27 Judicial deference to legislative delegation and administrative discretion in new democracies: recent evidence from Poland, Taiwan, and South Africa

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The tension between judicial control, legislative delegation, and administrative discretion is an ever-contested issue in administrative law. Many administrative law doctrines address this question, 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 vague 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 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

* This chapter is a much condensed version of a set of case studies examined in my JSD dissertation, 'Judicial Deference and Democratic Governance in Nascent Democracies: Self-restraining Courts in Post-Transitional South Africa, Taiwan, and Poland' (University of Chicago, 2009). For further analysis of these cases and their implications in post-transitional democratic politics, please refer to the dissertation. I would like to thank Susan Rose-Ackerman, Peter Lindseth, Tom Ginsburg, Cass R. Sunstein, Eric Posner, John Comaroff and Daphne Barak-Erez for their valuable comments and suggestions on previous drafts. The pagination of the constitutional judgment of the Polish Constitutional Tribunal refers to online publication of the *Journal of Constitutional Judgments*, available at: http://www.trybunal.gov.pl/wydawn/wyd_TK.htm. Tytus Mikolajczak helped with the English translation of Polish judgments.

[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.

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 elevate the right to administrative justice to the level of a constitutional requirement, 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 have developed 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 (for example, the German style of 'intelligible principle' requirement, known as *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 policymaking in the last two decades (Tate and Vallinder 1996, Ginsburg 2003, Ginsburg and Chen 2008).

Nevertheless, what might intrigue scholars of comparative administrative law is the recent trend in certain post-transitional countries toward a kind of judicial self–restraint over both legislative delegation and administrative discretion.[4] These courts seem to credit the discretionary power of the executive branch to a sometimes surprising extent, given the recent experience with authoritarian rule. This chapter explores evidence of this recent tendency in the cases of post-transitional Poland, Taiwan, and South Africa. All three countries experienced democratic transitions since the late 1980s. In the process, their constitutional courts have all struggled to establish judicial supremacy over constitutional interpretation. However, between 2004 and 2006, a series of cases in these countries suggest 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 claiming expertise in the exercise of that power. By focusing on these three cases, this chapter addresses a puzzle: why have constitutional courts in post-transitional countries exhibited increasing deference in administrative law cases over the last several years?

I begin by examining each particular case in greater detail. The first two cases focus

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[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 recently shifted 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 criterion 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 elections nationwide and a democratic constitution is in use.

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 over 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 discussed. The strongest deference can be seen in the South African Constitutional Court's performance, which expressly addresses the merits of judicial deference and fully upholds the agency's policy choice. After the case studies, I try to provide some tentative explanations for the deferential turn, focusing on the historical heritage of administrative law from the authoritarian regime and the political function of courts in post-transitional democracies. I argue that judicial review of administrative action before democratization bestowed on courts some credibility to retreat from judicial intervention. Meanwhile, the needs of political and socio-economic restructuring also prompted courts to refine their degree of control over administrative action. The courts were, in effect, responding to a greater challenge: defining the extent and manner of their participation in the process of democratic governance in post-transitional contexts.

1. 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). If 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 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 at that time, it was already in the process of negotiating its accession. Scholars therefore argue that Poland's ambitious renewable-resource policy was a response to Poland's bid for EU membership (Wohlgemuth 2003 and Wojtkowska-Łodej: 112). Nevertheless, the Polish electricity industry was dominated largely by state-owned companies. One such company, PSE (Polskie Sieci Elektroenergetyczne S.A.), in fact played a leading role in the process of

[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 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'. This translation is taken from the English summary of the Constitutional Tribunal's Judgment of July 25, 2006, p. 24/05.

[6] Directive 2001/77/EC of the European Parliament and of the Council of September 27, 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 percent of gross national energy consumption by 2010.

reform (Wohlgemuth and Wojtkowska-Łodej 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 for the obligation to purchase CHP. At issue in this case was whether Article 9(3) of the Energy Law was a constitutional delegation of the legislative power to the Ministry of Economy in view of the fact that the purchase obligation might constitute a limitation upon the freedom of economic activity, which seemingly could only be imposed directly by statute. The Tribunal heard the case and summoned the Attorney General, members of the Sejm (the national parliament), 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 had found 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 setback 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.

