authority shall prescribe the regulations concerning the supervision of and assistance to public and private waste cleanup and disposal organs, as well as the qualifications of the specialized technical personnel." Mr. Hung, a technician in a cleanup company, whose license was revoked, brought the case to the Council challenging the administrative rule promulgated by the Environmental Protection Administration, which listed several conditions regarding the revocation of professional licenses. According to the rule, the illegal and undue operation of a waste disposal company constitutes the reason to revoke the company's operating license as well as the technician's professional license. Mr. Hung's company was found to have wrongfully operated in the process of waste disposal. As a consequence of the company's operations, toxic materials polluted the soil around the storage facility. Mr. Hung argued that he was not a manager at the factory and that, consequently, he should not bear the responsibility of the wrongful operations of the factory's managerial personnel. Mr. Hung cited the Council's decisions in Interpretation No. 313, 394, 402, 443, and 570, arguing that administrative rules which set limitations on freedoms and rights should have intelligible

¹⁴ Judicial Yuan, Constitutional Interpretation No. 443 (Dec. 26, 1997), English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p03_01.asp?expno=443

¹⁵ Judicial Yuan, Constitutional Interpretation No. 612 (June 12, 2007) (Taiwan); English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=612

legislative delegation.¹⁶ Nevertheless, the Council found that “although the said enabling provision did not specify the content and scope of the qualifications of the specialized technical personnel, it should be reasoned, based on construction of the law as a whole that the lawmakers’ intent was to delegate the power to the competent authority to decide [...].”

In arriving at this conclusion, the Council reconfirmed purposive interpretation it had articulated in an earlier case (Interpretation No. 538 of January 22, 2002)¹⁷, recognizing the need for deferring to administrative expertise in a modern state, especially in the arenas of environmental, technological, and health regulation, which are filled with uncertainty and risks. In the Council’s view, the Waste Disposal Act was designated to protect the health of citizens from unforeseen environmental pollution. Therefore, public interests serve as the main purpose of this legislation. Article 21 as the enabling clause should be construed in accordance with the legislative purpose. The Council thus regarded the existing mechanism of supervision provided in Article 21 has sufficiently satisfied the need of public interests because it could effectively control the waste disposal companies and deter potential law-breakers. Therefore, even though its past precedents indicated that Article 21 implicated a fundamental right (the “right to work,” in this case in the waste disposal field) and therefore, the regulatory power it enabled should belong within the “reserve” (*Vorbehalt*) that must be retained by the legislature, the Council held that the Legislative Yuan could delegate to the Environmental Protection Administration the power to revoke the technician’s professional licenses.

This seemingly trivial case inflamed a fierce debate among the justices. On the basis of textual analysis, Justice Liao Yi-nan and Justice Wang He-hsiung, the two specialists of administrative law on the bench, criticized the majority opinion for its confusion regarding delegated administrative rules. The two justices argued that by holding the *general delegation* under Article 21 of the Waste Disposal Act to be constitutional, the majority risked jeopardizing the well-established statutory reservation doctrine and the need, in effect, for an German-style “intelligible principle” (*Der Grundsatz der Bestimmtheit*) to guide the judiciary in the interpretation of the statute. According to their dissenting opinion, the rule in dispute infringed upon people’s right to work and went far beyond the limited function of general delegation. They seriously warned the majority that this interpretation essentially overruled the Council’s earlier approach (articulated in Interpretation No. 313 of February 1993)¹⁸ and that the current interpretation would

¹⁶ Mr. Hung’s Constitutional Petition (01-07-1994), see *supra* note 24, Constitutional Interpretation No. 612, pp. 71-77.

¹⁷ Judicial Yuan, Constitutional Interpretation No. 538 (January 22, 2002) (Taiwan), English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=538

¹⁸ Judicial Yuan, Constitutional Interpretation No. 313, February 12, 1993. English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=313

definitely invite severe criticism from legal academia.¹⁹ Meanwhile, Justice Hsu Yu-hsiou, a criminal law scholar, in her dissenting opinion, denounced this interpretation as “a judicial review without any review.” She disagreed with the majority’s purposive approach and criticized the majority’s use of public interest as writing a blank check for arbitrary and capricious administrative action. In her view, human-rights protection trumps any other principle of rule of law. Her libertarian conception of human rights called for a coherent interpretation based on the Council’s precedents.²⁰

