

**Courts and the Making of Public Policy
and The Social Contract Revisited**

Transformative Constitutionalism and Socio-Economic Rights

REPORT OF A LECTURE BY THE CHIEF JUSTICE OF SOUTH AFRICA,
RHODES HOUSE, OXFORD,
11 JUNE 2008

Daniel Butt

The Foundation for Law, Justice and Society
in affiliation with
The Centre for Socio-Legal Studies,
University of Oxford

www.fljs.org



Transformative Constitutionalism and Socio-Economic Rights

Summary

Chief Justice Langa began his address by noting that the subject of socio-economic rights is a difficult one. The Constitutional Court of South Africa started dealing with socio-economic rights when it began hearing cases in 1995. Socio-economic rights lend themselves to disagreement, the first such disagreement in South Africa emerging in relation to the question of whether such rights should be included in the Constitution, as indeed they were. South Africa is a nation with huge economic disparities, and the Court therefore finds itself dealing with socio-economic rights on a day-to-day basis. He suggested that South Africa's social contract of transformative constitutionalism could be used to shed new light on an old debate.

Social contract theory is a theory concerning the legitimacy of political authority. It claims that legitimate political authority must derive from the consent of the governed, where consent takes the form of an agreement of sorts in relation to the basic arrangements of society, which may include ideas of distributive and commutative justice, basic rights, and duties of citizens and the state alike.

As a historical claim, social contract theory is perhaps untrue in many contexts, as the current citizens of most states have never made such an agreement. Recent strands of social contract theory have therefore taken a turn towards the hypothetical. In this form, social contract theory asks whether particular fundamental rights would be agreed upon by citizens in conditions of equal bargaining power and knowledge, in order to model fairness and impartiality. If the answer is yes, then the fundamental right in question imposes genuine duties on others, and the enforcement of these duties is legitimate. However, when we consider the role of courts in enforcing the social contract, we are immediately struck by a tension.

Why should elite and esoteric courts play any role in defining fundamental rights, if the social contract is supposed ideally to be based on the people's consent? Langa suggested that such a line of criticism is misplaced. Notions of real and hypothetical consent of the people are useful to judges when courts assess basic questions of justice. Many human rights disputes throw up intractable conflicts that cannot be resolved by mere reference to the relevant legal text. In such cases, resort must be had to the values underlying the legal system. When doing so, judges may usefully ask themselves whether this is what the people have agreed to, or would ideally agree to.

This is especially true in relation to those, such as the poor, who have little bargaining power and almost no say in society. Social and economic imbalances are very likely to skew social arrangements over time to favour those in positions of relative advantage. If this is the case, as it is in South Africa, judges should approach human rights adjudications in such a manner as to uplift the underprivileged and thereby reorientate the social contract in a way that is fair to all. There is a clear parallel between the idea of inequality of bargaining power in concluding a social contract and real world inequalities of voice and participation in the democratic process. Thus, the role of the courts in deciding fundamental rights cases should be aimed at the protection and promotion of deliberative democracy, which embodies the ideals of self-governance, participation, and the public justification of the exercise of political authority. It is obvious that in many societies, inequalities in bargaining power stem predominantly from disparities in access to education, social security, health care services, adequate housing, and sufficient food and water. It is incumbent on judges to take these discrepancies into account and to settle disputes in a way which alleviates them, to the extent that doing so is legally permissible in their jurisdiction.

South Africa's social contract of transformative constitutionalism has two aspects. The first is that the Constitution approximates, albeit imperfectly, the idea of an actual historical contract between the people of South Africa, at least in relation to the current generation. The Constitutional Assembly directly responsible for the drafting and adoption of the final Constitution took public participation to a new level. A host of public meetings and workshops were held around the country. It received over 2 million submissions from private individuals and organizations before the first draft was circulated for public comment. The unprecedented scale of public participation is evidence that the constitutional settlement is expressed in terms that many South Africans embrace. The second aspect is that the Constitution is fundamentally transformative. This has been expressly recognized by the Constitutional Court, and by other courts. The goal of the Constitution is to heal the wounds of the past and guide South Africa to a better future. The Constitution marks a historic breach with the past of a divided society characterized by strife, conflict, untold suffering, and injustice, and which is now founded on the recognition of human rights, democracy, and peaceful coexistence and the development of opportunities for all South Africans regardless of colour, race, class, or sex. There are at least two parts of the commitment to change.

