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Marian Begadze

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Law's autonomy from politics has been in decline. Theories have been formulated to provide explanations for the development. However, these debates have overlooked the role of judicial agency in the construction of the Court's own fate. Judicial agency has a lot to determine when courts embark on their mission of embracing political circumstances surrounding them. The present paper argues that insistence on neutral principles by Legal Process School can be guiding for courts to devise judicial techniques that enable warranted appearance of neutrality. Two cases decided by the Israeli Supreme Court will be discussed to elaborate on the argument defended in the paper. In these cases, the Israeli Supreme Court constructs its institutional security by engaging in a principled line of reasoning across its evolving jurisprudence on the same political issue, namely by first exhausting more solid legal arguments and imposing conclusive constitutional resolutions once these less controversial decisions are implemented.

Key words: *Autonomy of Law, Israeli Supreme Court, judicialization of politics, judicial agency, Legal Process School.*

1. INTRODUCTION

Law's autonomy from politics has certainly been in decline. That law can be an adaptable instrument for the pursuit of political goals, is not an unheard idea anymore (Roux, 2018a). Nowadays, it is a routine practice to consider economic, political and historical context of court decisions. The increasing tendency to govern through courts termed as judicialization of politics has led to charges of politicization (Volcansek, 2019, 67). Hirschl (2008, 98) distinguished between "ordinary" judicialization of politics and judicialization of "mega-politics", the latter concerning political issues that "define the boundaries of the collective or cut through the heart of entire nations". Scholars have

* Author is a SJD candidate in Comparative Constitutional Law, Central European University, begadze.mariam@phd.ceu.edu

attempted to see these developments in a bigger picture and identified three distinct global waves of judicial review challenging the dominant narrative of progressive constitutionalism. They have described the third wave as a response to emergence of domestic constitutional jurisprudence, which had incorporated international standards as the source of higher law. According to these authors, the third wave is in dialectical relation with the other two in that it either reaffirms primacy of the domestic constitutional order over the international and emphasizes the discourse of national identity, or altogether exits the first and second waves (Lustig, Weiler 2018). This perspective has also been challenged connecting the emergence of constitutional identity discourse to broader social change brought by populist turn of politics (Versteeg, 2019). Contemporary trends in judicial review can be approached from various dimensions and angles, however, the purpose of this paper is different, namely, it will inquire into judicial approaches of mitigating charges of politicization.

Scholars have recognized limits of judges in putting through their subjective preferences into decisions, claiming that such subjectivity is always constrained by law (Zreik 2019, 222, 229) and judicial methodology (Rosenfeld 2019, 39–40, 47) that judges apply. Indeed, there are clear differences between political and judicial decision-making, the former does not carry the same argumentative burden, that will constrain the latter. Given extraordinary social and political circumstances, there may be exceptions, when even the very clear rules in the Constitution are not obstacles. Example of this is the Indian Supreme Court's jurisprudence turning Directive Principles of State Policy (DPSP) into justiciable social rights, when the Constitution had already decided against such interpretation. As widely recognized in the literature, the Supreme Court's move to pro-poor jurisprudence in this manner had to be explained in the political context of that time, namely the need to regain institutional credibility due to the Court's notorious failure to oppose the political repressions during the Emergency of 1975–1977 (Roux 2018a, 204).

The role of judicial agency in building the political and legal circumstances affecting the future operation of the Court is generally overlooked. Whether it is an “insurance theory” by Ginsburg (2003) or “hegemonic preservation theory” by Hirschl (2007) that explains empowerment of courts in national politics, judicial agency has a lot to determine when courts embark on their mission of embracing the

political circumstances surrounding them. Strategic adjudication carries the awareness of likely political repercussions with the aim to “maximize the chances” that the decisions will be enforced. In turn, with each decision enforced, prospects of future opposition to court decisions decreases (Roux 2018b, 22). Risks of political backlashes is reduced when urgent need for some form of intervention is recognized by a wider public, sometimes openly through mass protests on the issues to be decided by the Court. Public health emergencies as HIV/AIDS pandemic in South Africa (Young, Lemaitre 2013), failure to deal with famine in India (Pillay 2014, 395–396), have made politicization of apex courts possible perhaps without loss of public legitimacy. This is one strand of strategic adjudication by courts, in which success of courts is determined by public perception of the extreme need to act. However, judicial agency is not only observed in such cases and it can more generally characterize courts’ jurisprudence. Such posture of the South African Constitutional Court has been reconstructed by scholars, arguing that in the political context of a dominant party democracy, the Court has been strategic to build institutional legitimacy and created “doctrinal space” for its future “context-sensitive” adjudication (Roux 2009, 116).

