1997

Justices at Work: An Introduction

Michel Rosenfeld
Benjamin N. Cardozo School of Law, mrosnfld@yu.edu

JUSTICES AT WORK: AN INTRODUCTION

*Michel Rosenfeld**

"Justices at Work," a day long conference which took place on September 19, 1995 at the Benjamin N. Cardozo School of Law, brought together Justices and constitutional scholars from seven different countries to consider a hypothetical constitutional case dealing with fundamental rights. This issue of the *Law Review* includes the facts of the hypothetical case, the applicable hypothetical statute, the briefs submitted to the International Moot Court—all of which were the product of a collaborative effort among the seven scholars involved—as well as a transcript of the proceedings and of the deliberations of the seven Justices: Justice Ruth Bader Ginsburg of the United States Supreme Court (who was the Chief Justice of the International Moot Court), Chief Justice Antonio Baldassare of the Constitutional Court of Italy, Justice Dieter Grimm of the Constitutional Court of Germany, Justice Noelle Lenoir of the Constitutional Council of France, Chief Justice László Sólyom of the Constitutional Court of Hungary, Lord Slynn of Hadley of the House of Lords of the United Kingdom, and Justice Itzhak Zamir of the Supreme Court of Israel. These seven Justices sat as the Supreme Constitutional Court of Harmonia, the fictitious jurisdiction in which the case was set. Justices at Work was a live experiment in comparative constitutionalism and the purpose of this Introduction is briefly to place this experiment in its proper context.

The idea for Justices at Work was developed as an outgrowth of a course on comparative constitutional law which I co-taught at Cardozo with Bernhard Schlink—a Professor at the Faculty of Law of Humboldt University in Berlin, and one of the scholars who participated at the conference—in the fall of 1993. As a consequence of our discussions and of our co-teaching, which concentrated on a fairly thorough comparison of the respective constitutional jurisprudences of Germany and the United States, we became intrigued by the possibility of a convergence of various different contemporary constitutional jurisprudences towards a common core of fundamental constitutional principles and values. Such a convergence is far from obvious, as apparent similarities between different con-

* Professor of Law, Benjamin N. Cardozo School of Law; Co-Director Cardozo-New School Project on Constitutionalism.

stitutional jurisprudences often prove to be quite superficial[1] and, conversely, seeming differences can sometimes conceal more deeply rooted similarities.[2] Accordingly, we thought that it would be instructive to run a live experiment by bringing together constitutional judges from different countries and asking them to consider—and if possible adjudicate—the same hypothetical case.

Given the hypothesis we wished to test, it would have been ideal to gather together a court composed of judges from the widest possible range of diverse cultural traditions. However because, to our knowledge, this kind of experiment had never been tried before, we thought that it would be easier to succeed in having a fruitful experience if we restricted our focus to the Western tradition. With that in mind, and to maximize the possibility of having a cohesive yet diverse tribunal, we decided to settle on a seven judge court. In addition to Justices from Germany and the United States, we sought to include Justices from France, Hungary, Israel, Italy, and the United Kingdom. France, Germany, and Italy represent three of the leading Western European constitutional traditions and each of these countries provides for judicial review of constitutional claims arising in the context of a written constitution. Moreover, these three nations offer an interesting mix of similarities and differences, both in terms of their judicial institutions entrusted with constitutional review[3] and of their substantive constitutional norms and values. Israel and the United Kingdom, on the other hand, are countries in which constitutionalism and judicial review play a prominent role in the absence of a written constitution. Also, in the case of the United Kingdom, the prevailing unwritten constitutional tradition has had to come to grips with supranational

---

[1] *See* Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 353-68 (Michel Rosenfeld ed., 1994) (arguing that free speech provisions of a large number of constitutions are similarly phrased, but that the protection which they respectively afford varies greatly from one country to the next).

[2] A comparison of American and German constitutional decisions on abortion, for example, reveals that in the United States the mother's liberty and privacy rights are posited as predominant, whereas in Germany it is the sanctity of life, and hence the interests of the fetus, which command clear priority. Upon closer analysis, however, it becomes obvious that the nature and scope of abortion rights in the United States and Germany are quite similar and that they are both the product of balancing the liberty, well-being, and privacy interests of the mother with the fetus's interest in a live birth and the state's interest in promoting respect for the sanctity of life. *Compare* Roe v. Wade, 410 U.S. 113 (1973), *and* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), *with* the two German abortion decisions, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] [federal constitutional court] 1 (1975), *and* 88 BVerfGE 203 (1993).