Transformation envisages a society that will always be open to dialogue and contestation, and guards against self-congratulatory complacency when it ceases to imagine that things could be better.

The first is a commitment to creating a substantively equal society. It recognizes the moral entitlement of persons to what some call 'positive liberty': the ability actually to exercise one's rights and pursue one's projects, rather than a mere empty entitlement to do so. It recognizes that this entitlement vests

in everyone equally. The government bears duties to refrain from steps which restrict the ability of individuals equally to exercise their freedoms, but just as importantly, it recognizes that the government possesses duties to take positive steps to protect, promote, and fulfil the equal freedoms of the people. Thus, South Africa's pursuit of substantive equality requires both state prevention of discrimination and state promotion of distributive justice. This in turn means a radical commitment to the state provision of services and a levelling of the playing field which was so drastically skewed by the apartheid system. It also means binding private persons to do their bit to pursue the constitutional dream. In South Africa, two of the most important elements of this involve affirmative action measures and the entrenchment of socio-economic rights.

The second element of transformation is a shift from a culture of paternalistic state authoritarianism to a culture of the ongoing and never-ending justification of state power. This means that it is no longer sufficient for judges to rely on the mere say-so of previous courts or parliaments for justifications of their decisions. Instead, judges now bear the ultimate responsibility to justify their decisions, not only by reference to authority, but to ideas and values. Transformation envisages a society that will always be open to dialogue and contestation, and guards against self-congratulatory complacency when it ceases to imagine that things could be better. As a society, the South African people have agreed to commit themselves to a project of improving their lives so that they are equally able to exercise their rights and freedoms.

Turning to the subject of socio-economic rights, Langa expressed support for Professor Sandra Fredman's claim that the traditional conceptualization of human rights must be abandoned.

This conceptualization treats a particular cluster of concepts, focused on duties of restraint linked to civil rights, as justiciable, while seeing positive rights as being aspirational in nature. Negative duties are portrayed as concrete and cost-free, while positive duties are seen as indeterminate, programmatic, and resource intensive. However, there is no clear

hierarchy between the two categories, which in fact interact in important ways. Freedom of expression or of association, for example, is of little use to someone with insufficient food to eat. Furthermore, such freedoms are instrumentally useful in ameliorating poverty. Civil and political rights cannot be differentiated from socio-economic rights in terms of justiciability. Both categories of rights give rise to negative duties to refrain from interfering with the exercise of the rights in question and to positive duties to protect and promote their exercise. The civil and political right to life may be interpreted to give rise to positive state duties to provide emergency health care, food, and shelter. The civil and political right to a fair trial may be interpreted so as to confer a positive duty on the state to provide legal representation to indigent accused persons. Concomitantly, the socio-economic right of access to housing obligates the state to refrain from unlawful evictions. The right to access to water imposes a positive duty on the state not to turn off the taps.

This exposes as a fallacy the standard refrain that only socio-economic rights have budgetary implications. However, the positive duties arising from civil and political rights are much less likely to provoke fierce legal controversy. Many would decry as a grave violation of human rights a government decision drastically to reduce government spending on the justice system, forcing the closure of police stations, the legal aid scheme, and even some courts. In contrast, the closure of state schools and hospitals, though similarly in violation of positive state duties, is unlikely in many quarters to be denounced as a violation of the human rights to education and emergency health care. Such distinctions do not bear theoretical scrutiny. Instead, we should focus on the ways in which judicially enforced positive state duties may legitimately fulfil the promise of both categories of rights.

Langa then turned to the practical experience of South African courts in enforcing socio-economic rights. Bearing in mind that members of the judiciary have neither the expertise nor the political accountability to determine the exact manner in which

budgets should be spent, this has been a challenging task. Nevertheless, South Africa has been successful in beginning to create a meaningful socio-economic rights jurisprudence, which acknowledges the institutional and political limitations of the judiciary, but also contributes to the transformative project by ensuring that socio-economic rights are a reality.

The themes of transformative constitutionalism, substantive equality, distributive justice, and the ongoing need for public justification emerge in the adjudication of socio-economic rights. The ultimate goal of social transformation is to reach a level of substantive equality, where everyone is able to lead a life consistent with human dignity. It is unsurprising that equality and dignity are two founding values of the Constitution. Acknowledging and enforcing these ideals are important in furthering the goals of substantive equality and the protection of human dignity. Where people are denied basic necessities, they are denied the right to live a dignified human existence on equal terms with others. The approach of the South African Court has been to hold that a socio-economic right has been violated when the state has acted in a discriminatory way in providing essential benefits, even when such a finding has had significant budgetary implications. One example concerned a policy only to provide anti-viral drugs for the treatment of HIV in particular research centres.