In contrast, Justice Pong Fong-zhi and Justice Hsu Bi-hu, two experienced judges, argued in their concurring opinion that the Waste Disposal Act was in fact a policy choice made by the Legislative Yuan. The Legislative Yuan had deliberated collectively and had therefore decided to delegate to the EPA to adopt appropriate regulations regarding waste-disposal issues. The justices went on to argue that this general delegation was a *value choice* of the legislative branch that the Council should not displace with its own judgment. Meanwhile, pursuant to the proportionality test that the Council had previously adopted (in Interpretation No. 522 of March 9, 2001)²¹, the two justices argued that this rule’s negative effect is not greater than the public interest protected by the rule. This concurring opinion implied that the Council neither is better suited than the executive branch to make policy decisions nor has legitimate reasons to challenge the policy judgment of the legislative branch. In short, the concurrence argued that it is the political branches should be held accountable for their environmental policy.²²

Following Interpretation No. 612, the Council upheld six administrative rules in ten cases in respect of agencies’ discretion and policy choices (as of 2009).²³ This series of interpretations may mark the beginning of a new age in the judicial approach to the regulatory state in Taiwan, though the court also applies the proportionality test more and more frequently.²⁴ If this approach holds, the authority of the executive branch will gain

¹⁹ , Justice Liao’s and Wang’s Joint Dissenting Opinion, *supra* note 24, Constitutional Interpretation No. 612, pp. 31-40.

²⁰ Justice Hsu’s Dissenting Opinion, *supra* note 24, Constitutional Interpretation No. 612, pp. 40-71..

²¹ Judicial Yuan, Constitutional Interpretation No. 522, March 9, 2001, English translation is available at http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03_01.asp?expno=522

²² Justice Pong’s and Justice Hsu’s Joint Concurring Opinion, *supra* note 24, Constitutional Interpretation No. 612, pp. 6-31..

²³ The six constitutional cases include Constitutional Interpretation No. 614 (July 28, 2006), No. 615 (July 28, 2006), 628 (June 22, 2007), 629 (July 6, 2007), 643 (May 30, 2008), 648 (October 24, 2008). The unconstitutional cases include Constitutional Interpretation No. 619 (November 10, 2006), 636 (February 1, 2008), 638 (March 7, 2008), 658 (April 10, 2009). All these cases’ English translation are available at <http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p03.asp>

²⁴ Cheng-Yi Huang and David S. Law, “Proportionality review of administrative action in Japan, Korea, Taiwan, and China,” in Francesca Bignami and David Zaring eds., *Comparative Law and Regulation*, Edward Elgar, 2016.

more strength and the power relationship between the judiciary and the executive would significantly change. Administrative agency will be back on the stage of state-building, with the judiciary applying judicial review of reasonableness rather than that of textual and formalistic control over agency's rulemaking.

III. South Africa: Delivering transformation through judicial deference

Bato Star Fishing v. Minister of Environmental Affairs (“*Bato Star*”),²⁵ a 2004 decision of the South African Constitutional Court (“Constitutional Court”), is one of the most influential case in South African administrative law since this country's return to democracy in 1994.²⁶ The case concerns the regulatory policy over the deep-sea hake fishing industry, one of the most lucrative sectors of the South African fisheries. White South Africans had long dominated this capital-intensive business. After democratization, however, the Marine Living Resources Act (“MLRA”) of 1998 required the government to address the need to “restructure the fishing industry” so as to transform its historical imbalances. Under the Marine Act, the Fisheries Transformation Council (FTC) has launched into reallocation of fishing rights for fishers from previously disadvantaged communities. However, according to the Department of Environmental Affairs and Tourism (DEAT), “The FTC's first ever attempt to allocate hake longline fishing rights to predominantly black fishers and black owned fishing companies was set aside by South African courts due to various procedural flaws committed by the FTC. The FTC was also dogged by rumors and accusations of maladministration and corruption.” (Kleinschmidt et al. 2006, 3)

In the deep-sea sector, the number of rights holders rose from 29 in 1994 to 58 in 1999. (Japp 2001, 121-22) However, the years between 1998 and 2000 also witnessed the most turbulent days in the fishing industry. (Kleinschmidt et al 2006, 4) At that time, the total allowable catch was allocated on an annual basis to allow new entrants to join this industry, but this method destabilized capital investment and long-term projects for the deep-sea hake fisheries. The nature of deep-sea hake fisheries entails complex technology and financial investment, which is drastically different from the corresponding investment for labor-intensive inshore trawling. It is undisputed that the South African

²⁵ 2004 (4) SA 490 (CC).

