GLOBAL CONSTITUTIONALISM

ALUMNI WEEKEND 2013

Photography by Harold Shapiro


FREEDOM OF EXPRESSION

A record number of alumni and guests returned to Yale Law School in early October for the 2013 Alumni Weekend. Graduates reconnected during an all-alumni luncheon and at special reunion dinners and brunches for reunion classes. Panelists discussed "Global Constitutionalism" in sessions on **free speech**, **the intersection of international** and **domestic law**, **judicial review**, **human rights**, and **foreign policy** and **national surveillance**. There were also opportunities for alumni to meet students, including an early morning "fun run" and a "breakfast connections" event, which matched graduates with students with similar interests.


JUDICIAL REVIEW IN CONSTITUTIONAL SYSTEMS


EQUALITY, LIBERTY, AND DIGNITY—TRANSNATIONALLY

ALUMNI WEEKEND 2013


FUN RUN


BREAKFAST CONNECTIONS


FRIDAY EVENING RECEPTION AND DINNER

The quotes that follow give a sense of the formal discussions that took place during the weekend.

From the panel on **Freedom of Expression**

Aharon Barak
Visiting Professor of Law, Yale Law School;
Former President, Supreme Court of Israel

"In order to understand our complicated system, one has to distinguish between two eras. One is from the establishment of the State in 1948 until 1992. In 1992 we got our constitutional charter of rights and we got judicial review of legislation. But many of the cases on free speech were delivered by the Supreme Court in the first era when there was no judicial review and there was no constitutional protection for free speech. On the contrary, there were statutes, most of them from the time before the State was created, which we called British Statutes, which limited and restricted free speech in a very high degree. There was censorship on speech, military censorship, censorship on movies, on theater, on the press, etcetera. And the court could not knock it out because under the British system those provisions were the supreme law of the land.

"So what has the Supreme Court of Israel done? We couldn't knock it out. We couldn't declare those statutes unconstitutional. But we used a technique which we continue to use—an interpretive technique. We said to ourselves, 'Well, was the intent of the legislature to impact free speech?' No. Unless it says so expressly. And in very few cases did we find an expressed intent to affect free speech. In other words, we created a common law Bill of Rights. And we are not the only one who has done it . . .

"So the Supreme Court of Israel has created a whole case law protecting free speech. And in creating this case law, in protecting free speech, our foremost example was the United States. We gave a very, very wide definition of what speech is . . . Free speech is basically any utterance that has a purpose. And so, for us, pornography is free speech. Hate speech is free speech. And many, many things that in America, under the American methodology are ultimately not free speech, with us they are free speech. But free speech is not absolute. It may be limited. In the first era free speech could be limited if the speech created a near certainty that the public interest will be heavily effected. In the second era free speech—as derived from the constitutional right to human dignity—could be limited if it is proportional.

From the panel on the **Role of International Law in Domestic Systems**

Lori Fisler Damrosch '76
Hamilton Fish Professor of International Law and Diplomacy and Henry L. Moses Professor of Law and International Organization, Columbia Law School

"In the Syria instance that I was talking about, which do you do first? Do you follow your national constitutional process? Do you get parliamentary approval if you need it and then do what you need to do at the international level? Or do you go get your UN Security Council approval first, and take that to your national parliament and proceed in that way? We used those two different routes in the two different versions of the Iraq War. George Herbert Walker Bush did it one way in 1991. And George W. Bush did it the other way in 2002–2003. And it makes it a really interesting debate to try to figure out which is the optimal sequence, which one demonstrates better fidelity to some ultimate value that we have which might be constitutionalism or might be internationalism.

" . . . for all the mistakes that George W. Bush made . . . there is a certain logic to knowing if you are the superpower. If you are the superpower and you are going to be doing the heavy lifting, it makes sense to know if your national parliament is going to back you before you go to the United Nations and try to build your international coalitions."

From the panel on **Judicial Review in Constitutional Systems**

Albie Sachs
Visiting Professor of Law and Gruber Global Constitutionalism Fellow, Yale Law School;
Former Judge, Constitutional Court of South Africa

"This was judicial review with a vengeance. And it was absolutely vital in our country because we weren't a country. We needed some kind of institutional, almost imaginative capacity for telling everybody 'You can't just leave it to good chaps or to the culture of the society and rely on institutions automatically doing the right thing once you give them a nudge and a hint. It has to be really clear.'

" . . . a lot depends on the political culture, on the timing in a particular country. So you can't say one model is best for the world. In the case of the UK, Australia, New Zealand, where political culture is well entrenched, where certain customs play a bigger role than the actual text of the constitution, you can rely upon a nudge from the top courts and then parliament will follow suit. But in other countries, a nudge is just nothing. If you want to make it really clear that this is what the constitution requires, you have to be really clear, and it has to be a political crisis if parliament doesn't follow suit."

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Former Secretary of State Hillary Clinton '73 was awarded the Award of Merit and gave remarks on the importance of early childhood education to a full house at Woolsey Hall as part of the 2013 Alumni Weekend *(see page 2)*.

From the panel on the **Equality, Liberty, and Dignity—Transnationally**

Justice Rosalie Abella
Supreme Court of Canada

"It is unsettling to read decisions where you are still struggling with federalism. Is this a state's right? Is this a federal right? Is this a question of strict scrutiny or intermediate scrutiny? All of those things sometimes appear to us to avoid the need to get to the core issues which are really involved. I know what role precedent has. Every country builds on its own culture, history, and experience. We are lucky enough to be new enough that we can learn from your strengths—we took everything in human rights from *Griggs*—and from the things that you have been struggling with . . . It is sad for me that when I was in law school from '67 to '70, I looked longingly at the American Supreme Court . . . but I think if you look at the citations of most of the Western democracies now, at the constitutional courts, you would find Israel referenced, South Africa referenced, the European Court of Human Rights referenced, and very little coming from the United States. And it makes me wistful. But on the other hand, as Isaiah Berlin said, "There's no pearl without some irritation in the oyster." You've helped us learn. I just marvel at this resonant legal system and hope that somehow you'll figure out a way to get back to the core values that, to me, animated who you are as a country." *Y*

video

Photos and videos of Alumni Weekend 2013 are available at www.law.yale.edu/slideshow/aw13/