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[7] Judgment of July 25, 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 available at: http://www.trybunal.gov.pl/eng/summaries/documents/P_24_05_GB.pdf (last accessed: April 16, 2009.)

[8] Judgment of April 21, 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 available at: http://www.trybunal.gov.pl/eng/summaries/documents/K_33_03_GB.pdf (last accessed April 16, 2009.)

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) unconstitutional. Indeed, from its birth in 1986, the Constitutional Tribunal had applied a strict standard to cases involving delegated legislation (Brezezinski 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 energy security, the principle of sustainable development (Article 5), as well as environmental protection (Article 74). The court 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 parliament to delegate regulatory power to the executive via legislation. 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

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[9] Judgment of June 26, 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).

[10] Judgment of July 25, 2006, OTK ZU no. 7A, entry 87, ref. p. 24/05, see supra note 7.

[11] Ibid.

[12] Ibid.

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.

2. Taiwan: dejudicialization of environmental regulation

Judicialization of governance is an emerging phenomenon in post-democratization Taiwan. Since its political liberalization in the early 1980s, the Council of Grand Justices (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, however, in fact merged 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'. A technician in a cleanup company whose license was revoked, Mr Hung, 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

[13] Ibid., 'Do ustawodawcy należy rozstrzygnięcie, czy upoważnienie powinno być bardziej szczegółowe'.

[14] Judicial Yuan, Constitutional Interpretation No. 443 (December. 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.

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, leading to toxic materials polluting 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 be based on a clear 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 the approach of purposive interpretation that it had articulated in an earlier case (Interpretation No. 538 of January 22, 2002).[17] This case had recognized the need to defer to administrative expertise in a modern state, especially in the arenas of environmental, technological, and health regulation, where uncertainty and risks are high. In the Council's view, the Waste Disposal Act was designed to protect the health of citizens from unforeseen environmental pollution. Therefore, the public interest constituted the main purpose of this legislation. The enabling clause in Article 21 should therefore be construed in accordance with the legislative purpose. The Council thus regarded the existing mechanism of supervision provided in Article 21 as sufficiently satisfying the need of protecting the public interest because its aim was control of waste disposal companies and the deterrence of 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 authorized 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 a German-style 'intelligible principle' (*der Grundsatz der Bestimmtheit*)[18] to guide the judiciary in the interpretation of the statute. According to their dissenting opinion, the rule in dispute infringed upon the 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

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[16] Mr. Hung's Constitutional Petition (January 7, 1994), see supra note 15, Constitutional Interpretation No. 612, pp. 71–7.

[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] See supra note 7.

Interpretation No. 313 of February 1993)[19] and that the current interpretation would definitely invite severe criticism from legal academia.[20] 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.[21]

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 authorize the Environmental Protection Agency 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),[22] 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 that should be held accountable for their environmental policy.[23]

Following Interpretation No. 612, the Council upheld six administrative rules in ten cases in respect of agencies' discretion and policy choices (as of 2009).[24] This series of interpretations may mark the beginning of a new age in the judicial approach to the regulatory state in Taiwan, though at this point it is hard to predict because the transformation is ongoing. If this approach holds, the authority of the executive branch will gain more strength and the power relationship between the judiciary and the executive would significantly change. There would be a reconfiguration of state power, which would bring administrative authority back on the stage of state-building, with the judiciary applying

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[19] 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.

[20] Justice Liao's and Wang's Joint Dissenting Opinion, supra note 16, Constitutional Interpretation No. 612, pp. 31–40.

[21] Justice Hsu's Dissenting Opinion, supra note 15, Constitutional Interpretation No. 612, pp. 40–71.

[22] 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.

[23] Justice Pong's and Justice Hsu's Joint Concurring Opinion, supra note 15, Constitutional Interpretation No. 612, pp. 6–31.