²⁶ Hugh Corder once commented on *Bato Star*, “This is the most influential judgment since 1994 as regards the meaning to be given to review for reasonableness” (Corder 2006, 339).

deep-sea hake industry ran the risk of “becoming less and less internationally competitive” during the initial stage of transformation.²⁷

In 2000, the Minister of the DEAT abandoned the oft-criticized FTC and established a new branch of Marine and Coastal Management (MCM). The Deputy Director-General of the MCM announced in early 2001 that “the government would no longer allocate fishing rights on an annual basis.” (Kleinschmidt et al. 2006, 5-6) It then invited applications for commercial fishing rights across all sectors regarding specifically bids on four-year quota allocations. The department also issued policy guidelines regarding the allocations, declaring that “[t]he policy on transformation is broadly to reward those ex-rights holders who have performed and taken steps to transform and to admit suitable new HDP entrants that demonstrate both a capacity to catch, process and harvest the right applied for and a willingness to invest in the industry.”²⁸ More than five thousand applicants applied for the quota allocations, and overall the applications summed up to 1.1 million tonnes of hake per annum, more than nine times the total allowable catch.

To balance the need for industrial restructuring with stabilization, the department had turned down all applications from new entrants. The Chief Director of the MCM had then used the tonnage allocation in 2001 as the starting point and deducted five percent from each applicant’s original quota. These deducted tonnages were placed in an “equity pool” and distributed among quota-holders according to their scores in the comparative balancing assessment. According to the department, the assessment criteria included the degree of transformation, the degree of involvement and investment in the industry, past performance, legislative compliance, and degree of paper quota risk. In so doing, the department regarded itself had achieved redistribution by reducing a large portion of tonnages from the bigger companies and allotting these quotas to the smaller ones.²⁹

Two medium-sized “black empowerment” fishing companies brought their cases to challenge the government’s quota allocation for deep-sea hake fishing, focusing their challenge on the legislative purpose of MLRA.³⁰ They won in the Cape Provincial

²⁷ *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (1) (40/2003) [2003] ZASCA 47, para 18.

²⁸ 2004 (4) SA 490 (CC), para 12.

²⁹ (1) (40/2003) [2003] ZASCA 47, para 37.

³⁰ Bato Star entered the deep-sea hake fishery industry in 1999, with a moderate quota of 1,000 tonnes. It sought a new allocation for 12,000 tonnes in this four-year period. But it only got 856 tonnes. Dissatisfied with the result, Bato Star sought to appeal this decision to the Minister. After the appeal process, the

Division of the South African High Court but lost in the Supreme Court of Appeal. One of them, Bato Star Fishing (Pty) Ltd went on to appeal the case to the Constitutional Court. The Constitutional Court, however, deferred to the expertise of the Ministry of Environmental Affairs in its administration of the statutory scheme. Although lower courts had previously adopted an approach of self-restraint in an administrative context.³¹ *Bato Star* was the first instance in which the Constitutional Court clearly expressed a preference for judicial deference in such circumstances.

In *Bato Star*, Justice Kate O'Regan, writing for the court, confronted two central issues. The first was whether the Chief Director had misconstrued his legal obligations under the MLRA, namely in Section 2 (j) and Section 18 (5). The second was whether the Chief Director's decision was a reasonable one. Section 2 of the MLRA states the objectives and item (j) provides, "the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry."³²

department granted Bato Star 17 more tonnes, which made for a total of 873 tonnes. Phambili Fisheries (Pty) Ltd was another medium-size company completed a review application in the Cape Provincial Division of the South African High Court.

³¹ *Logbro Properties CC v. Bedderson NO and Others*, 2002 ZASCA 135. In fact, the Constitutional Court had previously issued some judgments mentioning the self-constrained role of the judiciary in a democratic government. Please see *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another*, 2002 (3) SA 265 (CC); *Du Plessis and Others v De Klerk and Another*, 1996 (3) SA 850 (CC); *S v Lawrence*, 1997 (4) SA 1176 (CC). These judgments have been cited by the Supreme Court of Appeal in *Phambili*, (1) (40/2003) [2003] ZASCA 47.

