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Courts and the Making of Public Policy
Democracy, the Courts and the Making of Public Policy

REPORT AND ANALYSIS OF A WORKSHOP ON COURTS AND THE MAKING OF PUBLIC POLICY, RHODES HOUSE, OXFORD
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Contents

Introduction 1

Courts, Legislatures, Administrators and the Making of Public Policy 2

SESSION ONE: The Rise of Judicial Activism in Public Policymaking 7

SESSION TWO: Principle v. Policy 12

SESSION THREE: Congress and the Supreme Court in a Partisan Era: Lessons from the Past Twelve Years 16

SESSION FOUR: The Human Rights Act, the High Court and the UK Parliament 22

CLOSING SESSION: Reviewing the Issues 26

Conclusion 28
Introduction

This report is intended to provide both a record of, and a critical response to, the launch event of the Foundation for Law, Justice and Society programme on ‘Courts and the Making of Public Policy’, a three-day seminar held in Oxford in June 2006. In the last fifty years, courts have emerged as key players 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 aim of the seminar was to bring together leading figures from a range of different backgrounds with a common interest in the contemporary role of the courts, and, in particular, to seek to facilitate interaction between academics and legal practitioners. Accordingly, those attending the seminar included judges, private sector lawyers, and academics from Law, Politics and Philosophy Departments. There was a distinctly international flavour to the seminar, with participants drawn from many different countries, and with a diverse range of real world experience of judicial activity.

The seminar was launched with a keynote lecture by Professor Martin Shapiro, and a response by Lord Justice Sedley. Subsequent sessions saw presentations by Dr Daniel Butt, Professor John Gardner, Professor R Shep Melnick and Professor Vernon Bogdanor. In each case, the paper was followed by formal responses by two discussants, and then substantial periods of open discussion. The result was a wide-ranging debate, which included both theoretical reflection on the normative justifiability and desirability of judicial intervention and consideration of the empirical workings of courts in a range of real world settings.

In what follows, each of the papers and the responses are summarized. The report then integrates the debate which followed the formal presentations into a critical analysis of the subject under consideration. The seminar concluded with an open session aimed at identifying areas of potential further research, and this report draws upon this discussion to suggest a number of possible future directions for the programme.
Taking the proposition that courts make law as being uncontroversial, Professor Shapiro's lecture addressed the following assertion: 'Judges, when they make law, follow essentially the same thought processes, and engage in the same ways of making decisions, that legislators and administrators do.' This means that there is really only one way of thinking about making law, and everybody who makes it thinks in the same way. The assertion was considered in three contexts: constitutional rights review by courts, judicial review of administrative action, and the implementation of statutes or of common law rules by courts.

The first argument maintains that when courts undertake constitutional judicial review concerning rights, they universally use the same basic test (generally called the balancing test in the US and the proportionality test in Europe). When two rights conflict, one has to be favoured over the other, as when privacy is prioritized over freedom of speech, or national security over due process. So constitutional rights decisions by judges are always balancing of interests decisions, just as legislatures are supposed to deal with interests, balance them and prioritize them. Any institution that uses a balancing test will also use a least means test, seeking to minimise the sacrifice of the less important interest. So if the government passes a privacy statute, prioritizing individual privacy rights over freedom of speech, it ought to pass the privacy statute that does the least damage to freedom of speech while being compatible with the protection of the interest of privacy. In using a balancing least means test approach to constitutional rights questions, all a judge can do, after having first decided whether he will agree with the legislature on which right to prioritize, is imagine every possible statute that the legislature might have enacted to achieve the interests it is seeking to achieve, and assess whether the legislature’s interest has been achieved at the least cost (or whether the legislature might reasonably have thought that it had).

Thus, constitutional rights cases involve the judge engaging in a thought-experiment as though he were a legislator: considering all the possible statutes and determining which gives the best cost-benefit ratio.

In terms of administrative action, similar arguments apply to the judicial review of delegated legislation. In making decisions as to which rule to adopt to implement a statute, there is no kind of thinking that a judge can employ that is different from that originally used by the administrator. Both judge and administrator are acting as supplementary law-makers, as agents of the legislature, and must consider which policies are more or less likely to succeed, often in a context of uncertainty as to the full intentions of the legislature. The courts must, on the basis of a standard cost-benefit analysis, decide whether the administrator has chosen an interpretation of the statute which gives a decent cost-benefit result.

The third case is that of courts which, in the case of litigation, have themselves to interpret statutory language, to apply common law rules. Both English-speaking and continental courts tend in this context to follow a process of stare decisis, which corresponds exactly to the rules for incremental decision making that policymakers use all over the world on all questions. Incremental policymaking has obvious common sense value, and is the standard approach adopted
by all those involved in making public policy, including judges, legislators and administrators. The conclusion is that judges have nothing of a special, or better, or peculiar nature to offer in terms of policymaking techniques.

Such thoughts lead naturally to a consideration of the role of judicial law-making in democratic systems. Professor Shapiro asserted the proposition that judicial law-making is simply undemocratic, since ultimately judicial law-making is law made by unelected officials. One response to such a claim is that a demos may nonetheless choose to afford powers of judicial review to their courts, deciding that constitutional judicial review in defence of rights and the judicial review of administrative action is good for them. But if the demos finds it convenient to have a functioning judiciary to perform certain tasks, then it has to accept judicial law-making, as undemocratic as it is, as one of the costs of having judges. If one buys a junkyard dog to bite other people, one must expect sometimes to be bitten oneself. Constitutional judicial review to protect individual rights means that courts will sometimes thwart the will of the majority in protecting these rights. And judges will make a good deal of law in the process of settling day-to-day disputes. Since it is a basic institutional characteristic of courts that they do and must make law in the process of doing what they do, choosing to have functioning courts means choosing to have judicial law-making. The demos is entitled to make this decision, and also to place any limitations it wishes on that law-making process.

The alternative justification for judicial law-making in democracies maintains that it is precisely the fact that judges are not elected that makes judicial law-making in democracies a good thing. Each of us possesses both particular and selfish short-term preferences and longer-term, more general preferences that are oriented towards the common good. Elected politicians anchored to short-term electoral cycles are likely to give high priority to the former; judges, free from electoral pressures, are more likely to give prominence to the latter. Such an argument crucially depends upon the assumption that judges do in fact give greater preference to the long-term general good than to their own or other people’s short-term or selfish interests. Professor Shapiro was highly dubious as to the validity of this assumption.

The final question discussed was that of judicial responsibility. It can be argued that judges are less responsible than other government officials, and therefore are not to be trusted. Courts do sometimes intervene on complex policy matters where they do not bear responsibility for the ensuing policy. For example, at least 20 state Supreme Courts in the US have required the equalization of per capita school expenditure, but it is not the courts but the legislatures which subsequently have to pass the relevant tax laws or school budgets. In this particular policy area, the result has been almost annual crisis over school budgets, where states are under court order to equalize, but legislators cannot find the political means either to raise or cut expenditure. However, there are some areas in which judges are held highly responsible, notably in criminal law, where they are often blamed for outcomes by the general public. A similar claim can be made in relation to security matters, although it can also be argued that around the world courts have been very loath to intervene significantly in the security policies of governments. Courts have, in fact, been very sensitive to the argument that others are responsible for protecting lives, and judges are not casually to interfere with the activities of those charged with such responsibilities. This is particularly noticeable in cases where, as in the US or in Israel, courts are very big on proclaiming civil liberties but are very cautious about actually limiting government action in any way in those areas.

Professor Shapiro’s conclusion was that it was at least open to question, given that judges do not go about law-making by thinking about it in any different way than other people, whether we can reasonably expect judges to defend long-term socially orientated values more than we expect elected officials to do so.
Response: Lord Justice Stephen Sedley

Lord Justice Sedley started by remarking that, as a toiler in the judicial vineyard, it was his experience that judges are as bad as lawyers in getting a decent perspective on what it is that they do, and that one of the reasons he was there was his great admiration for Professor Shapiro, who had shown how much better a good political scientist’s view of law can be when compared with that of the lawyers themselves. He put forward a slightly parodic version of Professor Shapiro’s view: that judges are politically irresponsible; not having to count the cost or pay the price of what they do. Their public law adjudications are thinly disguised, or sometimes well-disguised political interventions and, as such, are subjective. But this is the price of installing independent judges and asking them to administer a constitution; a junkyard dog will bite from time to time. Judges limit or disguise their own interventionism by purporting only to be assessing the proportionality of measures undertaken by government, but this is properly what government is there to do. So judges are in the business of attempting to govern government. The only thing one can say for judges, runs the argument, is that they do not operate according to short-termism and majoritarianism and, perhaps also, that it would be worse not to have the judiciary at all.

In response to this argument, Lord Justice Sedley suggested that those who do not like the junkyard dog should try keeping the burglars out themselves. Judges are there for a purpose that others don’t manage to fulfil, since majoritarianism does not deliver on a number of individual rights. It is not simply that judges somehow make up a democratic deficit. Rather, they are doing something without which there is not a democracy. If one takes out the judicial element, one creates an illiberal society with a dictatorship of the majority, and nothing to control the impact of that dictatorship on minorities. Most important of all, perhaps, is the minority of one, to whom all human rights refer.

He questioned the meaning of the common assertion that judges make law. It is not possible to draft legislation in such a way as to anticipate every contingency that might arise: in ninety-nine cases out of a hundred, both with statutes and with contracts, judges seek to deal with situations whose materialisation did not occur to the drafters. Contracts are often rewritten as they should have been had the parties to the contract not been trying to outsmart each other in other aspects of the deal, and so with statutes: it is often about teasing out meaning from an obscure mode of expression. The role of the judge is far more often about making sense of the law, than of making law. Ninety-nine per cent of cases are concerned not with law-making, but with the application of perfectly clear law to facts, when there is difficulty in ascertaining what the facts are and how the law applies to them. Who other than the judiciary can fulfil this function?