[24] 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.

judicial review of reasonableness rather than that of textual and formalistic control over an agency's rulemaking. A new paradigm of administrative decision-making grounded on judicial deference would replace the rights-oriented paradigm that took root in the aftermath of democratization.

3. 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 cases in South African administrative law since that country's return to democracy in 1994.[26] The case concerns regulatory policy with regard to 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. Pursuant to the MLRA, the Fisheries Transformation Council (FTC) has initiated a program to reallocate fishing rights for the benefit of previously disadvantaged communities. However, as summarized later by Horst Kleinschmidt, the Deputy Director-General of the Marine and Coastal Management: '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: 121–2). 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 deep-sea hake industry ran the risk of 'becoming less and less internationally competitive' during the initial stage of transformation.[27]

In 2000, the Department of Environmental Affairs and Tourism (DEAT) disbanded 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

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[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).

[27] *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (1) (40/2003) [2003] ZASCA 47, 16 May 2003, para 18.

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 5,000 applicants applied for the quota allocations, and overall the applications would entail a harvest of up to 1.1 million tons of hake per annum, more than nine times the total allowable catch.

To balance the need for industrial restructuring with stabilization, the department turned down all applications from new entrants. The Chief Director of the MCM then used the tonnage allocation in 2001 as the starting point and deducted 5 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 as having achieved redistribution mandated by the MLRA 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 Division of the South African High Court, but lost in the Supreme Court of Appeal. One of them, Bato Star Fishing (Pty) Ltd, then appealed 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 Sections 2(j) and 18(5). The second was whether the Chief Director's decision was reasonable.

Section 2(j), which is contained in the section of the MLRA setting forth legislative

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[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 tons. It sought a new allocation for 12,000 tons in this four-year period. But it only got 856 tons. Dissatisfied with the result, Bato Star sought to appeal this decision to the Minister. After the appeal process, the department granted Bato Star 17 more tons, which made for a total of 873 tons. Phambili Fisheries (Pty) Ltd was another medium-sized company that 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 *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another* (1) (40/2003) [2003] ZASCA 47, May 16, 2003.

objectives, points to 'the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry'.[32] Section 18(5) further specifies that, '[i]n 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 took a pragmatic approach to the interpretation of the statute. 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 effect. Therefore, while making his decision on quotas, the Chief Director was '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 corresponded to 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 statutory objectives? The test laid out by Justice O'Regan focused 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)

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[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;
(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] Ibid, para 35.

[35] Ibid, para 40.

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 the policy guidelines, the 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 in the application of these objectives? Justice O'Regan found that this determination '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-giving, 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 view 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

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36 Ibid.
37 Ibid, para 45.
38 Ibid.
39 Ibid, para 46.
40 Ibid, para 49.
41 Ibid, para 50.

to decide whether an increase of 25 percent or 40 percent will give effect to the purpose of transformation specified in Section 2(j) and 5 percent will not. Instead, from Justice O'Regan's perspective, the courts should simply make sure that by adopting 5 percent, the Chief Director acted in a reasonable manner in light of the statutory objectives. The Court concluded that the Chief Director had taken into account the need to restructure the deep-sea hake industry after examining the policy guidelines, the screening reports, and the final decisions issued by the department.

4. Conclusion

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 that the executive has the power to make decisions.[42] She characterized the question of deference as a question of law, which depends on the purposes of the legislation. In this regard, the concern of the first two cases merges with the third, 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 (that is, Article 9(3) of the Polish Energy Law and Article 21 of Taiwan's Waste Disposal Act).

Because legislative intent or purpose is often uncertain or vague, this can provide courts with the basis to intervene in administrative policymaking through judicial construction of the 'legislative intent'. However, courts in new democracies, at least at the outset of the transition, often seem eager to expand their power by actively seeking to constrain executive power, or at least that is the conventional wisdom. People might therefore regard deferential judgments as a failure on the part of the courts to safeguard the new constitutional values of a democratic *Rechtsstaat*. But one could just as easily conclude that the emergence of deferential judgments is a product of an increasingly more self-confident court in the world of post-transitional politics. Deferential judgments suggest a judiciary unafraid of being criticized as executive-minded or as a rubber-stamp of the legislature or the government. They suggest further a judiciary that does not regard a deferential judgment as in tension with their constitutional role. Rather, as seen in the three cases, the courts have also recognized the vital role of administrative agencies in the regulatory process in post-transitional societies.