Judges may invoke the widely accepted prohibition on status-based discrimination as a legitimate, relatively uncontroversial tool in socio-economic rights adjudication. If the state is going to provide socio-economic benefits or impose a socio-economic burden, it must do so in a nondiscriminatory manner. The need, within the terms of transformative constitutionalism, for the formulation and implementation of government policy to be publicly justified has greatly affected the approach of the Court in enforcing socio-economic rights. The Court requires state representatives to come to Court and justify to litigants, and to the public in general, its preferred socio-economic policies. Where the reasons advanced in defence of the state's policies are insufficient in terms of reasonableness, understood in the light of a commitment to transformation,

the Court may declare these policies unconstitutional. This approach is designed to avoid ruling on the adequacy of particular social policies where they constitute sincere and reasonable attempts fairly to allocate and apportion scarce resources. More extensive intervention may be counterproductive since judges do not have the necessary expertise and may make harmful decisions. Rather than insisting on the provision of particular socio-economic goods, the Court provides a forum where individuals can ask the state why its approach to such matters is reasonable.

The need for a society to be open to the possibility of change and to the desirability of contestation is particularly relevant to the issue of socio-economic rights, as they are to be realized progressively. What the state is obligated to do today may be different from what it is obligated to do tomorrow. It must be ensured that socio-economic rights and entitlements do not ossify. There is a need for flexibility in the focus on context, which determines what is required in particular circumstances, the hope being that, over time, distributive injustices will subside and unfair discrimination will wane.

All nations should ponder the value of legally obliging the state to take positive steps to protect and fulfil socio-economic rights.

It must be recognized that widespread transformation of socio-economic conditions is beyond the power of the courts alone. The central purpose of rights in general is to guide the state in fulfilling its constitutional mandate. To do this, the state needs assistance from other stakeholders. The context, then, is one of a constitutional conversation with government. The courts should be seen to be working with the state in fulfilling socio-economic rights, which avoids creating the impression that they are attempting to usurp the government's political role. Such perceptions may compromise the legitimacy of the judiciary or make state officials reluctant to obey

court orders. The realization of socio-economic rights is not only the responsibility of state actors. Civil society and public interest groups, and even private persons, have an important part to play.

In conclusion, Langa considered the relevance of South Africa's social contract of transformation to other nations, particularly those in the developed world. It is obvious that South Africa's constitutional project is closely tied to the country's divided history of race-based segregation and disempowerment, and the massive inequalities that persist in the present day. Nonetheless, the South African experience is of direct relevance to others. It may be that South Africa is notable in terms of the degree of its internal inequality in relation to states such as the United Kingdom, and that therefore the themes of transformation and change need to be stressed to a greater extent. However, no nation has achieved the social ideal in which all people are actually able to exercise their rights and freedoms. No nation has achieved perfect distributive justice and substantive equality. Conditions within states, including distributions of burdens and benefits, may change over time. Therefore, every nation should deeply consider ways in which the plight of those without a say in the democratic process and with little bargaining power in concluding the social contract may be alleviated by sympathetic state intervention. All nations should ponder the value of legally obliging the state to take positive steps to protect and fulfil socio-economic rights.

Commentary

Chief Justice Langa's extraordinarily rich lecture raises a number of points of obvious interest for those concerned with the comparative study of the role of courts in the public policymaking process. The first of these stems from the political context of contemporary South Africa, and concerns the Chief Justice's discussion of the social contract in relation to the South African constitutional settlement. It is commonplace nowadays for discussions of the social contract to assert that such a contract must be understood in hypothetical terms: not in relation to what people have agreed to, but in relation to what they would or should agree if they were to be

asked. This reflects what many have seen as a crucial weakness in traditional social contract arguments, which, it is suggested, rested upon the implausible assumption that modern day states have their historical genesis in some form of binding agreement between the ancestors of their present day citizens.