Lord Justice Sedley disputed Professor Shapiro’s account of the role of the courts in relation to delegated legislation. Precisely because Parliament does not have the time to work out every scenario, it simply sets out the statutory purpose and enacts a rule-making power which it hands over to a nominated executive body, local or national. That body can make whatever rules it thinks just or useful. Parliament has no intent beyond the power that it has conferred, but the courts have two very specific functions in relation to delegated legislation. One is to make sure that the authority does not break the bounds of power that Parliament has in fact given it to make the rules, and those powers can be derived either from the statute itself or, just as often, from the general fundamental rules of common law. For example, that nobody is to be condemned unheard, which judges are repeatedly having to interpolate into delegated legislation. The other role of courts in relation to delegated legislation requires that it be applied properly, and that is a due process issue.

With reference to judicial activism, Lord Justice Sedley claimed that judges who are not ‘activist’ are either asleep or dead. Any other judge who is doing his or her job is an activist, and the fact that there are those who use the phrase as a form of political denunciation is worrying. Doing nothing can be a
very active form of intervention indeed (as reactions to American judges’ reluctance to pronounce themselves on the Schiavo case show). There is no point, in academic discourse, distinguishing between ‘activist’ and ‘non-activist’ judges: the only differentiation is that between a judge who is awake and one who is asleep.

It is true that there are ‘hot potato’ issues that politicians will not grasp, and that judges grasp because nobody else will, a British example being the termination of life-support. It is also true that the Human Rights Act is a new departure, but it has not handed judges any power at all to interfere with primary legislation. The power to interfere with secondary legislation does not come from the Human Rights Act, but is the most fundamental power of the common law to control the lawfulness of executive action. All that the Human Rights Act has done in relation to secondary legislation is to inject certain new criteria into the assessment of the legality of secondary legislation. It also allows judges to decide upon, without doing anything about, the compatibility of primary legislation with the Convention on Human Rights. Judges can declare an incompatibility, which the executive does not have to accept. If it does, then there is a fast-track process to amend the legislation accordingly. The criterion injected by the Human Rights Act is not actually a substantive one, although there are substantive rights, but a procedural or intellectual one. The notion of proportionality is a novelty in the UK. The Convention does not actually use this term, but it does refer to such interference being permitted, as is necessary in a democratic society. Proportionality requires a structured enquiry that weighs ends against means, and it is a very sophisticated mechanism.

The other novelty introduced by the Human Rights Act is section 19. This requires ministers to certify on the front of a bill that it is compliant with the Convention. So the absence of a certificate means that there is a political row. The result is that ministers pay a great deal of attention to bills and take a great deal of time and trouble to ensure that they can put the certificate on. This means that bills are drafted with human rights lawyers in attendance to advise, which in turn has had some quite dramatic effects. The legislation that was passed to take away from asylum seekers access to benefits of any kind had to have a subsection, in order to make it compliant, where this was qualified to the extent that benefits were taken away, but not so as to violate the Convention. This has resulted in a dialogue, not between the courts and the legislature, but between it and the executive.

Criticism and Discussion:
Two related issues emerged from this opening session. The first relates to the nature of judicial public policymaking. There was much discussion of the character of policy decision-making in democracies. Professor Shapiro asserted that legislators, administrators and judges ‘follow essentially the same thought processes, and engage in the same ways of making decisions’. The question arises as to how universal such practices really are. Is it true that those engaged in public policymaking use the least balancing test? Is it the case that they make policy incrementally? This can at best be a general empirical observation rather than a universal law — it is not hard, for example, to recall policy change in modern democracies which was, on most accounts, radical and abrupt rather than incremental (a number of the reforms of the Thatcher governments in the UK in the 1980s being examples). And even if it be argued that electoral incentives exist which tend to lead elected representatives to act in such a way, further argumentation is necessary to show whether similar or related pressures also bear upon administrators and (particularly) judges. There is, of course, a significant body of political science literature which correlates US judicial decisions with public opinion, and which stresses the need for courts to work within the confines of public opinion so as to retain their legitimacy. As Professor Shapiro noted in his lecture, such evidence is problematic for the defence of judicial intervention which sees judges as guardians of the long-term, general good.) But the issue of the causality of the correlation between popular opinion and judicial outcomes...
is contested in this literature, and clearly further questions arise when we look at courts outside a US setting. So the question remains as to whether Professor Shapiro's argument is best understood as descriptive (as giving an account of what judges do in fact do) or normative (as giving an account of how judges should act). Professor Shapiro acknowledged in discussion that while courts and legislators are supposed to balance interests, they may, at times, not do so. The resolution of this question would involve further empirical study. With this in mind, Lord Justice Sedley suggested that it would be desirable to have a greater scrutiny of judicial voting records in the UK.

If we accept Professor Shapiro's argument that the demos is justified in limiting the role of the courts in public policymaking should it choose to do so, then the quality of the policy which arises from judicial involvement is clearly of great significance.

The second point of dispute which arose from the opening session, and which gave rise to a clear difference of opinion between the two speakers, concerns the democratic legitimacy of judicial review. On Professor Shapiro's account, judicial law-making is, by definition, undemocratic, insofar as judges are (generally) not elected. Lord Justice Sedley, however, suggested that judges are in fact performing a function which is necessary to democracy: namely, protecting the interests of minorities (extending to, in some cases, single individuals) against the potential tyranny of the majority. This can be seen as providing a democratic justification of counter-majoritarian intervention, if one's definition of democracy is sufficiently substantive to go beyond the procedural account which focuses on counting votes and following the will of the larger part of the demos. This suggests three different ways to justify judicial involvement in public policymaking:

1) Judicial law-making is an unavoidable, but undemocratic and undesirable, consequence of the role of courts in modern society, and this role is sufficiently valuable to make their presence desirable overall.
2) Judicial law-making is undemocratic, but is desirable insofar as courts seek to promote certain policy goals (such as the protection of minority rights).
3) Judicial law-making is desirable and is in fact democratic, insofar as courts seek to promote certain policy goals (such as the protection of minority rights).

This distinction shows that Professor Shapiro's metaphor of the junkyard dog works best if one accepts the first of the justifications for judicial involvement in public policymaking. The dog bites its owner on occasion, but the harm this involves is more than offset by the benefit which comes from the dog's presence in the junkyard. If one accepts either the second or the third justification, it seems as if the dog is biting its owner, on occasion, at least, for the good of its owner. The view one holds is also likely to affect one's understanding of Shapiro's claim that, just as the demos is entitled to delegate decision-making power to judges, it is also entitled to determine precisely how this power is to be exercised. Under (3) above, there is more to democracy than what a majority of the demos wants.
SESSION ONE:

The Rise of Judicial Activism in Public Policymaking

Opening Address by Dr Daniel Butt with a response by Professor Carlo Guarnieri and Dr Daniel Smilov

Chair: John W. Adams

The task of Dr Butt in this introductory session was to identify and contextualize the main questions that arise in relation to the role of the courts in public policy. These were identified as: 1) what do judges do?; 2) why do they do it?; and 3) should they do it? He set out to provide a background to these questions from political theory and political science by making the largely uncontroversial claim that judicial power has grown over the last 50 years. This refers mainly to consolidated democracies, although the suggestion that democratization is a necessary condition for a rise in judicial power should be resisted — limited constitutional moves in China towards the promotion of the rule of law and the protection of human rights providing an interesting counterpoint. Such a claim need not insist that judicial power has increased at all times and in all places, nor that judiciaries are necessarily now more powerful than other political actors such as legislatures and executives. Nonetheless, there are many examples of increased judicial power, and political scientists have sought to provide a range of (often complementary) explanations for this phenomenon. Dr Butt suggested that a key issue was whether this power was being exercised in collusion with other political actors, or as a result of a competitive struggle for power with said actors. Different explanations have important implications for the democratic legitimacy of judicial public policymaking.

For example, it is commonly observed that in contemporary politics executives have gained ascendancy over legislatures. As legislation has become increasingly technocratic, so judiciaries have emerged as alternative forums where political actors, such as legislators and interest groups, can seek to hold executives to account and pursue their own policy goals. When, for example, Alex Stone Sweet labels the French Constitutional Council as ‘the third legislative branch’ of France, he does not simply mean that the court has an independent legislative power. Rather, the Council has become a focal point of conflict between political parties, as opposition parties have sought to exploit its constitutional status to restrict government activity. It is no coincidence that the rise in significance of the Council has largely coincided with the 1974 constitutional amendment which allows 60 deputies or senators to refer pending legislation to the Council for a ruling on its constitutionality, a right that had previously been restricted to the president of the Republic. Thus, it seems as if an institution which was intended in the Constitution of the Fifth Republic as a check on the legislature, is now characterized by cooperation between the parliamentary opposition and the judiciary, as a check on the executive.