Why? To answer this question would take us well beyond the scope of this brief chapter. What I propose instead is to offer a set of tentative explanations rooted in the development of judicial review of administrative action in these countries.

First of all, in each of the countries considered here, a tradition of judicial review of administrative action predates democratization. For example, 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

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[42] 2004 (4) SA 490 (CC), para 49.

Court played a critical role in controlling governmental action. Some of its judgments would provide the foundation for future rulings of the future Constitutional Tribunal establishing its jurisdiction over administrative power.[43] Later, in 1986, the Constitutional Tribunal came into operation, which was the first of its kind in the former Communist bloc.

In Taiwan, on the other hand, the Council of Grand Justices reclaimed its constitutional power incrementally over the course of the 1980s (Ginsburg 2003: 140–42). To expand its jurisdiction, the court first struck down administrative actions, especially those in the field of tax administration, where the risk of an authoritarian backlash was somewhat diminished (Chang 2010: 290–305). The court then gradually built a series of judicial criteria by which it could examine the constitutionality of administrative rules since the early days of democratization.

Finally, in pre-democratic South Africa, the judiciary was not always timid in confronting the apartheid regime (Baxter 1984: 329). Admittedly, the courts upheld apartheid legislation in cases like *Lockhat*, which recognized the Group Area Act as a legitimate 'colossal social experiment'.[44] Nevertheless, they also overruled racially discriminatory administrative decisions in cases like *Komani* and *Rikhoto*.[45] 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).

This background suggests that the pre-democratic jurisprudence of these courts not only reinforced judicial power 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 in the future. Moreover, there is a considerable doctrinal heritage from the pre-democratic era. The courts' pre-democratic jurisprudence often emphasized the formality of statutory delegation as a basis to strike down administrative regulations and decisions. In addition, the courts claimed to rely on implicit constitutional principles like the 'democratic state based on the rule of law' doctrine in Poland or the adopted *Rechtsstaat* doctrine in Taiwan. After democratization, this approach also helped the court to shape its professional image as a neutral, non-political arbiter in the fragmented politics.

There have indeed been significant governance challenges in 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), something also true in South Africa. Moreover, in post-transition Taiwan, fierce partisanship in the political sphere often tended to ossify the everyday administration. 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

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[43] In this regard, some scholars maintain that the High Administrative Court 'developed an area of legality in communist Poland, creating a gateway for democratic institutions' (Brezezinski and Garlicki 1995: 21).

[44] *Minister of the Interior v Lockhat*, 1961 (2) SA 587 (A)

[45] *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).

wreckages of former authoritarian regimes (Elster et al. 1998:27). Over time, this may well have tempered the inclination to judicial activism. 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, because it had 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 of life that people expect to lead in a well-functioning democracy. A dynamic democracy cannot rely solely on the courts' fulfilling gatekeeper duties. Stringent judicial scrutiny of administrative action might hinder a healthy political process of policymaking. By mechanical application of legal doctrines, this situation could foster a highly legalized culture opposed to reason and argumentation within the technical domains of administration. In fact, a self-restraining court does not necessarily signify a retreat from effective control of state power. Rather, deference can sometimes enhance the capacity of the administrative organs and effectuate an institutionally capable government. The examples from Poland, Taiwan and South Africa considered here may simply reflect how courts may be liberating themselves from anachronistic fears and are further prepared to reinvigorate the dynamic interaction among different political and administrative actors. In this regard, judicial deference is not a surprise but an incremental reform responding to the competing needs of state-building and accountability in post-transitional democracies.

References

Baxter, Lawrence. 1984. *Administrative Law*, Cape Town: Juta & Co. Ltd.

