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A Conversation with Justice Stephen Breyer

Justice Stephen Breyer, known for his interest in cross-border intellectual exchange, recently visited various German academic and judicial institutions. Despite a full schedule, Mr. Breyer dedicated some of his valuable time to discuss legal developments with a small group of young lawyers. The following is a brief account of that discussion which took place at the American Academy in Berlin.

Mr. Breyer opened the colloquium by introducing himself and by outlining his job as a Supreme Court justice. He mentioned previous career stops such as being an aid to the state legislator before he revealed how his professional life had changed after he had been nominated by President Bill Clinton to become a life-tenured Supreme Court justice. As part of this introduction, he portrayed the Court's history and, in particular, the Court's jurisdiction within the U.S. dichotomy of state and federal adjudicatory systems.

Out of the millions of cases filed each year in U.S. courts, only approximately 4% deal with federal law and are thus potentially subject to U.S. Supreme Court review. Among those 4%, about 70% are resolved by settlement or plea bargaining according to statistics. Unlike the situation in most European countries, where a right to appeal exists, appeals in the United States are discretionary and rather exceptional. To provide a quantitative reference point, the Brazilian Supreme Court hears more than 100,000 cases each year; the U.S. Supreme Court currently limits its caseload to 70 cases per year.

This enormous filtering process presupposes rigid criteria. Permitting rare looks into the internal administration of the Court, Justice Breyer praised the role of his law clerks. Law clerks are graduate lawyers who are assigned to common law judges to prepare opinions and to facilitate administrative responsibilities. Typically, law clerks take a first look at incoming cases and evaluate the merits of the arguments. In this selection process, Mr. Breyer explicitly trusts his law clerks. While different judges have different criteria for choosing cases, Justice Breyer follows a two-step analysis: "All I care is: is there a split in the circuits and is this split relevant?"

Thematically, there were no restraints. Justice Breyer presented himself not just open to intellectual diversity but also as profoundly knowledgeable and informed. No field of law, no corner of specialization seemed to exist in which the justice did not have a deliberate opinion or reasoned comment. Whether the topic was intellectual property law or transatlantic tensions in antitrust enforcement, WTO developments, or international arbitration, Justice Breyer cited the applicable precedents and outlined or criticized the current status of the law.

Mr. Breyer found particular interest in three topics: federalism, the use of foreign precedents when interpreting the U.S. constitution, and the profile of future Supreme Court justices.

The first big topic was federalism. We initiated the discussion by inquiring how exactly the contours of federalism have changed in the aftermath of the Court's interpretation of vertical powers in United States v. Lopez. In *Lopez*, for the first time in almost six decades, a majority of the Court held that Congress exceeded its authority under the Commerce Clause. Recently, however, the Court seemed to have reaffirmed its old vision of federalism by cutting the immunity of several individual states. Justice Breyer attributed these fluctuations to the famous "Rule of Five" whereby five justices form a majority. A majority supported *Lopez*, but each justice leaving the court and each new justice joining the court restacks the deck.

We sought further explanations on a comparative level. Mr. Breyer was asked to comment on what might be called the federalism paradox. On the one hand, the tremendous growth of federalism is quite the success story throughout the world. Many countries have either transformed from a unitary governmental system into a federal structure or have – as New Beginnings – decided to establish a federal as opposed to a unitary state. Even Great Britain and Belgium, classic examples of unitary governments, have successively decentralized power to other constitutional entities and thus joined the federal movement.

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On the other hand, there is a sense of centralization and monopolization. Whether because of economic emergencies, anti-terrorism or environmental legislation, many countries have successively shifted powers from the states to the federal government.

We wanted to know if Justice Breyer had an opinion about or an explanation for this paradox that federalism, while increasingly popular, appears at the same time to be outdated. Justice Breyer was well aware of these conflicting developments and identified the enormous changes that have taken place in many countries since 1990 and after September 2001 as starting points of an answer. Speaking for the United States, he viewed federalism as a reflection and occasionally even as mirror of overall developments. Someone has to respond to attacks or to a financial crisis, he said, and federalism aims to find out which governmental entity can do the job best.

A second major topic was the role constitutions play in times of globalization. In particular, we focused on the idea to interpret a constitution in light of foreign experience. Unlike Chief Justice Roberts, Justice Scalia, Justice Alito, and Justice Thomas, who vigorously reject foreign law even as a non-binding reference point, Justice Breyer presented himself as an outspoken supporter of comparative analysis.

Our discussion tried to put aside political, historical, and cultural arguments and instead we directed our focus to genuinely legal arguments. How would Justice Breyer respond to the alleged risks of using foreign law when interpreting the U.S. constitution?

Apparently, U.S. law and foreign law are not always in harmony. One classic example is the decision of *New York Times v. Sullivan.* While some Americans may consider the decision as "an occasion for dancing in the streets," as Professor Meiklejohn famously put it, much of the rest of the world vehemently rejects the Court's actual malice standard to establish defamation.