A related feature of judicial power refers to the phenomenon of ‘hot potatoes’: particular policy issues which political actors are reluctant to address because doing so will be costly in electoral terms, and so are left to the judiciary to handle. An example is the case of Holland: Dutch political culture tends to favour accommodation and compromise, and so party politicians are reluctant to risk losing support by legislating on divisive issues such as abortion and euthanasia.
Another commonly cited trend is the development of a politics of rights. It is claimed that post-industrial politics are characterized by a shift from broad questions of class and redistribution of wealth to issues with which particular minorities are concerned. So many political actors are keen to phrase their demands in terms of rights, and thus keep them out of the hands of majoritarian decision-making institutions. The classic case of a judicial strategy of this kind comes from the civil rights movement in the US. The rise of the language of rights has been reflected by growing constitutionalization, both nationally and internationally, with the adoption in many countries of bills of rights. Such moves clearly enhance the power of the judiciary as it falls to judges to hear appeals from individuals who claim that their rights are being infringed, and this in turn affords a substantial degree of latitude in how the rights should be interpreted. At the same time, the development in many countries of welfare states has seen a significant expansion of the role of the state. The state now intervenes in a far wider range of areas, and has greater responsibility for the well-being of its citizens, than before. Such expanded governmental responsibilities typically create entitlements on the part of citizens, and courts have played a key role in determining whether the state’s duties in relation to its citizens have been fulfilled.

A raft of other explanations for the growth of judicial power were put forward, including the influence of the US model (of judicial review) in other countries, and in new democracies in particular, where US Supreme Court decisions are regularly cited. The move to globalization has witnessed increasing international cooperation and what has been described as a ‘legalization’ of international politics as the interaction between nations has been governed by treaties and agreements. The rising number of international contacts in areas such as trade, transport, migration and the environment has meant more demand for regulation, and international norms of basic human rights have also developed: the Universal Declaration of Human Rights was agreed in 1948, and the European Convention on Human Rights was signed in 1950. Such international law has been constitutionalized in a number of countries: the German Basic Law specifies that the general rules of public international law are an integral part of federal law.

It has also been argued that the decline of left-wing ideology has meant that political activists on the left have lost their traditional mistrust of the judiciary. Many majoritarian institutions across the world have seen a decline in their popular support, but judiciaries, on the whole, have resisted this trend. One may look at Israel, Italy and India as cases in point. Pursuing this idea within the context of modern forms of government, which increasingly depend upon executive regulation rather than representative law-making, suggests that judicial involvement in political decision-making is necessary as a way of legitimizing it. Such a perspective challenges the view of judicial law-making as inherently undemocratic.

With these phenomena in mind, Dr Butt suggested that an impact model of judicial activism, which simply measures the activism of a court by the degree of power that it exercises over citizens, the legislature and the administration, is only partly helpful. What it cannot tell us is the extent to which this exercise of judicial power is the result of a deliberate attempt by justices to exert their influence at the expense of, and, in some cases, against the wishes of other political actors, or to what extent it is facilitated or even encouraged by others. So the first question is whether judicial political power is wielded in competition or in collusion with other political actors. The case of the European Court of Justice was discussed at length in this regard, and the matter was left as an open question for further discussion.

Another open question concerns what it is that judges are doing when they make decisions on issues that relate to public policy. What are they motivated by, and is it reasonable to claim that (some) judges are honestly motivated to restrain their actions in particular cases by a genuine democratic conviction? If they are, they will be acting in a way that most mainstream political science does not recognize. Frequently, political
science either draws upon what has been called an attitudinal model of judicial decision-making (where judges are primarily motivated by sincere ideological attitudes and beliefs), or upon a separation of powers model (whereby courts are strategic actors that interact with other institutions with the aim of retaining their ability to affect policy). Both these models portray judges as policy-motivated actors who use legal rules to achieve policy results.

An obvious response to them is to point to the tradition of judicial restraint, which typically argues that judges act illegitimately, and undemocratically, if they allow their own policy preferences to come into their judicial decision-making in this way. There is a tendency among political scientists to be suspicious of these claims and see them as a rationalization of the fact that the political ends of those who advocate them are best served by restraint. But what is not considered by such an approach is that a judge’s view of the legitimacy of judicial intervention might itself be a policy preference which he or she seeks to further through his or her actions. In the real world, to what extent do judges practise judicial restraint for neutral, democratic reasons?

Response: Professor Carlo Guarnieri, Università degli Studi de Bologna

In his comments on the general issue of the relationship between courts and the making of public policy, Professor Guarnieri chose to argue in favour of judicial activism, with some caveats.

The novelty of the twentieth century is not so much that judges have made law, but that that they have been prepared to confront the political branch, and to assert its autonomy. Pluralism, separation of powers and federalism all favour political activism. The greater the degree of fragmentation, the more likely it is that judges can gain allies in the political system.

General talk of judicial activism obscures the fact that there are different kinds of judges. There are significant differences between judges in common law and civil law systems. The first is dominated by the legal profession, and the bar is the crucial reference group. By contrast, in civil law systems, particularly in what he termed the Latin variety (in context to the Scandinavian and Germanic countries, which have a traditional hierarchical system), one finds mostly career judges and civil servants of the Weberian bureaucrat model. Here, higher ranking judges serve as a reference group. Significantly, there is the Higher Council of the Judiciary, which is elected by judges. This can be traced to the authoritarian experiences of the thirties and forties, and is a consequence of those experiences. Until the thirties, judicial review was perceived as reactionary in a Europe that was in love with democracy.

Enthusiasm for judicial review grew as faith in democracy declined. Thus electoral politics is a process embedded in the workings of the judiciary in Latin civil law countries, such as Portugal, Spain, Italy, France and Belgium. Judicial activism in Europe began as an import from the US, but nowadays Europe produces different brands of judicial activism, and has created new models of how judges can play a role within the democratic framework.

Dr Daniel Smilov, Centre for Liberal Strategies, Sofia

Dr Smilov chose to address himself specifically to two questions: in the first place, the thought process employed by judges when reaching decisions; secondly, the question of who drives judicial activism.

With regard to how judges think when making decisions, he took the view that at a very general, conceptual level, judges function similarly to other political actors. They are concerned with the well-being of society, unless they are corrupt. So what they are trying to do is to find the proper balance to society of costs and benefits of their decisions. But there are certain institutional constraints which are quite specific to judges, when compared with legislators.

Legislators can offer comprehensive social programmes, indeed this is their main function. Judges, on the other hand, face institutional handicaps in formulating programmes (since it is not their function to do so). There are exceptions: in Macedonia the constitutional court can address itself to many issues; in Hungary there is the notion...
of actio popularis so that any person can address the courts, so it is very easy for the courts to raise issues. But even accounting for these aberrations, it seems that in general, legislatures are encouraged to be programmatic while judicial bodies are discouraged, and there are deliberate institutional constraints on this.

Secondly there is the question of ideology. Political parties are the fora for elaborating and testing ideologies. By contrast, judicial bodies are institutionally hampered from such functions. Thus the measures of success of judicial action and legislative action show a difference which is relevant to the thought-process or reasoning that is employed by the two bodies. For a politician it will be a success if a particular decision fits well with his or her programme and ideology. This would be the standard measure of success. For a judge this is not the case; in fact he is not responsible to the public or to anybody else insofar as measures of success. So this has to have an impact on the way a judge reasons. An example is the practice of senate hearings for US Supreme Court judges, where it seems that the purpose of the candidate is to demonstrate that he or she has no agenda and, if possible, no ideology. So there is institutional pressure on them in this regard.

So the question is what those institutional constraints are there for. The answer is provided by Professor Shapiro in terms of the adjudicatory role, and that of conflict resolution, which courts are supposed to perform.

There is a well-known metaphor in constitutional law, which draws an analogy between Ulysses as the primary adjudicator in the Trojan War and the situation in a constitutional or High Court, which illustrates that there are no pre-established rules.

In the first place, Ulysses had a nimble mind, and in the same way there are institutional requirements of intellectual training for judges. It is not to their benefit in the judicial function for judges to be wrestlers, for example. Secondly, the Trojan War was not Ulysses’ war, so he did not harbour any agenda in relation to it. Thirdly, he was a secondary hero. He had a weight of his own, but did not compete with the political bodies. These constraints fitted him to be an adjudicator, and the analogy can be applied to judges today.

As to judicial activism, it is mostly politics-driven, as a result of decreasing political ideological confrontation. The assumption behind convergence towards centrist or consensual politics is that values do not clash with each other, and therefore trade-offs are not inevitable. This (flawed) assumption leads political actors to favour an active role for the courts, particularly in areas where there is no political prize and a heavy political cost to making a stand.

Criticism and Discussion:
It became clear during the discussion period of this session that there is considerable disagreement both as to the nature and to the desirability of what is commonly called judicial activism (a term which several participants found problematic). It is clear that judicial power is not itself an exclusively modern phenomenon — judges have historically had significant degrees of power in a range of different jurisdictions. Nonetheless, the more recent involvement of judges in policymaking has been of a somewhat different character. Professor Guarnieri’s assertion that, ‘the novelty of the twentieth century is not so much that judges have made law, but that they have been prepared to confront the political branch, and to assert its autonomy’ is striking when one considers that the twentieth century was also, in many countries, the period where political institutions (other than the judiciary) gained, or furthered, their democratic legitimacy. Unsurprisingly, therefore, concerns relating to the democratic legitimacy of judicial law-making raised in the first session recurred here: some participants regarding judicial power in an era of democratic governance as representing a challenge to the principle of democratic equality, whilst others stressed the (historically contingent) positive role of judiciaries in bringing about social change which serves minority interests, such as the 1954 ruling in Brown v. Topeka Board of Education.
It is not, perhaps, surprising that perspectives on this issue should be different on either side of the Atlantic. In the UK, for example, there is a long tradition of suspicion as to the politics and motives of the judiciary on the political left in particular, reflecting a belief that the particular minority whose interests are being served is the landed and the wealthy. Such a perspective characterizes the judiciary as working against equality — Professor Keith Ewing suggested that the British judiciary has characteristically sought to promote ideas of liberty over those of equality within the common law tradition. On the other hand, and from a US perspective, it is possible to build a defence of judicial intervention based on the Supreme Court’s record (in the second part of the twentieth century) on affording equal treatment to members of minority groups within the explicitly egalitarian terms of the US Constitution.