Brezezinski, Mark. 1993. 'The Emergence of Judicial Review in Eastern Europe: The Case of Poland', *American Journal of Comparative Law,* 41: 153–200.

Brezezinski, Mark and Leszek Garlicki. 1995. 'Judicial Review in Post-Communist Poland: The Emergence of a Rechtsstaat?', *Stanford Journal of International Law,* 31: 13–59.

Chang, Wen-cheng. 2001. 'Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective', unpublished JSD dissertation, Yale Law School.

Corder, Hugh. 2006. 'From Despair to Deference: Same Difference?', in Grant Huscroft and Michael Taggart, eds., *Inside and Outside Canadian Administrative Law,* Toronto, Canada: University of Toronto Press.

Currie, David. 1995. *The Constitution of the Federal Republic of Germany*, Chicago, IL: University of Chicago Press.

Elster, Jon, Claus Offe, and Ulrich K. Preuss. 1998. *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*, Cambridge, UK: Cambridge University Press.

European Commission. 1997. 'Energy for the Future: Renewable Sources of Energy', White Paper for a Community Strategy and Action Plan: Communication from the Commission, COM (97) 599 final, Brussels, 26 November 1997.

Galligan, Denis J., and Daniel M. Smilov. 1999. *Administrative Law in Central and Eastern Europe 1996–1998*, Budapest, Hungary: Central European University Press.

Garlicki, Lech. 2005. 'Constitutional Law', in Stanislaw Frankowski, ed., *Introduction to Polish Law*, The Hague, Netherlands: Kluwer Law International.

Ginsburg,Tom. 2003. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge and New York: Cambridge University Press.

Ginsburg, Tom, and Albert H. Y. Chen, eds. 2008. *Administrative Law and Governance in Asia: Comparative Perspectives*, London: Routledge.

Haysom, Nicholas, and Clive Plasket. 1998. 'The War Against Law: Judicial Activism and the Appellate Division', *South African Journal on Human Rights,* 4: 303–33.

Hoexter, Cora. 2000. 'The Future of Judicial Review in South African Administrative Law', *South African Law Journal,* 117: 484–519.

Jagielski, Jacek. 2005. 'Administrative Law', in Stanislaw Frankowski, ed., *Introduction to Polish Law*, The Hague, The Netherlands: Kluwer Law International.

Japp, D. W. 2001. 'The Allocation of Harvesting Rights in the South Africa Hake Fishery', in R. Shotton, ed., *Case Studies on the Allocation of Transferable Quota Rights in Fisheries*, FAO Fisheries Technical Paper No. 411, Rome, Italy: Food and Agriculture Organization of the United Nations.

Kleinschmidt, Horst, Shaheen Moolla, and Marius Diemont. 2006. 'A New Chapter in South African Fisheries Management. The Office of Marine and Coastal Management', available at http://www.mcm-deat.gov.za/press/2006/commercial_fishing_rights_applications_2005.pdf (last accessed February 22, 2009).

Lindseth, Peter L. 2004. 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s', *Yale Law Journal,* 113: 1341–415.

Nilsson, L.J., Marcin Pisarek, Jerzy Buriak, Anna Oniszk-Popławska, Pawł Bućko, Karin Ericsson, and Luckasz Jaworski. 2006. 'Energy Policy and the Role of Bioenergy in Poland', *Energy Policy,* 34: 2263–78.

Oniszk-Popławska, A., M. Rogulska, and G. Wiśniewski. 2003. 'Renewable-energy Developments in Poland to 2020', *Applied Energy,* 76: 101–10.

Rose-Ackerman, Susan. 2005. *From Elections to Democracy: Building Accountable Government in Hungary and Poland*, New York: Cambridge University.

Tate, C. Neal, and Torbjörn Vallinder, eds. 1996. *The Global Expansion of Judicial Power*, New York: New York University Press.

Wohlgemuth, N., and G. Wojtkowska-Łodej. 2003. 'Policies for the Promotion of Renewable Energy in Poland', *Applied Energy,* 76: 111–21.