³² The other objectives under Section 2 are:

- “(a) The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;
- (b) the need to conserve marine living resources for both present and future generations;
- (c) the need to apply precautionary approaches in respect of the management and development of marine living resources;
- (d) the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;
- (e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;
- (f) the need to preserve marine biodiversity;
- (g) the need to minimise marine pollution;

Section 18 (5) provides that “In granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section 2, have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.” In dealing with the first issue, Justice O’Regan applied a pragmatic approach to the statutory interpretation. She did not regard the objectives stated in Section 2 as merely advisory or functioning like a policy guideline, as the Supreme Court of Appeal had done. Rather, she emphasized that the objective of transformation is informed by the Constitution and should be given legal effects. Therefore, while making his decision on quotas, the Chief Director had been “obliged to give special attention to the importance of redressing imbalances in the industry with the goal of achieving transformation in the industry.”³³ However, Justice O’Regan noted that there are other goals critical in the MLRA, such as environmental protection, which also served as constitutional commitments. Therefore, though she recognized that the statute stressed the need for transformation in the industry, she came to a conclusion that “there is no simple formula for transformation” and that “[t]he manner in which transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker.”³⁴

But the question remains: what should be the test to determine whether the Chief Director took into consideration these objectives? The test laid out by Justice O’Regan depends on practical examination of official records generated by the Director. She pointed out: “At the very least, some practical steps must be taken in the process of the fulfillment of these needs each time allocations are made if possible.”³⁵ It is held that “so long as the importance of the practical fulfillment of these needs is recognized and a court is satisfied that the importance of the practical fulfillment of sections 2 (j) and 18 (5) has been heeded, the decision will not be reviewable.”³⁶ Therefore, if the Chief Director could show that he had taken certain practical steps in relation to the objectives in the decision-making process, he would have fulfilled his obligation and thus had neither ignored nor misapplied the empowering statutes. After examining documents about policy guidelines, evaluation of applicants’ capacity, and the allocation process, Justice O’Regan concluded that the Chief Director had taken into consideration the topic of transformation while deciding quotas, so the first challenge could not succeed.

The court then turned to the even more difficult second question: what constitutes a reasonable administrative decision? Justice O’Regan found that this determination

(h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;

(i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law”

³³ 2004 (4) SA 490 (CC), para 34.

³⁴ *Id.*, para 35.

³⁵ *Id.*, para 40.

³⁶ *Ibid.*

“will depend on the circumstances of each case.” Justice O’Regan enumerated several factors to be considered: “the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.”³⁷ However, except for reason—given, all these factors are second-order inquiries, in that they facilitate the characterization of the decision-making, but provide no criteria to evaluate whether the reasons of the decision itself are in accordance with constitutional values. In responding to the key issue about reasonableness, Justice O’Regan remained vigilantly faithful to her judgment that “[t]he court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”³⁸

Though approving the idea of judicial deference, Justice O’Regan addressed this issue from an institutional perspective: “[T]he need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.”³⁹ In her opinion, the question of deference is a question of law that the court must confront to demarcate the scope of its decision-making power. Furthermore, she argued:

[I]t is clear from this that Parliament intended to confer a discretion upon the relevant decision-maker to make a decision in the light of all the relevant factors. That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium.⁴⁰

In a difficult policy issue like the allocation of hake quotas, which involves technological knowledge, multiple political values, and administrative expertise, the Justice reasoned, “If we are satisfied that the Chief Director did take into account all the factors, struck a reasonable equilibrium between them and selected reasonable means to pursue the identified legislative goal in the light of the facts before him,” the court should give due respect to the agency’s decision and not interfere with the administrative decision-making process.⁴¹ In this vein, Justice O’Regan reasoned that it is not the courts’ job to decide whether an increase of twenty-five percent or forty percent will give effect to the purpose of transformation specified in Section 2 (j) and five percent will not. Instead, from Justice O’Regan’s perspective, the courts should simply make sure that by adopting five percent, the Chief Director acted in a reasonable manner. The Court concluded that the Chief Director had taken into account the need for restructuring the deep-sea hake industry after

³⁷ Id., para 45.

³⁸ Ibid.

³⁹ Id., para 46.

⁴⁰ Id., para 49.

