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Law is Politics:

Comments on 'Law or Politics: Israeli Constitutional Adjudication as a Case Study."

In his essay: "Law or Politics: Israeli Constitutional Adjudication as a Case Study." Gideon Sapir is coping with some problems concerning adjudication of religious issues. He presumes that there is a certain dichotomy that differentiates 'law' from 'politics', since the first deals with norms and the second with regulating and balancing political branches. My theoretical perspective, however, is different and critical. Sapir's article- in my reading- proves that law is politics in a sense that law generates and embodies political and socioeconomic interests, identities, and consciousness. I will argue below that politics can not be differentiated from law, and therefore can not respond to Sapir's aspiration to de-politicize adjudication and to monitor and hamper the effects of personal backgrounds and worldviews on judicial rulings. From a critical perspective that law is politics, I intend to analyze some of Sapir's findings and arguments.

The subject matter of religious justices in supreme courts is particularly relevant to countries where almost no institutional and constitutional separation between state and religion prevails. In countries like Israel that have not separated state from religion, and have used religion as part of state nationality and legal ideology, the background of the justices and their basic worldviews will most often be a reflection and articulation of interactions between religion, state power foci, and state ideology. Israeli Jewish political elite has used Orthodox religion to legitimatize the state, and hence has used the non-separation of nationality and religion embedded in Zionism, for their political purposes.

Hence, in the Israeli context, the religious background of religious background of justices in their rulings. On the other hand, in countries like the USA in which a

formal institutional separation has largely prevailed the liberal-religious continuum affects degree of pluralism but has less relevance for conflicts over state power. My point goes further than claiming that the significant difference between the USA and Israel is that the Israeli Supreme Court has a religious seat. In countries like Israel where religion, in its Orthodox interpretation, is a constitutive part of its nationality, religious justices are part of the mechanisms of state control and especially the religious justices articulate the dominance of Orthodoxy in public life. Hence, whilst American models are useful to illuminate the Israeli case, the comparison between the two countries might be misleading. Israel is much more similar to countries like Germany and Ireland than to the USA, since in these countries there is no constitutional separation between religion, state, and nationality.

Sapir's correctly expounds that there has been a religious seat in the Israeli Supreme Court. The reason for it was political- getting legitimacy to the state was a crucial effort in the 1950s when the ruling elite of Mapai were striving to co-opt the religious Zionist camp into its political coalition. Ultra-Orthodox judges in the Supreme Court have not been present and for two reasons. First and foremost, ultra-Orthodoxy has negated state legitimacy and ultra-Orthodox nominees in the Supreme Court would have contradicted such an ultra-Orthodox ideology. Second, many ultra-Orthodox judges have lacked a formal legal education outside studies of the Jewish *Halacha*. In this context Sapir observations have focused only on one aspect of state-religion tension in Israel; the one that concerns "Jewish and democratic " state. However, there is a more severe aspect, which concerns the controversy between ultra-Orthodoxy and the state over the legitimacy of the Zionist enterprise and its courts.

Sapir points correctly that when the principle of freedom of religion might endanger the religious-secular status quo religious justices offer the narrow interpretation and their secular counterparts offer the broader one. Admittedly this is very expected to begin with. If the structure of the political regime is being taken into account, in addition to the textual analysis alluded by Sapir, then one can easily comprehend why a different hermeneutics based on the religious/secular background of the justice is expected. Since every hermeneutics is about politics, the effect of the personal background is much more understandable taking into consideration that every legal

norm is shaped based on hermeneutics. Sapir illuminates another more intriguing finding according to which religious justices may use a broader interpretation of the principle of freedom of religion, when such hermeneutics serves the autonomy of their own Orthodox community.

Following these findings two explanations should come to mind. The one is an explanation of monopoly and the other is explanation of autonomy. The first has been elaborated in Sapir's article. The Orthodox establishment has monopolized religious affairs of Jews in Israel. The principle of freedom of religion has been used in the Supreme Court by secular justices in order to confine such monopoly. Under some spirit of liberalism in Israeli law, primarily since the mid 1980s, majority of justices (i.e., the secular justices) have supported and upheld appeals that called for imposition of limitations on such monopoly. The liberal political interest behind the arguments of equality and non-coercion was to privatize religion and to diversify ways of religious beliefs. The religious Orthodox hermeneutics is different, because it aims to preserve the Orthodox monopoly that was crystallized in the 1950s, and has become under attack with Israel cultural shift towards some liberalism in state law particularly since the 1980s.