[3] *See infra* Appendix I for a discussion of the differences among the three respective judicial institutions.

norms such as those embodied in the European Convention on Human Rights. For its part, Israel has buttressed its judicially generated constitutional jurisprudence through borrowings from American jurisprudence, particularly in the First Amendment area.[4] Notably, however, Israel's use of American doctrine has often led to diametrically opposed results in similar cases, as evidenced, for example, by Israel's use of First Amendment doctrine to ban hate speech deemed constitutional in the United States.[5] Finally, the choice of Hungary seemed particularly propitious because of its recent transition from socialism to constitutional democracy, and because its constitutional court is not only among the most innovative but also by many accounts, the most powerful tribunal of its kind in the world.

Together with the five other scholars—Shlomo Avineri of the Hebrew University in Jerusalem, Anthony Bradley of the University of Edinburgh, Riccardo Guastini of the University of Genoa, Andras Sajo of the Central European University in Budapest, and Michel Troper of the University of Paris X—we set out to come up with a fact pattern and statute that would be suitable for consideration by the Justices in accordance with our objectives. From the outset, we decided to stay away from procedural issues, as no single matter could be heard both by the United States Supreme Court and the French Constitutional Council because of the complete divergence of their respective justiciability requirements. Indeed, the French Constitutional Council is only empowered to engage in abstract review of laws voted by the Parliament that have not yet become effective. Such abstract review, however, does not comply with the "case or controversy" requirement imposed on federal courts by the United States Constitution.[6] From the standpoint of American constitutional jurisprudence, therefore, the French Constitutional Council is only empowered to render advisory opinions, which is something that the United States federal courts are prohibited from doing.[7] This, in turn, raises an important question which we could not pursue through our experiment, namely whether the contrast between abstract and concrete review of constitutional challenges is likely to lead to significant substantive differences in the shaping of constitutional doctrine and norms.

---

[4] *See generally* GARY J. JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES (1993).

[5] *See id.* ch. VI.

[6] *See* U.S. CONST. art. III.

[7] *See* GERALD GUNTHER, CONSTITUTIONAL LAW 1593 (12th ed. 1991).

Concentrating exclusively on substantive issues, we opted to build a case revolving around the tensions between ethnic and religious pluralism and national unity, between freedom of religion and equality between the sexes, and between mandatory education and freedom of conscience and belief. This choice seemed called for not only because the tensions in question have fueled some of the most heated contemporary constitutional controversies but also because they are conspicuously present in each of the seven countries involved. Moreover, we shaped the particular facts of the case and the provisions of the statute with an eye to insuring that none of the significant constitutional issues raised by the case be subject to an obvious solution within any of the seven constitutional jurisprudences involved.

In the hope of focusing the debate and the Justices' deliberations both on the similarities and differences among the seven constitutional jurisprudences involved, we gave the fictional country of Harmonia a constitution made up of a few general and very broadly phrased provisions. In addition, we gave the Supreme Constitutional Court of Harmonia the task of interpreting its constitution in terms of the "best traditions" emanating from the constitutional jurisprudences of the seven countries represented.

Each reader of what follows will undoubtedly decide for him or herself to what extent the hypothetical case presented here sheds light on the hypothesis of convergence among various contemporary constitutional jurisprudences. For my part, I believe that the experiment points to significant convergence, but I wish nevertheless to close with a note of caution. On the one hand, we should not overlook the possibility that in shaping the case to suit our objectives we may have artificially boosted similarities that might otherwise have been much more attenuated. On the other hand, we should be mindful that not all disagreements among judges are attributable to differences in the way in which various countries approach constitutionalism. Indeed, it may well be that the gap between an American judge on the left of the political spectrum and one on the right of it is far greater than that separating an American judge from a foreign one who occupies a similar place within the relevant political spectrum. In short, in order to have a firm grasp on the issue of convergence, it is important to distinguish significant similarities and differences from those that are of little significance in light of the purposes at hand.

Preparations for Justices at Work took nearly two years, and the conference would not have been possible without the dedicated

work of a large number of people. Thanks are due above all to the seven Justices who took time off from their extremely busy schedules not only to participate in this experiment, but also to thoroughly prepare for the conference, as was evident by their total mastery of all facets of the hypothetical case. The Justices' dedication, openness to the various constitutional traditions invoked, and probing inquiries into the various issues raised made the day-long conference an unforgettable event for all those in attendance.

Next, thanks are also due to my fellow scholars, who met several times to exchange ideas, to generate the hypothetical case, and to refine it so as to maximize its potential for fruitful constitutional analysis; who drafted briefs; and who engaged in excellent oral advocacy before the Justices.

Finally, thanks are due to members of the *Cardozo Law Review* for their fine work in preparing the materials that follow for publication. In particular, I wish to note the fine contributions of Jonathan R. Gross, the Editor-in-Chief; Julie B. Nobel, the Executive Editor; and Sascha N. Rand, the Submissions Editor.

Financial support for the Justices at Work conference was generously provided by the Jacob Burns Institute for Advanced Legal Studies and the Goethe House/New York, German Cultural Foundation.