⁴¹ Id., para 50.

examining the policy guidelines, the screening reports, and the final decisions issued by the department.

IV. Is there really a deferential turn?

The three cases happened during 2004 and 2007, roughly the first and the second decades after democratization. However, since 2009, we have seen the rise of “new authoritarianism” coming to threaten the deepening of democracy in these countries. The most dramatic move might be done by the Polish Sejm, passing the amendment to the Act of Constitutional Tribunal, which sets limitation on its composition and voting rules.⁴² Meanwhile, the Constitutional Tribunal also tries to set back the ruling party’s agenda by declaring the amendment unconstitutional. The Sejm did not publish this judgment, which leads to a constitutional showdown inviting concerns from the European Commission and the United States.⁴³ A similar episode also happened in South Africa, when President Jacob Zuma commented on the Constitutional Court’s split decisions on hard cases. According to President Zuma, the court’s dissenting opinions show the dysfunction of the Constitutional Court, which requires further reform on the court.⁴⁴ However, President Zuma was embattled in scandals and the constitutional court ruled that he did not uphold the constitution by refusing to repay the government for his spending on house improvement after the public protector’s report in 2014.⁴⁵ Although he survived an impeachment in the National Assembly, he is under tremendous public pressure in South Africa.⁴⁶ The fear of imperial executive also occurs to Taiwan. After the landslide victory in 2008, the longtime authoritarian party, KMT, reclaimed its power in Taiwan. However, President Ma Ying-jeou was criticized as abusing his political power to “fire” the speaker of the Legislative Yuan in 2013 and manipulated legislative agenda to pass the free trade agreement with China. His pro-China policy ignited furious

⁴² Poland’s Constitutional Crisis Deepens After Top Court Annuls Law, *The Wall Street Journal*, March 9, 2016.

⁴³ See Anna Sledzinska-Simon, Paradoxes of Constitutionalisation: Lessons from Poland, *VerBlog*, 2016/03/30, (online source:); Tomasz Tadeusz Koncewicz, The Polish Constitutional Crisis and “Politics of Paranoia”, *VerBlog*, 2016/03/11, (online source:)

⁴⁴ Cora Hoexter, The Importance of Dissent: Two Judgments in Administrative Law, *Acta Juridica*, 2015, p. 121.

⁴⁵ The case was decided on March 31, 2016. The court’s judgment can be accessed here: <http://cdn.24.co.za/files/Cms/General/d/3834/24efe59744c642a1a02360235f4d026b.pdf>

⁴⁶ Simon Allison, South Africa’s “Teflon president” survives another day, but scandals will stick eventually, *The Guardian*, April 6, 2016, online source: <http://www.theguardian.com/world/2016/apr/06/jacob-zuma-south-africa-anc-nkandla-impeachment>

public outcry which resulted in a 23-days occupation in the Legislative Yuan. Although President Ma did not face any impeachment or constitutional condemnation, his administration was entangled with various litigations in policy domains, among which the most notable one is about environmental impact assessment. After losing several cases in the Supreme Administrative Court, the Environmental Protection Agency even bought an advertisement criticizing the judgments by administrative courts as “inefficient, meaningless and deleterious to the EIA system.”⁴⁷ Many has worried that the rule of law was in danger under Ma’s administration.

Against this backdrop, how did the court respond to policy controversy in these new democracies? In 2013, the constitutional court in Taiwan weighed in to strike down two critical provisions in the Urban Renewal Act.⁴⁸ Like many megacities in the world, Taipei suffers from the scarcity of land resource. Developers and construction companies allied with legislators to pass the Urban Renewal Act which allows the minority of a community, only 10% of the residence to initiate the process of renewal application. The renewal project was often associated with fierce fight among residence and forceful eviction by the municipal government brought more social advocacy groups to participate in the dispute.⁴⁹ The court carefully carved out a novel theory of “due process of administrative procedure” and bypassed the arguments of private ownership or the group rights to the better living environment in this case. However, it also upheld two provisions, since they passed the test of proportionality. The key argument in this highly regarded judgment is the municipal government shall provide the opportunity of hearings in public which “allow the interested parties to attend the hearing, present their statements and conduct oral argument” and the government should “take the entire records of the hearing into consideration, explain its rationale [...]” The court construed its theory of “due process of administrative procedure” from the constitutional requirement of “due process of law.” It mandates the executive branch, either in national level or in local level, to follow the due process requirements, including holding hearings, giving notices to the stakeholders, collecting arguments and evidence, and making decisions based on records. The court has elevated procedural justice of administrative