Such an argument appears seriously flawed as an account of political legitimacy, for two reasons. First, we may reasonably doubt whether such a contract was ever agreed, or whether political societies were in fact typically founded on the basis of coercive force for, at least, many of their members. Secondly, as David Hume argued in his essay 'Of the Original Contract' in opposing, amongst others, John Locke, even if such a contract had indeed been agreed, there appears to be no good reason to hold that the agreement of an individual's ancestors should bind her in the present day. Accordingly, modern social contract theorists such as John Rawls and T. M. Scanlon have developed hypothetical social contracts based on what people would agree to, or could not reasonably reject, if they sought to draw up fair terms of social cooperation. It is often suggested that, in such accounts, the idea of agreement is actually doing very little work, and that the idea of a 'contract' is merely a device to model the requirements of impartial morality, derived, perhaps from our settled intuitive judgements of right and wrong. Ronald Dworkin famously wrote that, 'A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all'; and the common joke goes that a hypothetical contract 'is not worth the paper it's not written on'.

The example of the South African Constitution shows how a rather different social contract model can be employed in the present day. The primary legitimizing force behind the South African Constitution – and the subsequent activism of the South African judiciary – is not hypothetical but *actual* agreement. It is not, of course, unusual for new constitutional regimes to claim a democratic mandate from the people. The Constitution of the French Fifth Republic, for example, was passed in September 1958 by 79.2 per cent of those members of the electorate who voted in a constitutional referendum.

The passage of the South African Constitution, however, was rather different. Chief Justice Langa's remarks underline the extraordinary efforts which were taken to maximize public participation in the drafting of the Constitution. The explanatory memorandum attached to the beginning of the Constitution makes clear that the idea of popular agreement lay at the heart of the adoption process. It notes that the objective of the drafting process:

...was to ensure that the final Constitution is legitimate, credible and accepted by all South Africans. To this extent, the process of drafting the Constitution involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text, which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly. This Constitution therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.

This, then, is very different from the French experience in 1958, when the French people were presented with a document largely drawn up at the behest of Charles de Gaulle. The idea of public justification at the heart of Langa's speech is not one which appeals to a one-off endorsement of a prepared constitutional document by a majority of the public in a referendum. Rather, it emphasizes political participation both in the initial formation of the Constitution itself and in the subsequent workings of government within the terms of the Constitution. By requiring the government continually to justify its decisions in public, and by providing a forum in which citizens can challenge these decisions in the light of the transformative goals of the Constitution, it seeks to give an account of legitimate governmental authority that need not rest upon simple majoritarianism, and which has the potential to retain its legitimacy even beyond the

lifespan of the generation which initially accepted the constitutional settlement. The vision of justifiable authority here is reminiscent of what Philip Pettit has called 'contestatory democracy', whereby one seeks to avoid the tyranny of the majority by setting up institutions through which minority groups or individuals can object to proposed governmental actions and insist they be reviewed, to demonstrate that they are in keeping with the common good. For obvious historical reasons, the prospect of one social group exercising tyrannous rule over another is a compelling spectre in South Africa.

For obvious historical reasons, the prospect of one social group exercising tyrannous rule over another is a compelling spectre in South Africa.

It is, perhaps, an open question to what extent this attempt to ground the South African constitutional settlement in actual agreement really succeeds, as the Chief Justice's description of it as being 'imperfect' suggests. If we take the point of the social contract to be legitimation of the coercive authority of the state over each and every one of its citizens, then there are three obvious problems: 1) the fact that each and every citizen did not, in fact, agree to the Constitution; 2) the fact that even those who did agree may have withdrawn their agreement; and 3) the fact that some members of the South African citizenry were not adult members of the polity at the time the Constitution was passed. The ongoing public justification of state authority may or may not be taken to assuage these problems. But the 'actual agreement' version of the social contract is potentially of crucial importance when it comes to justifying the judicial activism of the Constitutional Court. As previous reports from the Foundation for Law, Justice and Society have argued (see, for example, Daniel Butt, 'Democracy, the Courts and the Making of Public Policy'), judges

often face objections when they step into the policymaking process, which can be broadly categorized in terms of challenges to their democratic legitimacy and to their policymaking competence. The former is commonly aired and straightforwardly articulated: how can it be legitimate, in a democracy, for judges to substitute their own policy preferences for those of elected representatives voting in legislative assemblies? The (disputed) rejoinder that judges are merely upholding the Constitution when they engage in the judicial review of legislation carries little weight with some democratic theorists: why should a constitution, typically passed many generations ago, stay the hand of those living in the present? To the extent that the South African Constitution has its genesis in widespread, and ongoing, agreement amongst the South African people, a simple response seems possible. If we are content that the existing demos of a given society has given its blessing to substantive elements of a constitution, then it seems as if the Court does possess democratic legitimacy in seeking to uphold the Constitution's legitimacy. Indeed, given the notorious problems of social choice theory which accompany attempts to describe the actions of elected political parties as representing the will even of a majority of the people – let alone the people as a whole – we may well think that, in some cases, the Court has greater democratic legitimacy than the elected government.