Yet, there is another crucial perspective that conceives the attempts of religious Orthodoxy to preserve its autonomy facing the increasing invasion of liberalism into its fabric of communal life. In such cases religious justices are using broader interpretations in which the principle of freedom of religion is used to justify their opposition to liberal and non-Orthodox social forces like seculars and proponents of the progressive and the observant movements. Such a sociopolitical context inside and outside the legal text explains the hermeneutics that Sapir expounds in his article. There is no direct line of influence between the judicial personal background of the justice and his/her rulings, since the intercommoned context of liberal and non-liberal communities is constitutive to any hermeneutics in the legal text itself.

The justices, whether secular, observant, or religious, do not enjoy the alternative of law or politics, but rather they are agents of various political forces in law as part of state law. Due to the majority of secular justices in the court, they support a liberal judicial activism aimed to privatize religion and confine the Orthodox monopoly. The

minority of religious justices will oppose such an activism unless it protects communal religious autonomy. Furthermore, since the religious political parties in the Israeli parliament enjoy a significant power, the religious community prefers to decide issues in legislation and not through adjudication. Again, the controversy over judicial activism in Israel is not only about different perceptions of the judicial process, but rather it is about strongholds of influence in the political process. The personal background of the justices would have been rather meaningless without the political context in which their personal judicial characterizations have been formed and generated as part of conflicts over power in a multicultural setting of state and society. Their rulings are the field in which such characterizations have been articulated concerning specific issues under contention.

Since law is politics, and not an alternative to politics, Sapir's assertion is correct: "I.e., every justice adopts *ad hoc* the interpretation of the principle of freedom of religion that accords, under the circumstances at hand, with his background." Institutional struggles, not only cultural issues, will be part of such circumstances. Thus, when the possible reaction of the parliament against the court ruling might be severe characterized by a counter-legislation, coalitions between secular and religious justices are plausible. It is expected that religious justices and secular justice will be in some significant rivalry, but judicial coalitions might be established when the secular majority opposes any intervention in legislation due to its fear of a possible counter-judicial move by the parliament under the influence of the religious political parties.

Following his findings Sapir turns to suggest legalistic solutions to politics in law. How to confine, he wonders, the effects of personal background on judicial rulings? The author aspires to find a balance of power that will confine personalities in law. Since law is politics such an attempt might be invigorating and futile, at once. Judicial activism as Sapir correctly assumes should not be taken for granted. Yet, his findings are not connected to activism but point to importance of identities in law, a fact that can not and should not be reduced. Judicial nominations as the author correctly claims should be more publicly accountable and public hearings of candidates to the Supreme Court have some benefits. Yet, it will make justice's worldviews more transparent and not less influential.

Furthermore, since in Israel religious justices are expected to represent their sector, public hearings might be a matter of formalities, nothing more, and nothing less. Limitations over terms of judges might hurt the independence of the judiciary without any relevance on the effects of their worldview. Moreover, if a religious justice will be reluctant to have his ideology being aired since he is fearful, it may damage the democratic principle of judicial independence. Sapir's third suggestion to have a political control over judicial interpretations is too vague and needs clarifications. Indeed, the Israeli Supreme Court has become a constitutional court, and has acquired even hegemonic position in the Israeli political setting. But the Court has always taken into consideration institutional and cultural constraints. Therefore, whilst the adjudication has been extensive, the judicial intervention has always been rather limited. Since the religious parties enjoy veto position in parliament such a political control serves their interests and will encourage, not reduce the influence of religious background on the religious justices.

The author suggests another problematic solution- he aspires that originalism will dominate judicial interpretations. But, contrary to the author presumption, originalism is not a more 'objective' hermeneutics. Going back to the original fundamental documents of the state of Israel, like its declaration of independence, will certainly encourage fierce debates and contentions among the justices, and between secular and religious justices. Last, Sapir offers that constitutional documents will be very specific and clear. But what is very detailed and clear? The definitions are also political and subjected to cultural and institutional conflicts. The aspiration to draft such constitutional documents is bound to spur a great deal of political conflicts that will be brought to court. The justices will have to rule in accordance to their identities and worldviews, and particularly based on their religious identities.

Contrary, my perspective is that effects of justices' personal worldviews over their rulings should not and can not be exclude or balanced since such characterizations and worldviews are part of hermeneutics. Attempts- as Sapir suggests- to de-politicize the judiciary may impose the political administration over the judiciary. The question is not politics or law but what kind of politics we want to see in law. One can not exclude politics from law without destroying the judiciary; one has to

ponder which society and politics we want to advance in and through law. Since no one concept exists, law is a fascinating battle- field. Courts exist in order to enable wars of ideas instead wars with weapons. Moreover, since the Israeli Supreme Court has become a constitutional court, communal representation in court is a democratic need, a prerequisite for the court to serve as democratic institution in its political realm.