The variation between these two countries alone suggests a need for caution when making broad, cross-country generalizations concerning the nature of judicial power. Dr Butt’s paper raises the question of whether judicial power is exercised in collusion with other political actors, or reflects conflict and a competitive struggle for power. This question must be answered if judicial activism is to be properly understood. To this end, Professor Shapiro suggested that judicial activism should be defined in terms of the deference or non-deference which courts show to other lawmakers. Such a perspective would allow us to draw distinctions between cases of legislative retreat, where courts have little or no choice but to take decisions on unpopular or controversial issues, which elected politicians seek to avoid, and instances of judges positively seeking to expand their policymaking role despite the wishes of other political actors. Again, the wealth of seemingly divergent empirical examples raised in discussion suggest a considerable degree of variation in practice.

Finally, the issue of accountability and scrutiny of judicial action was raised. This can be put as a question of institutional design: what mechanisms should be in place to appoint judges; to keep them in situ or to remove them from office; to scrutinize their decision-making processes and to hold them publicly accountable for their judgements? It is generally though that such scrutiny is desirable for other political actors who are in the business of making and implementing law, such as members of legislatures and the executive. To what extent should this also extend to judges, given their seemingly enhanced role in the public policy process?
Professor Gardner began his presentation by noting that Ronald Dworkin had a very ambitious programme on the question of principle versus policy: Dworkin has attempted to develop a robust and universally applicable doctrine of the separation of powers on top of the distinction between questions of principle and questions of policy. His core idea is that courts are the forum of principle, whereas policy is properly the province of government. However, Professor Gardner argued, the distinction between principle and policy can easily be broken down.

The question to be addressed is whether there are any decisions that should not be taken by the courts. The answer has to be a resounding affirmative, since if there were none, this would leave no scope for decisions to be taken by legislatures, government, or individuals, corporations, associations, or electorates. So the real question becomes: are there any general principles that determine which decisions should be taken by courts, and which outside? This involves the possibility of coming up with a general theory of the separation of powers. Such a theory might unfold in several steps. In the first instance one might find a distinction between types of decisions that should be made by public bodies, and those that should be made privately. Then there might be a subdivision within the types of decisions that should be made by public bodies, between those that should be given force of law and those that should not. Finally, within those decisions that should be given force of law one might expect to have a general account of the respective legal decision-making roles, and those which are executive and judiciary.

How general should such a theory be? Much of it would have to be specific in respect of place and time.

With modest ambitions for a theory of the separation of powers, resulting in the requirement of cultural specificity to particular cases, Professor Gardner made some observations on courts as law-applying organs (this affects the grounds on which they are permitted to change the law) which have a different set of skills, and different resources at their disposal to other organs of the state. There is no restraint around the topics that courts may consider; indeed, every topic which is suitable for the legislature has of necessity to be suitable for the courts to consider. This is because, under the rule of law, the courts have a moral duty to answer every question that is raised by legislation. So if there is legislation on a topic, there must necessarily be a role for the judiciary on that topic. Thus, separation of power should not be thought of as topic separation, but as a separation between different classes of reasons for decisions.

In considering every point that is validly brought to them, courts face a set of restrictions. As law-applying institutions, the first duty of courts is to make legal rulings on particular cases. The making of a legal ruling does not of itself affect the legal rules; lower courts make legal rulings all the time without altering the power of legal rules on the strength of which they make the rulings. In the higher courts, on the other hand, the making of rulings may also affect the legal rules. In these cases the higher court has the power to bind later courts, and hence, to bind the government in later cases, in respect of points of law that were at issue between the parties involved. In doing so the courts inevitably take the role of shaping public policy, and they do it by shaping the legal framework within which public policy is implemented. This does not affect the traditional tenet of separation of powers (whereby
only the legislature should make the law) since it is possible to change the law by the very act of applying it (which is the duty of the judiciary). So when the courts change the law they may well still be acting as law-applying institutions. So long as they restrict themselves to this method of changing the law, they continue to respect the separation of powers. Thus they face restrictions. First, courts cannot change the law on any given topic whenever they choose. They must wait for cases to be brought before them. Secondly, when the courts do make a change, this is only acceptable insofar as it is relevant to the case in the particular scenario facing it, and no further. In third place, there must be legal grounds for change. That is, the new decision must follow a pre-existent line of thought. Lastly, courts may not legitimacy engage in a programme of reform. Because democracy is subject to the rule of law, the law-making activities of the courts are not a threat to democracy. The net effect of these restrictions on courts is that courts only change the law in relatively small steps, and do so occasionally. This means that they may not engage in a programme of reform.

An institution that can announce its intention to deal with a certain set of problems in general, without anyone having asked it to do so, is simply not a court. Thus, the power of courts to make law does not represent a threat to, or dereliction of, democracy itself, since democracy is not merely a system of majoritarian rule. Democracy is a system of majoritarian rule subject to the rule of law and one facet of the rule of law is that there have to be independent and authoritative law-applying institutions.

Another set of considerations regards the separation of powers. Being restricted to relatively non-programmatic reform of the law, courts are not particularly equipped with the kind of staff, or the kind of facilities, called for by the pursuit of such programmatic reform. Moreover, judges do not have the mindset for thinking programmatically about the changes they make; their training orientates them towards their proper responsibility. It follows that judges who attempt to deal with problems that call for programmatic solutions are likely to get it wrong, or at least more wrong than governmental institutions with access to the civil service and other support. In particular, courts would be likely to misjudge the large-scale behavioural consequences of their initiatives.

To furnish courts with resources similar to those at the disposal of other actors would be a wasteful exercise, since courts do not know how many cases on any particular topic they are going to be hearing in any given period. To focus on large-scale behavioural changes which come from programmatic measures would distract judges from their primary role.

There is no general theory of the separation of powers that states that judges should not engage in programmatic change. Rather, there is the contingent question of how well-placed they are to do so, to which the response is: not very. One should not in fact expect a theory of the separation of powers to settle the question.

Response: Daniel Slifkin, Attorney, Cravath, Swaine & Moore, LLP

Daniel Slifkin challenged Professor Gardner’s account of the limitations faced by courts in seeking to affect social policy in real-world circumstances. The claim, as he saw it, was that courts are restricted in three ways: they can only react to cases brought before them; they can only act relative to the parties in front of them; and they can only act on legal grounds. He suggested that such restrictions are not actually as restrictive as they may appear. Although it is certainly the case that the courts may not engage in a programme of reform, it is equally true that there are those, both individuals and groups, who do have an agenda, and who are prepared to bring cases to court that may serve to further that agenda. In their interaction with such parties, courts may well be better placed to further programmatic reforms than is commonly suggested.

The US Supreme Court was taken as a case in point. Firstly, although the Court is to a certain extent reactive, the power to issue writs of certiorari gives it
an obvious say in what cases it hears. Secondly, US jurisprudence has developed a legal doctrine whereby the fact that a case will be moot does not mean that it cannot be addressed, and so in this sense, the Court is not making rulings in relation to the people in front of it, but with regard to the future. Finally, cases such as Roe v. Wade and Griswold v. Connecticut show how flexible the Court can be in its determination of what constitutes ‘legal grounds’.

Slifkin concluded by suggesting that courts often have resources which allow them to gather facts and evidence in ways that are far more powerful than legislatures, comparing a Senate hearing with a six-month trial with presentation of evidence by lawyers backed by major law firms.

Dr Margit Cohn, Faculty of Law, Hebrew University

Dr Cohn focused in her comments on determining the role of courts, and also reflected on the dimension of public opinion and its impact on judicial decision-making.

She put forward a threefold account of the role of courts in society: firstly, to rule on cases presented to them and make decisions in the context of disputes; secondly, to engage in dialogue within the network of society; and thirdly, in their constitutional role, they are given the power to uphold certain basic core principles of the society by the demos.

Criticism and Discussion:

Professor Gardner’s paper puts forward a limited model of legitimate judicial intervention in the social policymaking process. Courts can legitimately change the law insofar as they do so in their capacity as law-applying institutions, and respect the constraints of precedent and stare decisis. But they may not legitimately engage in programmatic reform. This gave rise to two major topics of discussion.

One substantial methodological question raised by the session concerns the relation between ideal and non-ideal principles. The key question concerns the extent to which courts should seek to make normative judgements concerning the real-world functioning of particular institutions based upon an account of how they should ideally function. This is not a matter of whether it is realistic to expect institutions to work perfectly; rather, the question is what is the best course for a given institution to adopt if other institutions are not, as a matter of empirical fact, behaving as they should. One might, for example, accept that in an ideal world, segregation in the US would have been ended as a result of the creation of law by elected legislators (be they State or Federal). Non-ideal theory asks what should be done when such action is not forthcoming from those who are arguably best placed to provide it. It may well be true that judges are not generally, as a matter of fact, the best placed, in resource terms, to undertake programmatic reform, and it may further be true (depending on one’s account of democracy) that they are not democratically empowered to do so. Non-ideal theory asks whether they should do so nonetheless, as the result of an all-things-considered judgement.