Other examples suggest similar irreconcilable differences: Hate speech; capital punishment; gun laws and fundamental rights associated with it; the contours of obscenity; privacy rights versus dignity; the implications of positive and negative rights; the existence and scope of social rights as fundamental rights; the scope of executive powers; the legitimacy of abstract and centralized judicial review; the commensurability problem resulting from a lack of hierarchy of fundamental rights in the United States as opposed to, for example, Germany's principle of "praktische Konkordanz"; and, finally, the difficulties in comparing the idiosyncrasies of U.S. federalism with those of other countries.

Given these and other differences among the world's constitutions, the question arose as to what methodological function the Justice attributes to judicial comparison. Does Justice Breyer recognize some areas of constitutional law as too idiosyncratic, as too uniquely "national" to fit for comparison? If so, which ones? Is there a systematic theory of judicial comparison or are references to foreign law necessarily ad hoc considerations?

Justice Breyer responded to these questions in two interrelated ways. In direct response to the questions, he rejects any firm principles that would proscribe or prohibit the use of foreign precedents in any methodologically (or "mechanically" as he called it) manner.

This said, he continued to elaborate on the point of methodology more broadly. He, as a member of the Court, does not see himself to be in a "camp," but rather likes to think of the Court as a unity- despite disagreements. The division of originalists, liberalists, textualists, etc. is an invention of the media, Mr. Breyer claimed. "They have to write about something." To him, being an originalist or a liberalist is only a matter of emphasis, not something of a fundamental choice. He likes history, but he is not a historian. "History is not my area of expertise," he said and left doubt whether other members of the Court would be more qualified to engage in profound 18th century historic exegeses.

He then further expatiated on his rejection of classifications when he started to talk about what he calls the "legal mind approach." Mr. Breyer strongly depreciates categorizations, theories, bright line rules, and any form of "boxes." Instead, he prefers to look at consequences, enforce pragmatism, and to present "good results". Formalistic self-restraints and abstraction do not, in his opinion, adequately address the multiplicity of factual situations or the requirements of individual equity and fairness. To a common lawyer, each case is unique, he explained, each pattern of facts is too distinct to allow factually immune, pre-drafted academic approaches to solve the issue. Problems in the common world, one might add, are primarily factual and not legal problems.

Mr. Breyer's repeated reference to late Justice Holmes in this context came as no surprise. When identifying the two approaches to adjudication – flexible versus absolute – Justice Breyer allied with Justice Holmes and Justice Cardozo as perhaps the two most prominent supporters of case vis-à-vis doctrine orientated resolution. "[G]*eneral principles do not decide concrete cases,*" Justice Holmes famously declared and later Justice Cardozo added that *"[t]he common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars.*"

To Justice Breyer, law is permanently evolving and in constant flux, not static or absolute. Explicitly, Justice Breyer sharply distinguished himself from Justice Hugo Black's position according to which *"there are 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what the words meant and meant their prohibitions to be 'absolutes'.*"

We next talked about the issue that lower federal courts are not always aware that decisions of international tribunals are not (U.S.) "law;" a major setback for practicing U.S. attorneys, lower courts regularly overlook the distinction between individuals and corporations when applying treaties and thus run the risk of subjecting companies to strictly speaking non-applicable obligations. Although Mr. Breyer did not criticize lower courts, he agreed that "international law" still implies something mysterious if not cryptic to "too many U.S. judges and practitioners."

With this, we bridged his answer to a third big issue, namely whether the criteria for nominations to U.S. high courts are likely to change in the future. Justice Breyer was quite enthusiastic about this topic. He predicts that "soon" being an excellent lawyer will no longer be enough to become a U.S. Supreme Court judge. Future judges, he envisioned, will have to have more than just legal expertise; diversity and foreign experience will become additional requirements that candidates are expected to bring to the court. In particular, he hopes for more female Justices because of their "inherent gift to conciliate". Mr. Breyer made no secret that he misses Justice O'Connor not just as a well respected colleague but also as a friend.

I asked him if this lack of diversity and internationality in the composition of the current Court helps to explain why decisions of the U.S. Supreme Court seem to become less influential abroad. Numbers from India and Japan (note: both non-European countries) suggest that the European Court of Human Rights is progressively taking over the U.S. Supreme Court's role as pre-eminent inspiration. I asked him if he as a member of the Court acknowledges this development and whether it concerns him. He doesn't care at all, he aridly replied. Mr. Breyers' job "is to

decide cases, not to do politics, nor to care about what the world thinks" of his judgments. I expressed my surprise because in several recent decisions he claimed the impact that U.S. Supreme court decisions have upon the world community.

For example, in *Roper*, Justice Breyer argued that applying the death penalty against minors would isolate the United States from other civilized nations and thus jeopardize the United States' role within the international community. His response indicated that he did not like this follow up. He added that he does not see himself or the Court in any competition with foreign courts. Doubts about this indifference remained among the audience.

With this summary, I thank the American Academy in Berlin, the esteemed law professors who sponsored the event, my colleagues at the roundtable, and, of course, Justice Breyer in particular with my highest appreciation and sincere gratefulness to make this opportunity such a memorable experience.

In den folgenden Ausgaben des DAJV-NL sollen verschiedene Programme zur Ausbildung im US-amerikanischen Recht und der englischen Rechtssprache an deutschen Universitäten vorgestellt werden. Den Anfang macht die Universität Osnabrück.