⁴⁷ Cheng-Yi Huang, “Environmental Decision-making, Judicial Review and the Reasonableness of Administrative Action: Judicial Control of Discretionary Power in the Process of Environmental Impact Evaluation in Taiwa and the United States,” in Cheng-Yi Huang ed., *2010 Administrative Regulation and Judicial Remedies*, pp. , 321-432, Taipei: Institutum Iurisprudentiae, Academia Sinica, 2011. [in Chinese] Also see June Tsai, Rule of law endangered in development dispute, Taiwan Today, online source: <http://taiwantoday.tw/fp.asp?xItem=95504&CtNode=436>

⁴⁸ Interpretation No. 709. For English translation of this opinion: http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=709

⁴⁹ <http://www.taipeitimes.com/News/taiwan/archives/2012/03/16/2003527927>

action from statutory requirements (i.e. the Taiwanese Administrative Procedure Act) to constitutional requirement (due process of administrative procedure).

The growing importance of procedural justice can be found not only in Taiwan but also in South Africa. In *Joseph v. City of Johannesburg*, the South African constitutional court shifted from its reasonableness test (more deferential) to the requirement of procedural fairness in reviewing the decision of disconnecting electricity service to Ennerdale Mansion, a residential building in a low-income community in Johannesburg.⁵⁰ Although the tenants of Ennerdale Mansion had paid utility fee to their landlord, Thomas Nel, Mr. Nel had owed the City Power up to R.400,000. The City Power disconnected the power supply without any prior notice to the residents and the disconnection continued for more than twelve months. Many tenants had to move out from the building because the living condition deteriorates soon after the termination of electricity supply.⁵¹ The City Power rejected the tenants' request for reconnecting the electricity supply and claimed that there was no contractual relation between the tenants and the company. The High Court found the applicants could not established *prima facie* right and they were not "customers" in any sense under the Credit Control By-laws so the City Power has no obligation to deliver pre-determination notice to the tenants.⁵² The Constitutional Court first discussed whether or not the termination was an administrative action according to section 3 of PAJA. Justice Thembile Skweyiya wrote for the court, indicating that since the decision would "materially, adversely affect" the applicants, it certainly had "direct, external legal effect" on the applicants and should be recognized as an administrative action.⁵³ However, the court rejected the applicants' arguments on rights to adequate housing and human dignity. It also bypassed the reasonableness test employed in *Bato Star*. It relied on Section 3 (1) of PAJA to construe applicants' right to procedurally fair administrative action. In the court's view, to achieve administrative justice enshrined in the Constitution, administrator has to fulfill the requirements of Section 3(2)(b) of PAJA: to provide adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations. The court argues, the main function of procedural fairness is "not only for the protection of citizens' rights but also to facilitate trust in the public administration and in our participatory democracy."⁵⁴ Therefore, the tenants did enjoy the "public law right" to receive electricity supply as the basic municipal service. While disconnecting the supply, the City Power was actually

⁵⁰ 2010 (4) SA 55 (CC).

⁵¹ Jackie Dugard, "Urban basic services: rights, reality and resistance," in Malcolm Langford et al eds., *Socio-economic Rights in South Africa: Symbols or substance?* pp. 297-298, Cambridge University Press, 2014.

⁵² 2010 (4) SA 55 (CC), para 10, 11.

⁵³ Para 27-31.

⁵⁴ Para 46.

obliged to provide them procedural fairness “before taking decision which would materially and adversely affect that right.”

The South African Constitutional Court also responded to the respondent’s argument about administrative efficiency and capacity. It cited a judgment done in 1999, “[a]s a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly.”⁵⁵ The court regarded a notice as an instrument which, “remains open to users to approach City Power to challenge the proposed termination or to tender appropriate arrangements to pay off arrears.”⁵⁶ It is a way to engage citizens in the process of decision-making guaranteed in the constitution as the means to transform this country. It would not impede the government’s ability or bring too much workload to it. In other words, procedural fairness is the core value of South African constitution to promote public trust in the government.