The second question is more empirical and concerns the extent to which courts are, in fact, well placed to engage in programmatic reform. Historically, the (predominantly American) literature on the efficacy of judicial policymaking has focussed on the shortcomings of judiciaries as policymaking institutions, based upon their limited resources and expertise, their dependence on other political actors for the implementation of their judgements, their nature as reactive institutions, and so on. However, a number of participants sought to challenge this account. As Slifkin’s response suggests, it is possible to argue that, in some areas, lengthy legal proceedings, involving not only judges but lawyers with well-resourced research departments and the participation of relevant interest groups, and which may well attract considerable public interest, may afford courts opportunities to make intelligent and well-informed public policy, and may compare favourably with the facilities for decision-making and scrutiny available to legislators. Other participants suggested ways in which courts are able to adopt programmes despite their nature as reactive institutions: by choosing what cases to hear (in the case of the US Supreme Court’s power of certiorari and particularly in the case of the discretion of the
House of Lords); by signalling what cases they would like to hear in the future, which can incentivize programmatic interest groups to pursue judicial strategies; and by utilizing bills of rights. The conclusion of a number of participants was that courts are, in fact, able to engage in a version of programmatic social reform. Such an argument is of real significance if considered in the light of Professor Shapiro’s argument that judges, legislators and administrators use the same techniques, such as a least means balancing test, in formulating public policy. Professor Shapiro’s point is that one should not see judges as having a qualitatively different (and therefore arguably superior) way of making decisions. But if one accepts both this and Slifkin’s suggestion as to (on occasion) superior judicial capacity for decision-making, then one may well conclude that judicial decision-making is desirable simply due to the capacity of courts to make good policy, in straightforward comparison with other political actors.
Professor Melnick began by observing that, in contrast to the UK, the American political system is characterized by separation of powers, bicameralism, federalism, weak parties, a decentralized bureaucracy and a written constitution. The result is a plethora of competing sources of legal authority, a relatively inefficient, veto-prone, and at times incoherent legislative process and greater autonomy for judges. In the US most judges consider it their duty not just to enforce the letter of the laws passed by Congress, but to give meaning to broad phrases of the constitution, to harmonize state and federal law, to update outmoded statutes, and to ascertain the underlying purpose of laws passed by legislators. These institutional features combine to produce an American judiciary much more inclined than its British counterpart to engage in substantive reasoning, or what some have described as results-oriented judging, judicial activism, judicial policymaking and a jurisprudence of personal values.

Since the late eighties, American politics has changed in important ways, moving closer to the British model. US parties have become both more internally homogeneous and more ideologically divergent. We now have the programmatic parties that American political scientists have sought for so long. As a consequence, Congress has become significantly more centralized. Especially in the House of Representatives, party leaders have eclipsed committee leaders as the rulers of the legislative process. One might therefore anticipate a closer fit between the policy preferences of the majority party in Congress and the rulings of the Supreme Court than usually found in the US - precisely the fear of many liberal Democrats. It may not be coincidental that what many call the Second Rehnquist Court began in the 1994-95 term - the very same months that Republicans were establishing their control over Congress.

The imprint of the Second Rehnquist Court is most obvious in the case of federalism. In a variety of ways the Court has limited the power of the national government and expanded the immunities of state and local governments. Although limits on congressional power under the commerce clause and the Fourteenth Amendment have received the most attention, Court rulings on enforcement of federal rules against state and local officials have probably had a much more significant effect on policymaking.

These new doctrines on federalism, frequently the product of 5-4 decisions, seem to dovetail nicely with the preferences of the post-1980 Republican Party. Starting in 1980 the Republican platform called for limits on federal power, protection of state sovereignty and appointment of federal judges with views consistent with the belief in the decentralization of the federal government and efforts to return decision-making power to state and local officials. Several elements in the Republicans' famous 1994 'Contract with America' stressed federalism, calling for limits on unfunded mandates and greater state control over welfare programs. Although most of the legislation based on the Contract either failed to pass the Senate or was vetoed by President Clinton, the Unfunded Mandate Reform Act and the welfare reform act of 1996 were successfully passed.

Although some law professors, journalists and a few Democrats in Congress reacted with alarm to the Rehnquist Court's federalism decisions, most members...
of Congress paid little attention, neither praising the Court for limiting federal power nor blaming it for restricting congressional authority. When these decisions were mentioned on the House or Senate floor, it was usually to discuss methods for rewriting legislation to make it compatible with Court rulings.

One reason for the muted congressional response to the Court’s unprecedented rate of invalidating federal laws was that most of the cases decided by the Court involved relatively minor policy issues. The importance of these decisions lay not in the individual cases but the complex new rules established by the Court on federal-state relations. Complex and uncertain rules about judicial enforcement of federal statutes and regulations seldom make congressional blood boil; nor do they mobilize many interest groups. Advocates for the disabled, environmental groups and civil rights groups could see that these decisions might prove problematic in the future, but could do little given Republican control of Congress. Republicans were generally content to let the Court proceed.

A second reason for Congress’s indifference was that most of the Court decisions were relatively easy to circumvent. For example, in many cases the Court merely announced that if Congress intended to impose mandates on the states, it must do so in clear, unambiguous language. The federal courts would not broaden federal mandates through creative statutory interpretation, nor did they give federal agencies extensive power to expand regulation of the states. This meant, in effect, that whenever party leaders in the House and Senate really wanted to impose a restriction on the states, they could do so. The Court also stipulated that Congress can regulate the states under the Fourteenth Amendment, meaning that Congress could at times protect its legislation by developing a more elaborate record. Moreover, while the Court limited the availability of private suits against subnational governments, it left open many other options for enforcing most federal mandates. Most importantly, it placed virtually no limits on Congress’s spending power and its authority to place conditions on receipt of federal funds: a power Congress has not hesitated to wield.

Finally, the longer Republicans have remained in power, the weaker their commitment to federalism has become. Popular policies have trumped federalism on a large number of issues, criminal law and the Religious Freedom Restoration Act (RFRA) being just two obvious examples. President Bush proposed and the Republican Congress passed the most prescriptive federal education law ever enacted, No Child Left Behind. Republicans have pushed for more demanding federal regulation of state welfare programs. Rather than defend state autonomy on such matters as marriage, abortion, and end-of-life issues, the Bush White House and many Republicans in Congress have supported a national definition of marriage, federal restrictions on partial birth abortion, and federal pre-emption of state right-to-die laws. Moreover, the Republican Congress has frequently passed legislation pre-empting state laws. Republicans have been particularly intent upon restricting tort suits at the state level.

As Thomas Merrill has argued, the Second Rehnquist Court shifted its agenda from social issues to federalism. While this increased the cohesiveness of the conservative bloc and the number of federal statutes invalidated by the Court, it also meant that the Court was focusing on matters that are of less and less importance to Republicans in Congress and the White House. Now that Democrats are rediscovering the joy of federalism, they sometimes find themselves lobbying for a narrow reading of national authority.

Most confirmation hearings and journalism on the Court focus on ‘hot button’ social issues such as abortion, affirmative action, gay rights and capital punishment. It is here that the Rehnquist Court most disappointed conservatives: for example, saving the essential holding of Roe v. Wade in 1992; striking down a relatively narrowly drawn federal restriction on partial birth abortion in 2000: giving a qualified
green light for affirmative action in education in 2004 and reversing its position on anti-sodomy laws. Although the Court has reduced litigational delay in death penalty cases, it has in recent years ruled that execution of the mentally retarded and those under the age of 18 violates the Eighth Amendment’s prohibition of cruel and unusual punishment.

What can be learnt from this? Firstly, while the appointment and confirmation process ensure that there will be some general similarities in the thinking of Justices, presidents, and members of Congress, the weakness of ex post controls on the courts in the US allows substantial differences to appear regularly and survive for years, even decades. The ex ante controls available to Congress and the president – nominations and confirmations – simply do not give much power to current majorities. Despite the growing power of parties in the US, it is still hard to find a stable, coherent national lawmaking majority capable of guiding the Court.

Secondly, examining Congress and the Supreme Court reminds us how serious are the fissures that run through American conservatism. Libertarians often disagree with social conservatives on the issues that come before the courts. Republicans’ commitment to federalism conflicts not only with the Religious Right’s desire to establish uniform national policy on such matters as abortion, gay marriage, stem cell research, assisted suicide and drug use, but also with its business allies on such matters as tort law and federal pre-emption of state regulation. In recent years conservatives in both branches have split on the issue of executive power as well.

Thirdly, within Congress, Republicans have managed to remain unusually united by giving party leaders unprecedented power to set the legislative agenda, especially in the House. Matters likely to divide the party are either kept off the floor altogether or handled under rules that make defection politically painful. In the Supreme Court, by contrast, the votes of any four Justices are enough to grant certiorari, and the Justices do not seem particularly interested in avoiding divisive issues. The Justices also believe that they have the duty to resolve conflicts among the circuits and to review lower court decisions striking down state and federal laws. As a result, the schisms within conservatism are more apparent and the power of swing voters significantly greater on the Court than in Congress.

Finally, institutional demands inevitably influence how judges, legislators and executives view issues. This is particularly apparent in the area of criminal justice. Most members of Congress have concluded in elections that it never hurts to be tough on crime. This is the major cause of the federalization of criminal law. Federal judges, in contrast, must hear those thousands of cases diverted from state to federal court. Regardless of ideology, they resent the increase in their workload and believe that this is a poor use of the resources of the federal courts. They also resent the fact that their discretion in sentencing has steadily declined, sometimes requiring them to impose sentence they consider manifestly unjust. Similarly, behind many of the Court’s decisions on federalism lies the belief that the federal courts are overwhelmed with relatively minor cases, and that the judiciary should reduce its micromanagement of state and local affairs.