The present paper will discuss judicial techniques from the perspective of two line of cases decided by the Israeli Supreme Court and will ask whether Wechler’s insistence on neutral principles (1959) can be useful for that discussion. For this purpose, first the arguments of the Legal Process School will be summarized.

2. LEGAL PROCESS SCHOOL

Legal Process School as a response to legal realist’s indeterminacy thesis and critique of the law as an autonomous, “self-contained body of norms” has attempted to provide solutions to weakened institutional respect for courts (Roux 2018a, 206). Scholars in that school emphasized the importance of neutral, “impersonal and durable” (Bobbitt 2010, 142) principles constraining the indeterminacy of law and subjectivity of judges. Important goals were consistency and respect that constitutional adjudication had to attract, despite the inevitable possibility of pursuing one or the other policy preference through adjudication (Duxbury 2010, 287). Illustration of the core ideas behind

Legal Process School would be impossible without reference to *Brown v. Board of Education* decision by the U.S. Supreme Court and the criticism that it attracted. Wechsler flagged the famous critique of the Supreme Court's reasoning and the damage it could do to the legitimacy of constitutional interpretation. According to the criticism, even if the political adjudication served good purposes, such as desegregation of schools, judges had to refer to principled basis while doing so, which could not be reference to harmful effects of segregation on children. As he reasoned, there was reason to believe that contrary was true, as integrated schools may have proved more hostile in fact. Wechsler considered alternative justifications for the decision, which would not be linked to actual effects of segregation, rather neutral principles that would apply both to blacks and whites equally, such as the prohibition against state interference with freedom of association, which as he argued, would have better escaped the charges of politicization (Wechsler 1959, 32).

Search for neutral principles was a response to realists who were discussing the problem of judicial indeterminacy. The solution, although imperfect when applied to broadly construed rights and their conflicts (Dexbury 2010, 287–288), made an important contribution. The solution-oriented perspective at minimum kick-started a discussion on the importance of appearance of neutrality, even if judicialization of politics seemed inevitable. Even if judges wanted to steer policy in a specific direction, according to Legal Process School, this should be done in a judicial, not a political manner, judges required to substantiate their decisions had to apply general principles which would constrain the courts' discretion in future cases as well.

Insights from the Process School can be guiding for finding solutions in the modern context of judicialization, too. It should not come as a surprise that whatever course judges take, be it deferential or activist their decisions will not completely escape the political dimension, but in light of the legacy of Legal Process School, non-political, alternative way of doing that shall be preferred. Courts may engage in a principled, consistent line of reasoning across its evolving jurisprudence on the same political issue, first exhaust the more solid legal arguments in their hands, ensure that these less controversial decisions are enforced first, before they impose a conclusive constitutional resolution of the issue. Meanwhile, the strategy of consciously skipping the first opportunity of imposing a specific solution contributes to more

political consolidation. The decision not to instrumentalize the law at the very first occasion, despite a discernible preference in the Court's analysis, brings to the fore the Court's non-political, impartial way of operation. The two cases below decided by the Israeli Supreme Court will be discussed to support the claim.

In the case of *Ressler v. Knesset*¹ decided in 2012 the Israeli Supreme Court for the eighth time discussed the issue of deferring ultra-orthodox Yeshiva (rabbinical seminary) students and decided that such exclusive exemption from military service contradicted the equality rights of Israelis in the Basic Law: Human Dignity and Liberty. In Israel, law establishes the duty to serve in the military for all. This made the exemption exceptional as it operated exclusively for this group. The exemption was the source of division between secular and religious Jews since the creation of the state. One practical reason for such exclusive treatment was the political position of the ultra-orthodox Jewish parties, who despite their size, play a significant role in maintaining government coalitions and could demand pro-exemption policy as a political compromise in exchange for their support (Navot 2014, 85–87). For understanding the 2012 decision of the court in its full context, the preceding decisions have to be summarized, too. In the first cases, the court was more deferential to the political solution of the issue, and towards the end became more robust in its scrutiny. For the purposes of this paper, it would suffice to consider the two judgements before the final one discussed above.