There is a pressing need to defend the intervention of the Constitutional Court in the public policy process, since Chief Justice Langa's account of when the Court may so act is quite remarkable by British or US standards. Langa's account of transformative constitutionalism evidently makes extensive reference to South Africa's extensive internal inequality, and carves out a potentially far-reaching role for the Court as an agent of distributive justice. The extent to which he suggests that the Court may find the government's actions to be unreasonable in the light of the transformative goals of the Constitution goes far beyond what is generally thought to be the legitimate role of the courts in the United Kingdom or the United States. Clearly, the formal

incorporation of socio-economic rights into the constitutional text is of great significance here. Langa strikingly endorses Sandra Fredman's account of the relation between negative and positive rights, and thereby also reflects Henry Shue's account, as articulated in his classic work *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. Such rights would generally be thought at most to legitimate the court in seeking to ensure that members of the polity received certain minimal levels of welfare, in relation to subsistence, health care, education and so on. Langa's account of the role of the Court goes beyond this. He does not merely advocate ensuring sufficiency; he even goes beyond the claim that the courts should seek to give priority to the least advantaged. The Court is portrayed as having a positive duty to seek to bring about substantive equality between citizens.

The rhetoric Langa uses throughout is remarkable, having more in common with the writings of progressive political theorists in the United Kingdom and United States than it does with the language of contemporary political debate in these countries. It is commonplace nowadays to maintain that academic political theory has become idealized, utopian, and overly abstracted from the ideal world. It is often claimed, for example, that the growing prominence of egalitarianism and prioritarianism in academic discourse since the 1970s, as seen in the work of writers such as John Rawls and Ronald Dworkin, has coincided with dramatically increasing levels of inequality in Western liberal democracies. Left of centre parties have largely abandoned the rhetoric of the redistribution of resources and no longer argue in favour of substantive equality; seeking, at most, to alleviate poverty and perhaps pursue a meritocratic vision of equality of opportunity.

It is striking, then, to find Langa justifying judicial intervention which is intended to favour the least advantaged, and to transform South African society according to egalitarian principles of justice. Such an account brings together both actual and hypothetical consent theory: one might claim both that the South

African people *have* agreed to transform their society in accordance with egalitarian principles, and that these are the very principles which they *should* have agreed to, which would, in fact, be agreed upon in an idealized bargaining position of impartiality, such as Rawls's Original Position. As such, the hypothetical contract approach, which Langa explicitly endorses alongside the actual contract model, may be applicable even in contexts where widespread societal consensus on the desirability of the elimination of inequality is absent. Langa does note that the transformative commitment to substantive equality reflects, to some extent, South Africa's very particular history of gross injustice during the apartheid era. We might observe, however, that there are other societies that could point to extensive injustice in their own histories, whether this be on racial or other grounds. Such an observation would lend obvious support to the suggestion that the hypothetical elements of the South African model are directly applicable to at least some other polities.

Given, then, a potentially highly interventionist role for the courts, the relationship between the judiciary and the executive is of evident importance to the South African constitutional project. Langa stressed the extent to which the two institutions need not be adversaries in the political process. Rather than seeing the government and the Constitutional Court as competitive political actors, each seeking to maximize their influence on the policy process, the suggestion is that they may be viewed as protagonists in a 'constitutional conversation'. Each is a stakeholder in the constitutional settlement, and the role of the Court is to assist and guide the executive in the fulfilment of its constitutional mandate. It seems clear that such a characterization of executive-judicial relations is likely to depend upon the willingness of the executive to be so assisted and guided. It is not implausible to suggest that courts can come to possess a particular kind of legitimacy in the eyes of the public in political contexts that are characterized by historical upheaval and conflict. The high degree of social respect afforded to the judiciary in Israel and in Germany are two obvious examples, and both countries contain clear examples of executive deference to contentious court decisions. (This leaves as

an open question the issue of whether the restraint of the government in such cases is motivated by the same reasons which lead to high levels of support for the judiciary, or whether it is a self-interested response to this popular sentiment.) But this is characteristically the result of other political institutions possessing relatively low levels of consensual political support.