Professor Melnick ended his presentation with a prediction. Even if Republicans continue to control the Congress and the White House long enough to appoint several more reliably conservative Justices on the Supreme Court, the branches will continue to disagree on many, many issues. What the Constitution has pulled asunder virtually no political party or ideology can unite.

Response: Dr Katherine Eddy, Postdoctoral Research Fellow, Oxford University
As a political theorist, Dr Eddy observed that her discipline was predominantly concerned with questions of justice rather than those of institutional design. She thus posed two questions following Professor Melnick’s presentation. Firstly, is there anything inherently conservative in a preoccupation with federalism? Secondly, is there any reason to think that a commitment to federalism is likely to
promote justice? Her answer to the first question was negative, and she argued that ideological attachment to federalism tended to be a practical measure which resulted from the fact that one’s desired policies were unlikely to be adopted by those in control of central government. In this sense, federalism is best seen as a ‘foul weather friend’, and so one should not be surprised to see a growing interest in federalism from liberals in the contemporary political climate. Her answer to the second question was more equivocal. To the extent that an insistence on federalism promotes regional autonomy, individual liberties and local civic engagement, it could be said to promote justice. But if one wants to be able to counter discrimination on the basis of gender, race and so on, then federalism is not a helpful variable upon which to focus.

Dr Paul Martin, Fellow in Politics, Wadham College, Oxford

Dr Martin began by making the definitional point that ‘no one is just liberal or just conservative’. Justices appear to be, quite reliably, on the liberal or the conservative wing of the court relative to the issues which actually divide it, and reject or ignore issues which do not divide them but which might well divide courts with a different membership entirely. We live in an era in which, by 2009, the only Democratic presidents in four decades will have been Southerners from the moderate wing of the party, while Republicans have at least sometimes been able successfully to nominate principled conservatives to the office. It isn’t surprising that this has given us a court which, overall, appears very conservative. The best, albeit perhaps not very good for these purposes, quantitative measure we have of judicial ideology is the Segal-Cover scores. According to those, only one member of the current court is in the liberal half of the spectrum, and even she is closer to the centre than the extreme. Compare that to, for example, the Supreme Court in 1946–9 when three justices had maximally liberal scores, two who were closer to the liberal extreme than to the midpoint of the spectrum, and in total seven justices were in the liberal half with one Justice on the midpoint; or 1967–9, again with three maximally liberal justices, eight justices in the liberal half, and one justice on the midpoint. People writing about those courts also talk about liberals and conservatives, despite the near-extinction of the conservative. So we could quibble with individual scores in the list, but the sum total appears pretty convincing: relative to the political discourse of their time, the modern Court is composed of centrists, moderate conservatives, and extreme conservatives, and those issues which divide it are those which divide the conservative half of the ideological spectrum, not those issues which divide conservatives from liberals.

Within that perspective, Dr Martin suggested a reconsideration of Professor Melnick’s question. Does the Court’s apparent disconnect with the Republican moment of dominance indicate significant opposition, or just minor deviation within a broad trend of support which is so complete it goes without saying, since it rarely arrives at the Court and never divides it when it does so? One might wonder, in other words, just how much the Congress could reasonably expect from a sympathetic Court.

He then suggested two further frames within which the issue could be studied. First, one might want to consider how far the lack of synch between Court and Congress in a Republican-dominated system represents, as they say in computing, a bug rather than a feature. On the one hand, as Professor Melnick points out, Republican members of Congress seeking re-election might well pursue policies of a populist sort, such as creating new federal crimes; but that doesn’t mean that they wouldn’t prefer to be reined in by a more authentically conservative Supreme Court. But on the other, it seems likely that some elements of the Court’s rebuff of conservatism – notably the relative social liberalism evident in Lawrence v. Texas (2003), and of course Planned Parenthood v. Casey (1992) – have on the whole been rather helpful to the Republicans as a party, and to the Right as a political movement. It is difficult to imagine that George H. W. Bush’s difficult re-election campaign in 1992 would have been at all easier had the Supreme Court, with his new
appointees, just overturned Roe v. Wade. And of course, the Court’s lack of progress on the social conservative agenda is mirrored by the remarkable lack of enthusiasm Republican presidents and Congresses have had for substantive policies pursuing that agenda, as opposed to positive support.

Secondly, it is always relevant to stress the essential placidity of the life of the later Rehnquist court. Not only was it the second longest period of unchanged membership in the Court’s history, and the longest for the best part of two centuries. It was also a time when no significant changes to the Court’s work and docket occurred. For much of its life, the Court has been subject to quite significant change – sudden surges in workload, changes in its need to ride circuit, or its capacity to control its docket, or a move to a new building. For much of the twentieth century, the Court seemed to face a steadily rising workload, one which seemed nearly out of control under Chief Justice Burger. But by the later Rehnquist Court, the rise had been cut back, while the growth in the number of law clerks had ceased, and institutions designed to cut down work, such as the cert pool, had become well-established. This was, in other words, a mature institution, especially compared to the radical novelty of ideologically coherent partisan control of Congress by Republicans.

Thus, the questions raised by Professor Melnick’s paper are as follows: firstly, what is the context for comparing Congress and the Court – how much synchronicity should we, really, expect, and can we even usefully measure it? Secondly, whose interests are served by such lack of synchronicity as exists, and can that be a partial or whole explanation? Thirdly, how does the institutional sense of the later Rehnquist Court matter? It is in light of the latter question that the presentation is right to see the appointment of Roberts and Alito as a crucial moment, and perhaps even understates the potential consequences for relations between Congress and the Court.

Criticism and Discussion:
The question of the relation between the legislature and the judiciary was at the heart of this session. The recent emergence of relatively homogeneous, programmatic political parties in the European mould in the US raises important issues relating to the independence of the judiciary, on account of the role that partisan political actors, specifically the president and the Senate, play in the appointments process of the US Supreme Court. Historically, the heterogeneity of American political parties served to exacerbate the diffusion of power caused by the constitutional division of authority into separate branches of government. This diffusion was also furthered by the apparent preference of many voters for governmental offices to be divided between the two dominant political parties, as evidenced by the prevalence of split-ticket voting. The recent Republican dominance of American politics at the federal level has therefore represented something of a break from the norm. Participants disagreed over the extent to which this Republican success had been mirrored by conservative dominance at the Supreme Court. While some saw a Court that had been (perhaps surprisingly) liberal on a range of social issues, others suggested that the political spectrum had shifted substantially to the Right, so that disagreements between Court and Congress were best seen as intra- rather than inter-ideological, within the context of an essentially conservative paradigm.

There was also considerable discussion of the nature of federalism. In the US, opponents of centralized reform have for many years advocated the principle of subsidiarity, asserting the rights of the states to order their own affairs and seeking limits on the power of the federal government. Professor Melnick’s paper suggested that in recent years many Republicans’ commitment to federalism has become weaker, as they have found themselves in control of the federal government, and that it is increasingly Democrats who are advocating states’ rights as a bulwark against centrally initiated conservative social policy. Such an observation suggests that seemingly ideological commitments to
federalism are often pragmatic rather than idealistic: a political actor will advocate federalism if doing so serves that actor’s ends. There is a parallel here with the earlier discussion of the democratic legitimacy of judicial intervention in social policy. Do those who oppose such intervention tend to do so, really, because they oppose the mode of policymaking, or the policy itself?

The discussion of federalism in this session was primarily focussed on the United States, but there is no doubt that the themes which were raised are of increasing importance in other political systems. The rise of intergovernmental and supranational associations, such as the European Union, has meant that federal political solutions, where authority is divided between central and local levels, are increasingly appealing to many around the world. Dividing government into different levels is a move which inevitably raises the possibility of disagreement and conflict, and it is typically courts which have to decide said conflicts. In such a situation, if courts are to retain their legitimacy they must avoid being seen to have been ‘captured’ by a given political party. The greater the degree of polarization within a given society, and the greater the control of programmatic political parties over judicial appointment, the more likely this is to be the case.
Opening Address by Professor Vernon Bogdanor with a response by Professor Keith Ewing and Justice Kathleen Satchwell

Chair: Dr Marina Kurkchiyan

Professor Bogdanor began by asserting that, following the Human Rights Act, UK rights are no longer based on inductions or generalizations. Instead, they are coming to be derived from certain ‘principles of the constitution’; that is, the European Convention on Human Rights. For judges are now charged with interpreting legislation in the light of a higher law, the European Convention. Dicey famously declared that there can be no such higher law in the British Constitution and so the Human Rights Act formally preserves the sovereignty of Parliament. It does not empower judges to strike down Acts of Parliament. All that judges can do, if they believe that legislation contravenes the European Convention on Human Rights, is to issue a declaration of incompatibility, and then it is up to Parliament to amend or repeal the offending legislation if it wishes to do so. Professor Bogdanor noted that a leading public figure had told The Observer newspaper a few weeks previously that the Human Rights Act empowered judges to strike down Acts of Parliament. All that judges can do, if they believe that legislation contravenes the European Convention on Human Rights, is to issue a declaration of incompatibility, and then it is up to Parliament to amend or repeal the offending legislation if it wishes to do so. Professor Bogdanor noted that a leading public figure had told The Observer newspaper a few weeks previously that the Human Rights Act empowered judges to strike down Acts of Parliament. This leading public figure was in fact the prime minister, who seems not to have understood the import of legislation introduced by his own government.