The contextual reasonableness test developed in *Bato Star* has been widely applied in socio-economic rights cases. Some have argued that this is a case-by-case standard, which gives the judges too much discretionary power and lacks of substance.⁵⁷ The court in *Joseph* turns to procedural fairness emphasizing the process of decision-making should be more transparent and participatory. Procedural requirement is more predictable than the judge-made standard of reasonableness. However, proceduralization of policy disputes might let the administrator get away from reason-giving and making any substantive arguments, but simply follow the enumerated factors of procedural fairness (like notice-and-comment or hearings). Does it improve the quality of administrative decision or merely lessen the burden of policymakers? Both due process of administrative procedure (Taiwan) and procedural fairness (South Africa) represent a new model of judicial control in response to self-aggrandizing executive power. By invoking procedural safeguard, the court would prefer to adopt a more rule-like adjudication, reducing the room for contextual rationality as well as showing less deferential to the government.

V. Conclusion: Why do post-transitional courts turn deferential?

⁵⁵ Para 62, *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC), at para 41.

⁵⁶ Para 63.

⁵⁷ Geo Quinot and Sandra Liebenberg, “Narrowing the Band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa,” 2011(3) Stellenbosch Law Review 640, 648-652.

In the first two cases (Poland and Taiwan), the constitutional courts deferred to the legislature rather than to the executive. However, in the third case (South Africa), it is clear that the constitutional court deferred to the executive branch. Justice O'Regan elaborated a functional approach to judicial deference in her opinion, which recognizes the competency of the executive branch under the framework of separation of powers. Nevertheless, Justice O'Regan also emphasized Parliament's intent while explaining why the executive has the power to make decisions.⁵⁸ She attributed the question of deference as a question of law, which depends on the purpose of the legislation. In this regard, the distinction between the first two cases and the third one is not so apparent because the courts in Poland and Taiwan also employed legislative intent as the ground to justify the constitutionality of administrative rules delegated by statutes whose languages were vague and broad (i.e. Article 9 (3) of the Polish Energy Law and Article 21 of Taiwan's Waste Disposal Act.) Since legislative intent or purpose usually is uncertain or vague, the courts can exert its power over policymaking by its construction of the "legislative intent." From this viewpoint, these courts do not lose their power to the executive branch by deferential judgments.

However, courts in new democracies are used to expand their power by performing active roles in confining the executive power. People might regard deferential judgments as the courts' failure to safeguard constitutional value. The emergence of deferential judgments is indeed a product of a confidential court that begins to reconsider its role in the post-transitional politics. They are not afraid of being criticized as executive-minded or as rubber-stamp of the government. They do not regard a deferential judgment would lead to the wane of their power. Rather, as seen in the three cases, the courts have confirmed the vital role of administrative agencies in the regulatory process in post-transitional societies. Why the courts are so confident in rendering deferential judgments? To answer this question, one has to examine the development of judicial review of administrative action in these countries.

First of all, all three countries under review have established judicial authority in the area of administrative law before democratization. In 1980, the Polish Parliament established the High Administrative Court. (Brezezinski 1993, 153, 172) Before the establishment of the Constitutional Tribunal in 1986, the High Administrative Court played a critical role in controlling governmental action. Some of its judgments had laid down the foundation for the Constitutional Tribunal to establish its jurisdiction over administrative power.⁵⁹

⁵⁸ 2004 (4) SA 490 (CC), para 49.

⁵⁹ According to Mark Brzezinski's interview, Hubert Izdebski, a leading Polish legal historian at the University of Warsaw School of Law, held that the High Administrative Court "developed an area of

Later, in 1986, the Constitutional Tribunal came into operation, which was the first of its kind in the former Communist bloc. In Taiwan, the Council of Grand Justices reclaimed its constitutional power stage by stage in the mid-1980s. (Ginsburg 2003, 140-42) To expand its jurisdiction, the court first struck down administrative actions, especially those in the field of tax administration, so that it would not annoy the strongman. (Chang 2001, 290-305) With this pattern in mind, the court gradually built a series of judicial criteria by which it could examine the constitutionality of administrative rules since the early days of democratization. In pre-democratic South Africa, the judiciary was not always timid in confronting the apartheid regime. (Baxter 1984, 329) Though they upheld apartheid legislation in cases like *Lockhat*, which recognized the Group Area Act as a legitimate “colossal social experiment.”⁶⁰ Nevertheless, they also overruled racially discriminatory administrative decisions in cases like *Komani* and *Rikhoto*.⁶¹ As Haysom and Plasket pointed out, “One of the peculiar features of South African society is that the courts allow an impoverished black employee to call his or her white employer to account, and a voteless resident to summon a white cabinet minister before court.” (Haysom 1998, 307) The pre-democratic jurisprudence of these courts had engendered not only the court’s authority but also popular trust in the judicial system. Without the historical heritage of trust in the judiciary, the courts may not have the leverage to render deferential judgments.