In 1998 the Supreme Court stated that the deferment authorized only by the executive – Minister of Defense, without prior and explicit authorization of the Knesset was unlawful. The Court based its arguments on the considerations of Separation of Powers and Rule of Law and stated that issues that penetrate the nation and divide the society, has to be decided by the legislative branch of the country. This was discussed under the rule of primary arrangements, based on which the Knesset has the duty to set the appropriate boundaries, within which the administrative authority can act. The court referred to its previous decision, in which it already hinted that number of deferments by the Minister may indicate a point when “quantity becomes quality” (*Ressler v. Knesset*). In other words, because the arrangement had expanded and the number of exempted students had grown from hundreds to thousands, it became a national issue, which had to be

¹ ISC, case HCJ 6298/07, *Ressler v. Knesset*.

decided by the Parliament². Following the decision, Knesset adopted a temporary (valid for five years) legislative solution on this issue. The law adopted by Knesset reaffirmed the exemption of Yeshiva students, however introduced incentives for them to opt for a short military service (Weintal 2013, 299).

The case came back to court in 2002. In 2006, the Court decided that the law as it stood violated equality rights, however, refrained from declaring its unconstitutionality. The Court explained that although the data available now showed that the law's objective (equal distribution of the security burden) and incentives to integrate Yeshiva students to military service despite exemption was not realized, rational connection between those and the means adopted had to be also tested in practice. In this way, the Court gave more time to the elected branches to fix the problems of implementation. As the court elaborated, what still remained to be seen in time was whether the law had a "genetic" defect, or the problem laid with its implementation.³ As stated in the beginning, finally, in 2012, the Court concluded that indeed, those defects were related to the law's inherent unequal nature and 10 years of unsuccessful implementation proved precisely this. The Court relying on data regarding the implementation of the law indicated that it demonstrated how the law entails "inherent impediments that significantly influence the possibility for giving it effect and realizing its objective" (Ressler v. Knesset). Eventually, the Court ordered that the Knesset draw up a new law, that would simultaneously consider equality requirements and address the special circumstances of ultra-Orthodox Jews in relation to military service (Kahana 2013, 83–84).

The case is interesting from various perspectives, for instance in terms of the role of ultra-orthodox minority in Knesset for creating government coalitions and the convenience of delegating to court the decision on a long-standing political controversy. As Hischl (2008, 106) has brought to attention, in certain circumstance "judicialization from above" is a better explanation of the court's activism. Namely, judicial resolution of a politically sensitive issue may fit with the blame-shifting strategy of elected branches. However, for the purposes of the paper, emphasis will be placed on judicial techniques and agency. Already in 1998, the Court started to point out problems of the policy, however

² ISC case HCJ 3267/97, Rubinstein v. Minister of Defence.

³ ISC case HCJ 6427/02, Movement for Quality Government in Israel v. The Knesset.

it was not until 2012 when it delivered a more conclusive judgement now against the policy formulated by Knesset. First, the policy was rejected because according to the Court's decision, the nature of the issue required political deliberation in Knesset. Next, it was rejected due to more substantial grounds of the exemption law. Although the Court left the decision on specificities of the policy to the democratic branches, instructing them to respect both equality of Israelis subject to military service and interests of the Yeshiva students, the Court conclusively rejected the government's vision of pursuing those goals as present in the law before the Court at that point.

Another line of cases decided by the Israeli Supreme Court that illustrates the argument of the paper is *Maccabi Healthcare Services v. Minister of Finance*.⁴ The legal dispute was between health funds and the Government and related to updating of the health cost index – the mechanism that did not reflect the real costs of the health system. Before going into details of the Court decision, it is important to briefly describe the Israeli health system. Health services in Israel are provided by four health funds, which act as intermediaries between the state and providers of health care. Health funds receive resources calculated according to age and number of beneficiaries and cannot demand additional payments for the basic coverage. The National Health Insurance Law (NHIL) establishes a procedure for renewing the cost of services in the Health Services Basket (HSB) by the rate of increase in the cost of health index. However, the calculation rule for the health index was not comprehensive and did not relate to demographic changes and new technologies, thus did not reflect the overall increased cost of health care (Flood, Gross 2014, 159–168; Carmel, Chinitz 2005, 651–656).

The shortcomings of an updating mechanism in the end led to recommendation of the Health Council, a statutory advisory body, to introduce an automatic updating for HSB, considering the relevant increased expenses. The health funds addressed the Supreme Court first in 2000 to obtain a decision against the state, requiring that the Government complied with the Council recommendation. The Court did not issue a binding ruling but explained that the recommendation had to be considered before reaching a decision. Next, in the case decided in 2002, the Court emphasized that the Health Council is an advisory body and consideration of recommendation from the side of

⁴ ISC, case HCJ 2344/98, *Maccabi Healthcare Services v. Minister of Finance*.

the government was sufficient. Despite ultimate deferential stance of the Court, the decision already expressed frustration with the Government's inaction. It criticized the Minister's argument that budgetary constraints can be indicated for non-fulfillment of statutory obligations set by NHIL. The Court explained that when there was a right, in this case a right in the statutory provision, there needed to be a remedy, not vice versa, so the government had to provide sufficient funds for the services under the health care plan. The Court here as well gave an option to the Government, to either amend the scope of rights in the law or modify the budgetary framework to respond to increased expenses. Nonetheless, despite harsh language used, as noted, eventually, the Court did not order the Minister to grant the requests of health funds (Flood, Gross 2014, 159–168; Carmel, Chinitz 2005, 651–656).