The Human Rights Act preserves the sovereignty of Parliament, but provides for Parliament, ministers and the courts to play a much more important role in the protection of human rights. Ministers have to declare, when introducing legislation, that, in their opinion, it conforms to the European Convention. They are required, therefore, to scrutinize human rights legislation carefully before introducing it into Parliament. In addition, Parliament has established a Joint Select Committee on Human Rights, charged with scrutinizing all legislation in relation to its human rights implications.

The Human Rights Act, then, proposes a compromise between the two doctrines of the sovereignty of Parliament and the rule of law. This compromise depends upon a sense of restraint on the part of both the judges and Parliament. Were the judges to seek to invade the political sphere and to make the judiciary supreme over Parliament, which critics allege is already happening, there would be considerable resentment on the part of ministers and MPs. Conversely, were Parliament ever to ignore a declaration of incompatibility on the part of a judge, and refuse to repeal or amend the offending statute or part of a statute, or were the government to deny access to the courts to a litigant, by depriving him or her of the right of appeal, the Human Rights Act would have proved of little value.

Thus, the Human Rights Act seeks to secure a democratic engagement with rights on the part of the representatives of the people in Parliament. But, of course, the main burden of protecting human rights has been transferred to the judges, whose role is bound to become more influential. Many human rights cases concern the rights of very small minorities, minorities too small to be able to use the democratic machinery of party politics and pressure groups very effectively. Often highly unpopular minorities, such as terrorists, prisoners, asylum seekers or paedophiles, are involved.

The radical implications of the Act were not noticed in large part because the UK does not have a codified constitution. In a country with a codified
constitution, the Act might have required a constitutional amendment or some special process of legislation to enact it, and would almost certainly have given rise to a great deal of public debate and discussion; for a country with a codified constitution would have become accustomed to the idea that legal modalities were of importance in the public affairs of the state. In Britain, by contrast, constitutional change tends to go unnoticed.

There is a basic conflict between the principle of the rule of law, as interpreted by the judges, and the principle of the sovereignty of parliament. The Act sought to muffle this conflict by proposing a dialogue between the judiciary, Parliament and government. They are required to act together to protect human rights. It is the judges who issue a declaration of incompatibility, but it is Parliament and the government who have to put things right. The Act sought to avoid the question of what happens if there is a clash between these two principles. The Act presupposes a basic consensus on human rights between judges on the one hand, and the government, Parliament and people on the other. The Act assumes that breaches of human rights will be inadvertent and unintended and that there will therefore be little disagreement between the government and the judges.

But there is clearly no such consensus when it comes to the rights of unpopular minorities. Two matters in particular – issues concerning asylum-seekers and issues concerning suspected terrorists – have come to the fore, since the HRA came into force.

The problem of asylum long predated the Act, but it has grown in significance since the year 2000 and is now a highly emotive issue which politicians hold to have great electoral significance. Terrorism also has taken on a different form since the horrific atrocity of 9/11. To deal with this new form of terrorism, the government argues, new methods are needed, and these new methods may well infringe human rights. The judges, however, retort that we should not compromise our traditional principles – habeas corpus and the presumption of innocence – principles which have been tried and tested over many centuries and have served us well. Some senior judges, however, have gone further. They have suggested that a natural consequence of the Human Rights Act should be an erosion of the principle of the sovereignty of Parliament. They argue that the sovereignty of Parliament is but a judicial construct, a creature of the common law. If the judges could create it, they can now, equally justifiably, supersede it. In Jackson v Attorney-General (2005) the case that dealt with the invalidity of the Hunting Act, judges for the first time declared, obiter, that Parliament’s ability to pass primary legislation is limited in substance. The sovereignty of Parliament is a doctrine created by the judges which can also be superseded by the judges. At present, the rule of recognition of the British constitution, its ultimate norm, remains the sovereignty of Parliament, provided that we ignore complications arising from the European Communities Act of 1972. Some of the senior judges, no doubt, would like to see the sovereignty of Parliament supplanted by an alternative rule of recognition, the rule of law. In the mid-1990s, before the Human Rights Act was enacted, Lord Justice Sedley declared that parliamentary sovereignty was being replaced by ‘a new and still emerging constitutional paradigm’ comprising ‘a bi-polar sovereignty of the Crown in Parliament and the Crown in the courts’.

The difficulty with such a paradigm, of course, is that the two poles of the new bi-polar sovereignty, far from collaborating in the sharing of authority, can all too easily come into conflict. This conflict, if not resolved, could generate a constitutional crisis, in the sense of a profound difference of view as to the method by which differences as to what the constitution entails should be settled.

There are two possible outcomes to such a crisis. The first is that Parliament succeeds in defeating the challenge of the judges, and parliamentary sovereignty is preserved. But the logical corollary of such an outcome would be that Parliament might well, on some future occasion, refuse to take notice of a declaration of incompatibility. The second possible outcome is that the Human Rights Act comes to trump Parliament, and that, in practice, a declaration of incompatibility by a judge comes to be
the equivalent of striking down legislation. It is too early to tell which outcome is more likely to prevail. What seems unlikely is that the compromise embodied in the Act can survive over the long term. The UK may come to develop a codified constitution. It might even be that, as part of such a codified constitution, judges, as in the US, will be given the power to strike down laws which offend against human rights. We are, at present, in a transitional period. Eventually a new constitutional settlement will be achieved, but that could prove a painful process.

**Response: Professor Keith Ewing, Professor of Law, King’s College, London**

Professor Ewing began by suggesting that Professor Bogdanor might be exaggerating the extent to which the UK constitution has been codified, suggesting that much post-1997 activity has been peripheral, largely affecting secondary institutions. The central problem, namely the power of the executive, with particular reference to the role of the prime minister, remains untouched. The codification of rights has happened across common law jurisdictions over the last twenty years, and, as in the case of New Zealand, the results often exceed what was originally expected. In the UK, there may soon be a convention that governments will have to introduce legislation if a statement of incompatibility is issued, which may well be seen as an instance of rights inflation. He also suggested the role of the courts since the enactment of the Human Rights Act has probably been inflated. It is still the case that cases are going to Strasbourg, and the period 2002–4 saw more findings against the UK government than that of 1975–2000. With important exceptions, the history of jurisprudence since 1998 has shown courts to be largely inactive and deferential in their use of the new tool at their disposal. Professor Ewing suggested that the doctrine of parliamentary sovereignty was a product of Britain’s democratic revolution, and that one need not accept the arrogance of the view, which has been expressed by some judges, that parliamentary sovereignty is based in the common law – parliamentary sovereignty is the rule of law.

**Justice Kathleen Satchwell, High Court, South Africa**

Justice Satchwell suggested that perhaps the ‘mother country’ UK could take some tips from the ‘daughter country’ of South Africa. Although South Africa had the input, as a colony, of parliamentary sovereignty, this was not successful because in effect there was an executive autocracy, such that Parliament was not in fact accountable to the electorate. As a result, the country clutched to constitutional supremacy. However, tensions emerged. What Professor Shapiro has called the anti-democratic nature of constitutional democracy has indeed caused problems in South Africa. Courts are enjoined by the electorate and other bodies of government to look at socio-economic rights, since they are looking to redesign a society. The very nature of the constitution, which empowers courts to grant ‘appropriate’ relief, gives them enormous powers, including the power to strike down legislation. The courts are thus entering the public domain in South Africa in a way that had never been seen before, and this is directly linked to the need for the judiciary to ensure executive accountability when there is such a degree of executive pre-eminence over the legislature. As a result of the huge powers the judiciary has, the question of appointments becomes hugely important.

**Criticism and Discussion:**

Although there was disagreement between speakers and discussants as to precisely how much change has taken place within the British political system since the introduction of the Human Rights Act in 1998, it is clear that the role of the courts in the British public policy process is now some way from the traditional role envisaged by those who saw the courts as strictly subordinate to Parliament. As with a number of the constitutional reforms of the Blair governments, it may be suggested that potential sources of conflict have been introduced into the political system which have not yet been fully tested, since the government which introduced the changes in question remains in office. For example, both Professor Bogdanor and Professor Ewing spoke of the possibility that a constitutional convention might
emerge to the effect that the government will be
obliged to introduce fast-track remedial legislation in
the event of the courts finding a statute, or part of
a statute, to be incompatible with the European
Convention. But it should be noted that, in such a
case, the political pressure on a party which itself
introduced the Human Rights Act is likely to differ
from that on a party which opposed the Act’s
introduction. Constitutional conventions depend for
their force upon a combination of the weight of
established practice over time, and the degree of
popular support for the convention in question found
in a country’s political culture. If one thinks of the
kind of unpopular minorities Professor Bogdanor
discussed in his presentation, one might well imagine
that their cause might not be one that finds populist
enthusiasm. The key question here concerns the
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in a country’s political culture. If one thinks of the

‘human rights’ in inverted commas, suggesting that
the rise of rights consciousness in the UK had gone
too far, an instance of ‘political correctness gone mad’.
Such a view is certainly shared by a number of popular
British newspapers, who frequently rail against the
Act. This suggests that the level of conflict between
a possible future Conservative administration of a
determinedly populist bent and a newly assertive
judiciary, willing to challenge the principle of
parliamentary sovereignty and assert an alternative
rule of recognition, might be considerable.

A number of participants suggested that useful
academic study could be done of the current
situation in the British courts. Lord Justice Sedley
suggested that a very interesting study could be
conducted on how the UK High Court is going about
decisions concerning the issuing of statements of
incompatibility. Also deemed to be useful was some
research into why there has been such a change in
appetite for judicial activism over the last thirty
years, since in the seventies it was absent in both
courts and public.
The final session took the form of a discussion whose purpose was to attempt to identify key issues emerging from the seminar which participants felt would warrant further discussion and debate. Much of the discussion at the seminar was relatively abstract, and there was agreement that future discussion would benefit from a solid empirical basis and that a focus on the real-world working of judicial policymakers in different jurisdictions would be helpful. This could be achieved in a number of different ways, from commissioning research into particular case studies to interaction and discussion with those involved in the business of judicial policymaking.