Second, the courts have to respond to the epidemic of government failure plaguing these post-transitional countries. As Jon Elster and his colleagues argued, post-Communist countries in Central and Eastern Europe were usually left with institutionally weak governments after democratization. (Elster et al. 1998) This is also true in South Africa. Meanwhile, the fierce battles in elections would intensify the antagonism among political parties, which turns out to ossify the everyday administration, like the case of Taiwan. By their celebrated metaphor, Elster and his colleague described state-building in these nascent democracies as “building a ship in the open sea” from the wreckages of former authoritarian regimes. (Elster et al. 1998, 27)

However, the courts’ pre-democratic jurisprudence often emphasized the formality of statutory delegation as a pivot from which to strike down administrative regulations and decisions. In addition, the courts used to find its justifications in implicit constitutional principles like the “democratic state based on the rule of law” doctrine in Poland or the adopted *Rechtsstaat* doctrine in Taiwan. The doctrines were treated as given without any

legality in communist Poland, creating a gateway for democratic institutions.” (Brezewski and Garlicki, 1995: 21.)

⁶⁰ *Minister of the Interior v Lockhat*, 1961 (2) SA 587 (A)

⁶¹ *Komani NO v Bantu Affairs Administration Board, Peninsula Area*, 1980 (4) SA 448 (A); *Oos-Randse Administrasieraad en ’n ander v Rikhoto*, 1983 (3) SA 595 (A).

reasoning from the local contexts. Hence, there was a judicial tendency of detaching substantive justification from legal reasoning in these new democracies. In fact, this technical interpretation prevented the court from intimidating the authoritarian party in the past. After democratization, this approach also helped the court to shape its professional image as a neutral, nonpolitical third-party arbiter in the fragmented politics. However, with the emphasis on formality of statutory delegation, an activist court might paralyze the state-building of new democracies. For example, after the adoption of the 1997 constitution in South Africa, a prominent administrative law professor, Cora Hoexter, assailed “a highly interventionist or ‘red-light’ model of judicial review,” which has been embraced by anti-apartheid liberal lawyers for a long time, has impeded the well-functioning of the democratic administration. (Hoexter 2000, 488)

Fears of an abusive executive power are popular in transitional societies, but they do not guarantee a quality life people expect to lead in a well-functioning democracy. Stringent judicial scrutiny of administrative action might hinder a healthy political process of policymaking. By mechanical application of legal doctrines, this situation would foster only a legal culture opposed to reason and argumentation. However, these courts, at least in South Africa and Taiwan, have shown some changes after two decades of democratization. The court would like to keep the administration more competent and efficient on the one hand, but it would also disavow executive tyranny that threatens the very fundamental value of democratic constitution. Therefore, the courts put more emphasis on the procedural requirement as a threshold of rational administration. However, from the experience of the United States, the court might not be able to review all the records and evidence produced in accordance with procedural requirements. Thus, it might turn out that the government could follow procedural requirement without any substantive reason-giving in the process of decision-making. More participation does not guarantee better decisions. Nevertheless, one can easily see that procedural fairness is a convenient and practical tool for the court to counteract the government’s abuse of power. If the court applies this tool more frequently and vigorously, these new democracies might fall back to the procedural formalism occurred during final days of the authoritarian state. Judicial self-restraint might become a synonym of executive-minded court again. In fact, a self-restraining court does not mean to retreat from effectively controlling the state power. Rather, the respect for competency under constitutional structure is expected to enhance the capacity of the administrators and effectuate an institutionally capable government. Through the stories of Poland, Taiwan and South Africa, a self-restraining court may release the executive power from the anachronic fears and reinvigorate the dynamic interaction among different political actors. Nevertheless, political dynamics might bring the pendulum back to the judicial formalism again. Whether judicial deference is an unexpected surprise or an incremental reform responding to the competing needs of state-building in post-transitional democracies still requires further studies and observation.

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