The Court's position changed in 2012 when it recognized the protracted failure of the Government to address the real changes in prices and held it to be unreasonable (*Maccabi Healthcare Services v. Minister of Finance*). In the end, as a remedy, the Court instructed the Government to modify the mechanism of updating the health cost index within 6 months. The Court used a weak remedy and again gave considerable freedom to the elected branches to come up with the updating mechanism (Gross 2014, 167; Gross 2013, 319). Although the authority to define the exact method of calculating the health index still fell to the elected branches, after a decade, the Court felt in a better position to intervene.

These cases are illustrative of the Court's slow technique of reaching a decision against Government policy. Evolution of the jurisprudence manifests a specific way of accumulating legitimacy for the court's preferred interpretation. In the first case, considering the political sensitivity of the issue, the Court consistently developed its objections against the policy and after decades of political branches' inability to resolve the controversy, decided to take a more principled stance. Similarly, in the second case, the Court gave a benefit of doubt to the Government that it could recognize its failures and take measures to address them. Initially alternative legal arguments were exhausted, in the Ressler case the doctrine of "primary arrangements" is invoked, and in the Maccabi case, the statutory right is relied on. Recourse to alternative arguments allows the court to gain time, have its institutional security built up as the decisions on those alternative grounds get implemented. In this manner, when the government proves ignorant to-

wards the substantive arguments in the decision, the court faces the new legal challenges with somewhat bolstered institutional security, better placed to resolve the issue on a substantive constitutional level. Time in these cases is a valuable tool for the Court, which allows it to nurture its institutional claim on neutrality when the final decision on the issue is rendered.

3. CONCLUSION

The cases above do not as such illustrate a novel perspective into judicial review. Already in 2003, Tushnet discussed the possibility of weaker judicial remedies turning into stronger ones, once the government proved disobedient to the former (Tushnet 2003, 831–832). As Dixon and Issacharoff (2016) formulated “living to fight another day proves to be an attractive option in judging as in all matters of statecraft”. Such flexible forms of review have addressed Separation of Powers objections, as expressions of deliberative democracy⁵ encouraging political accountability of failing government institutions (Sabel, Simon 2004, 1020). However, these justifications have not eliminated the risks of backlashes from political branches. Perhaps, to avoid those, it is best for Courts to embrace political aspects of adjudication and behave strategically and to do so through legal means available, as principled, incremental legal reasoning will aid the legitimacy of the Court’s arguments.

Techniques of achieving public legitimacy may differ, change and adapt to different circumstances, but the perspective that judiciary will have to do more than decide cases in a manner that political bodies decide policy – the underlying logic behind Legal Process School – is as crucial as before. Even if courts survive backlashes from political branches because they act strategically, that will not lead to its institutional legitimacy as a legal actor. That being the normative goal to pursue, judicial strategy shall be translated into consistent legal reasoning. Pragmatic decisions of the Court have to be backed up by legal techniques that at minimum manage to maintain appearance of impartiality. Such appearance will bring more public legitimacy that

⁵ Arguments about dialogic justice have been extensively addressed in the literature on judicial enforcement of socio-economic rights, see (Gargarella 2011, 233–237, 243; Liebenberg, Young 2015).

will have a better chance of playing a preventive role against political backlashes (Volcansek 2019, 66–68). Enduring judicial independence is one that will be built on court’s reputation as a legal actor, rather than a strategic political one (Roux 2018b, 31).

What is argued here is that judicial agency has more bite in the construction of its own fate than generally recognized. Courts can ease decision-making by cooling down the political and advancing the legal sides of the issues considered. The Court’s commitment to consistent arguments in its journey from weak to stronger remedies and use of the time and evidence in-between, can be a technique to at least mitigate charges of politicization. The court’s timidity to impose its views on the very first occasion, inclination to first test the alternative, perhaps more solid legal basis, and obtaining more institutional security once these less controversial decisions are implemented, is one way to do that. This prolonged process of accumulating institutional legitimacy through time and more evidence creates more potential for incompletely theorized agreements both inside and outside courtroom as well (Sunstein 2007).

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