For obvious reasons, discussion at the seminar was focussed on the national high courts of a small number of countries, notably the US and the UK, with some additional discussion of France, Germany and Israel. There is clearly a wide range of other judicial settings which could be brought into the discussion. The FLJS is already engaged in work examining the cases of China and Poland, and other national courts in Eastern Europe, Asia, Africa and South America could also be brought into consideration. This could include both new democracies seeking to follow Western models of constitutional judicial review, and very different systems, such as those of countries operating within the terms of Sharia law. It would also be desirable to consider explicitly the increasingly significant workings of transnational judicial institutions, such as international arbitration tribunals. This is clearly a dynamic field, which is just beginning to receive serious scholarly scrutiny.

It was suggested during the seminar that an expansion of the range of cases under consideration would be particularly useful in terms of assessing the quality of the policy output of judicial institutions. Two broad questions arise concerning the desirability of judicial intervention in the public policymaking process. The first of these relates to the quality of the policy output in terms of efficiency: the question is whether courts make good policy. The second relates to the legitimacy of this form of judicial intervention: the question is whether judicial policymaking is democratic. The literature on the efficacy of judicial policymaking has traditionally focussed primarily (almost exclusively) on the US, the most prominent examples being found in the writing of Horowitz, Professor Melnick and Rosenberg. Such works have been largely negative about the abilities of courts, as compared to legislatures, to make good public policy, citing their limited resources, the adversarial nature of judicial proceedings and the limited ability of courts to enforce and implement their rulings. During the seminar, Professor Melnick himself suggested that fruitful comparative work could be undertaken in this area, to examine the extent to which courts in other jurisdictions have been successful in terms of producing good public policy. The key point here concerns the real-world variation which is found in the resources – material, constitutional and cultural – which different judiciaries have access to when seeking to make public policy. One way in which such research could be undertaken would be to look specifically at the policy areas which have received most attention from American scholars (welfare rights, environmental protection, etc.) and compare the way they have been addressed in other legal jurisdictions.

The question, alluded to above, of the resources which judiciaries possess is of obvious importance in discussions of judicial policymaking. Professor Shapiro, in speaking of possible future directions for the programme, made reference to the need to deal with courts ‘in their environment’. Such a project has two key elements. The first involves a focus upon the most obvious individuals within a judiciary – the judges. Several participants spoke of the importance of studying judges both as individuals and as members of...
institutions. One can look at influences upon judges both before and after their appointment. Obvious examples here include the nature of judges' education and training, but one might also look at how, and with what success, other political actors, such as interest groups and think tanks, seek to influence judges. Professor Bogdanor suggested that valuable comparative work could be done on the role of populism in different legal jurisdictions, investigating such questions as: What is the influence of popular opinion upon judges? To what extent do, and should, judges adopt populist strategies? To what extent do judges seek to explain their reasoning and engage with other political bodies and the media, and is such a wider involvement worth the political process desirable? If one does desire more openness, should this operate by formal mechanisms of accountability? Wight such moves undermine public trust in the judiciary? One can also look at judiciaries as collective institutions: examining how judges interact with one another; how power hierarchies within the judiciary operate; and how and when judges seek to compromise and reach consensus, or openly disagree and issue dissenting opinions.

But a study of judges in their environment must do more than look solely at judges themselves. Professor Shapiro also spoke of the need to look at ‘judges and company’, and examine the role played by a host of different actors in the judicial policymaking process. As judicial power expands, a range of different individuals and groups have emerged as repeat players in the process of judicial public policymaking: one may look here at lawyers, interest groups, private companies and government agencies, amongst others.

This observation feeds into the earlier concern with the efficacy of judicial policymaking. Several seminar participants made comments which suggested that judiciaries were similarly equipped to, or perhaps even better equipped than, legislatures to come to balanced and informed judgements in the public interest.

Professor Shapiro argued that, in making law, judges follow the same thought processes and engage in the same way of thinking as legislators and administrators: ‘there is really only one way of thinking about making law, and everybody who makes it thinks in the same way’. Analysis of this claim would itself constitute a fruitful avenue for future research, and if it is accepted, then the resources to which these different actors have access in making their decisions is of great importance. In contrast to much received opinion on the subjects, some participants, such as Slifkin, suggested that courts sometimes are notably well-resourced, observing that in the United States courts have the power to issue writs of certiorari, operate within the legal doctrine that moot cases can be addressed and have a considerable capacity to gather facts and form judgements, especially in the context of lengthy trials characterized by the presentation of evidence by well-resourced legal representatives. Examination of such an argument could take the form of consideration of how courts operate in particularly complicated policy areas, such as high-tech industry, and regulation of the Internet, for example.

If there was some debate over the quality of the policy which resulted from judicial intervention, there was certainly more open disagreement concerning the justifiability of judiciaries seemingly taking the place of legislatures in the policymaking process. The question of democracy is at the heart of this debate. At one level, this is a normative question of legal and political theory, and one’s perspective will depend on how one defines and understands democracy, and in particular whether one focuses on the content of a given policy, or on the procedure by which the policy comes about. But here again empirical study is important, as the nature of real-world beliefs which legal actors have concerning the justifiability of judicial activism is itself likely to have an impact on policy outcomes. The attitudes of judges to the legitimacy of judicial activism is a good example of this: it is common in the political science literature to suggest that the extent to which a given judge is likely to advocate judicial activism or judicial restraint will depend upon the judge’s own policy preferences (constrained, no doubt, by the institutional and cultural context within which the judge operates, and the subsequent requirement that the judiciary should retain its legitimacy, so as to be able to influence other policy outcomes in the future). But, as was suggested during the seminar, it is possible also to posit normative views concerning the justifiability of judicial activism as an independent variable, which itself can affect the
willingness of a judge to intervene regardless of his or her own policy preferences in other areas. The extent to which this happens in the real world is as yet a matter for conjecture, and can only begin to be addressed through interaction and discussion with legal practitioners. This clearly relates to the broader question of how judges understand the nature of their role. Justice Satchwell commented at one point that she believed that judges in South Africa would not characteristically accept the proposition that they played a role in the formation of public policy; such an observation suggests an obvious disparity between academic and judicial perceptions of the role of judges in at least one contemporary society (and perhaps underlines the importance of ventures which seek to bring the two groups together). It is also striking that such an observation seems to be in stark contrast to the British perspective afforded by the comments of Lord Justice Sedley, which itself reflects the variation there appears to be between different legal jurisdictions.

Finally, an empirical and comparative perspective will allow the possibility of suggesting concrete policy proposals to reform judiciaries in areas where it is concluded that they are not operating as they could or should. A noteworthy feature of much of the discussion of the seminar is that relatively little was suggested by way of institutional reform; the exception to this being the debate over recent changes to the British constitutional order, and the possibility of future constitutional reform (such as the introduction of a written constitution, reform of the electoral system and even the abolition of the monarchy). Clearly, institutional change is easier in such a system where Parliament is supreme and constitutional provisions are not formally entrenched, but there are nonetheless a range of alternatives to decision-making by the courts which might be considered, including, for example, a greater role for ombudsmen, parliamentary committees and constitutional councils. The desirability of such institutional reform will clearly depend on the answers given to prior normative questions about the efficacy and justifiability of judicial intervention in the policymaking process. The alternative to institutional reform, should change be considered desirable, but thought to be impossible or overly problematic, is cultural change. This can occur as a result of self-imposed behavioural changes by judges, or as a consequence of pressure put upon judiciaries by other political actors or by public opinion. Although lessons can no doubt be learnt from different systems, the right course for a given jurisdiction will no doubt depend upon its own particular character, and so changes can only be seriously proposed after considerable study of the jurisdiction in question. A greater emphasis on judicial decision-making in the real world is a necessary element of such a study.

Conclusion

The seminar drew extremely positive feedback from its participants. It was commonly felt to have been very successful, and particular appreciation was expressed for the opportunity it provided for those involved in real-world legal practice to interact with those concerned with the theoretical consideration of the role of the courts in contemporary society. It is hoped that those who attended the seminar will continue to be involved in the activities of the Foundation. Following the seminar, a number of participants have written policy briefs for the Foundation on a range of issues within the terms of the ‘Courts and the Making of Public Policy’ programme – these are available from <http://www.fjis.org>. 
List of participants

John W. Adams, Attorney and businessman, Chairman of the Foundation for Law, Justice and Society

Professor Vernon Bogdanor, Professor of Politics, Oxford University

Dr Daniel Butt, Fellow and Tutor of politics, Oriel College, Oxford University

Dr Margit Cohn, Faculty of Law, Hebrew University, Israel

Dr Katherine Eddy, Postdoctoral Research Fellow, Oxford University

Professor Keith Ewing, Professor of Law, King’s College, London

Professor Denis Galligan, Professor of Socio-Legal Studies; Director of the Centre for Socio-Legal Studies, Oxford University; and Board member, Foundation for Law, Justice and Society

Professor John Gardner, Professor of Jurisprudence, Oxford University

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Justice Kathleen Satchwell, High Court, Transvaal Provincial Division in South Africa

Lord Justice Stephen Sedley, Judge of the Court of Appeal

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The Foundation

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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 scrutinising 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.

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