Courts can come to possess a particular kind of legitimacy in the eyes of the public in political contexts that are characterized by historical upheaval and conflict.

The case of contemporary South Africa is unusual in terms of the electoral dominance of, and high degrees of popular support for, the African National Congress (ANC), which itself possesses a high degree of moral and political credibility as a result of its role in the anti-apartheid movement. The role of a constitutional court in what is, for now, effectively a one-party democratic state is a complicated one. It is tempting to suggest, given the improbability of another political party mounting a credible electoral challenge to the ANC in the foreseeable future, that the Constitutional Court should be seen as possessing some of the attributes and responsibilities normally borne by an opposition party, in terms, for example, both of proposing alternative policies and acting as a check on the elected government.

It would seem that for a court successfully to pursue such an agenda it would need to rely upon either cooperation from the governing party or a very high degree of legitimacy in the eyes of the public. To what extent either of these conditions are met in contemporary South Africa is an open question. In conversation following his lecture, Chief Justice Langa was asked whether he felt that the independence of the South African judiciary was under threat, following moves by the Ministry of Justice to introduce legislation reformulating the division of authority between the executive and the judiciary. Langa responded that, since

the President of South Africa had intervened to put the plans on ice, there was not a threat to the Court's independence – at present. The level of opposition the plans provoked in South African civil society may be taken to be some evidence of high levels of popular support for the judiciary. But the very fact that such legislation has been proposed from within the executive does indicate a degree of tension between the government and the courts, and suggests that the Constitutional Court may face a bumpy ride if it continues to pursue Chief Justice Langa's project of transformative constitutionalism.

Bibliography

- Butt, D. (2007) 'Democracy, the Courts and the Making of Public Policy', FLJS Policy Brief, available at: <http://www.fljs.org/uploads/documents/Butt_Policy_Brief%232%23.pdf>
- Dworkin, R. (1978) 'The Original Position'. In: N. Daniels. *Reading Rawls*. Oxford: Blackwell, p.18.
- Fredman, S. (2008) *Human Rights Transformed: Positive Rights and Positive Duties*. Oxford: Oxford University Press.
- Hume, D. (1748) 'Of the Original Contract'. Available at: <<http://www.constitution.org/dh/origcont.htm>> Last accessed 27 August 2008.
- Locke, J. (1689) *Two Treatises of Government*. Cambridge: Cambridge University Press.
- Pettit, P. (1999) 'Republican Freedom and Contestatory Democracy'. In: I. Shapiro and C. Hacker-Cordón (eds.) *Democracy's Value*. Cambridge: Cambridge University Press.
- Rawls, J. (1971) *A Theory of Justice*. Cambridge, MA: Harvard University Press.
- Scanlon, T. M. (2000) *What We Owe to Each Other*. Cambridge, MA: Harvard University Press.
- Shue, H. (1996) *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Second edition). Princeton, NJ: Princeton University Press.

The Foundation

The mission of the Foundation is to study, reflect on, and promote an understanding of the role that law plays in society. This is achieved by identifying and analysing issues of contemporary interest and importance. In doing so, it draws on the work of scholars and researchers, and aims to make its work easily accessible to practitioners and professionals, whether in government, business, or the law.

Courts and the Making of Public Policy

In the last fifty years, courts have emerged as key participants in the public policymaking process, exercising discretion to make decisions which have far-reaching consequences in terms of the distribution of benefits and burdens within society. The *Courts and the Making of Public Policy* programme seeks to provide a critical assessment of the role of courts in policymaking from both empirical and theoretical perspectives, assessing their level of influence and scrutinizing the efficacy and the legitimacy of their involvement. The programme considers a range of issues within this context, including the relationship between courts, legislatures, and executives; how judicial policymaking fits within a democratic society; what training and qualifications judges have for policy decisions; and how suitable the judicial forum is for handling the information that is needed for informed policy choices.

Daniel Butt is the Programme Director of the programme on *Courts and the Making of Public Policy*, Foundation for Law, Justice and Society, University of Oxford. He is fellow and tutor in Politics at Oriel College, Oxford, and a member of the Centre for the Study of Social Justice, affiliated with the Department of Politics and International Relations at Oxford University. His first book, *Rectifying International Injustice: Principles of Compensation and Restitution Between Nations* will be published in 2008 by Oxford University Press.

For further information please visit
our website at www.fljs.org
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD
T · +44 (0)1865 284433
F · +44 (0)1865 284434
E · info@fljs.org
W · www.fljs.org