The Nature and Function of Judicial Review

Le Conseil constitutionnel est une juridiction, mais il ne sait pas; mon rôle est de lui faire prendre conscience de sa nature.

—Robert Badinter, president of the Conseil constitutionnel, 1986–95[1]

The theme of this book is that modern constitutional review cannot always be adequately understood if seen through the traditional categories of the separation of powers. Constitutional courts do more than can be fitted into the domain allowed to courts exercising the judicial function. Much of what they do in what I call "transforming societies" involves spreading the values set out in the constitution throughout their state and society. Indeed, their idea of what a constitution is does not always fit well with the orthodox idea of a liberal constitution. I try to show that constitutional judges often come near to being applied political theorists, carrying out a quite new type of political function. This first chapter develops some of these concepts and sets out the plan of the book, offering technical information and definitions to be filled out in the substantive chapters.

A few examples always help in setting out a general approach. Though this book is primarily about "new" constitutional review in countries undergoing some form of transformation, I begin with a different sort of example. It is chosen not from a new constitutional court, or one involved in transformative jurisprudence, but from the oldest court doing constitutional review, what is beyond doubt the model court, the US Supreme Court. There are two reasons for this. First, the Supreme Court is familiar—if the reader knows anything about constitutional review, it is likely to be about America's experience. Second, I hope to show that the patterns and ideas that are relevant in newer jurisdictions have their counterparts even in this oldest and most familiar territory.

In 2003 the Supreme Court overturned one of its own precedents, a precedent that had only stood for seventeen years. The case was *Lawrence v Texas*, which challenged a state law criminalizing some homosexual practices.[2] The ruling precedent, *Bowers v Hardwick* from 1986, ought to have made the case unnecessary.[3] In *Bowers* a Georgia state law that made sodomy punishable by up to twenty years' imprisonment was challenged. Hardwick had been arrested for committing sodomy when a police officer had entered his house and found him with another man. In the end he was not prosecuted, but undertook a civil suit against the state claiming the law was unconstitutional. Though the federal appeals court agreed with Hardwick, the Supreme Court ruled that Georgia was entitled to use the law to impose the majority's moral code.[4]

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The Supreme Court is not totally forbidden to overturn its own pre sions, but puts a very strong value on *stare decisis*, the rule of precedent. , it is rare for the court to change its mind so soon after a major ruling, even one as controversial as that in *Bowers v Hardwick*. That case had raised a huge protest because it clashed with liberalising trends in American society during the 1970s and 1980s. When *Lawrence v Texas* overruled *Bowers*, there was an equivalent uproar from political and judicial conservatives.[5] When major courts do overturn their own precedents, they usually do so because they think an earlier decision has become inappropriate for a later society. Or they at least shade their disagreement with the past decision. The US Supreme Court of 2003 was much blunter. The majority opinion says outright, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."[6] This really was a choice by the Supreme Court—it could have held for Lawrence without overruling *Bowers*. The majority opinion explicitly says that the justices rejected an alternative approach that would have disallowed the Texas statute on narrower grounds. In fact Justice O'Connor, who voted along with the majority to overturn the Texas law, had been part of the majority in *Bowers* and still thought it correct. To find the law under which Lawrence was prosecuted unconstitutional, she used an ap-

[2] *Lawrence v Texas* 539 US 558 (2003) (US Supreme Court).

[3] *Bowers v Hardwick* 478 US 186 (1986) (US Supreme Court).

[4] The court's own summary of this point is this: "Sodomy laws may not be invalidated under the due process clause of the Fourteenth Amendment on the theory that there must be a rational basis for the law and that majority sentiments about the morality of homosexual sodomy are not an adequate basis." *Bowers v Hardwick* 3.

[5] There is an extensive journal literature on both cases. As a selection, EM Maltz, "The Court, the Academy, and the Constitution: A Comment on *Bowers v Hardwick* and Its Critics," 1989 *Brigham Young University Law Review* 59–91, gives a good account of both the first case and its reception, while J Weinstein and T DeMarco, "Challenging Dissent: The Ontology and Logic of *Lawrence v Texas*," 2003 10 *Cardozo Women's Law Journal* 23–87, is a useful analysis of the judicial logic in the second case. The two cases and intervening decisions are treated together in R Turner, "Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from *Bowers* to *Lawrence*," 2004 53 *University of Kansas Law Review* 1–81.

[6] *Lawrence v Texas*, 12. The nine justices on the court were split. Five signed the majority opinion, with a sixth judge concurring in the result but using a quite different approach. The main dissent, joined by two other justices, was by Justice Scalia. Even by the standards of the Supreme Court, it is bitter and confrontational towards the majority.

proach quite different from that offered in the majority opinion. But if the court in 2003 did not have to overrule *Bowers*, the court in 1986 did not have to rule on the constitutionality of the Georgia statute at all—it would have been perfectly possible to overturn the court of appeals by simply ruling, as the Supreme Court was invited to, that the case was moot. Right at the beginning, the first Georgia court to hear the case had ruled that Bowers had no cause of action because he had not actually been prosecuted.

The first point to make is that courts sometimes really do set out deliberately to make major legal statements. No one can avoid the fact that two US Supreme Courts, only seventeen years apart, felt so strongly about the issue of c homosexual behaviour that they took up challenges that could have! 3 / 39 Both courts, though radically opposed to each other, felt it their duty in this way. The second point to make at this stage is how much personnel changes matter. Since the 1930s the US Supreme Court has always had nine justices, though this number is not prescribed in the constitution and has not always been mandated by law, it may have hardened into a "constitutional convention." Of the nine men and women who heard *Lawrence*, only three survived from the *Bowers* court, and one of them, O'Connor, effectively changed tack. The six new appointments split four to two against the ruling in *Bowers*. On such minor things as judicial death and retirement can depend something as fundamental as a shift in a nation's public morality. (The route by which people become judges is commented on later, especially, as an example, in chapter 4 on France.)

In other ways this relatively ordinary piece of constitutional adjudication shares many of the features to be discussed at length in this book. The ruling in *Lawrence* is a self-conscious "modernization" of values, and an imposition of them. Much of the disagreement about the case revolves round the question of whether or not public disapproval of private behaviour can justify legal restrictions, but discussion is always admixed with matters of what I have called elsewhere "judicial methodology"—the rules to be applied in deciding such cases.[3] So those who wanted to overturn the Texas law claimed that there was no important and legitimate government aim served by it. Their opponents said that the law needed no such aim, because that test applies only to rights that are "deeply rooted in this Nation's history and tradition." Much of what will follow in this book is about what tests are applicable in what circumstances.

Part of the disagreement over *Lawrence* is factual—the two sides differ on the history of legal constraints on homosexuality—and we will see frequent use and misuse of claims to empirical knowledge in other jurisdictions. Much of the disagreement over *Bowers* and *Lawrence* is disagreement over what the cases are actually about. For both sides the issues have little to do with homosexuality in itself. For the majority in *Lawrence* the issue is the right of the citizen to be left alone in private. For the other side, the cases are about the right of the state governments to reflect majority feeling within their territories with no federal intervention. Sociol-