

Courts and the Making of Public Policy

The Court of Public Opinion: Justice, the Media, and Popular Will

REPORT AND ANALYSIS OF A WORKSHOP HELD AT
QUEENS COLLEGE, OXFORD
8 July 2011

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in affiliation with
The Centre for Socio-Legal Studies,
University of Oxford

www.fljs.org



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Introduction

This report is intended to provide both a record of, and where possible, a critical response to a workshop forming part of the Foundation for Law, Justice and Society's 'Courts and the Making of Public Policy' programme. The focus of this workshop was how the mass media shapes public opinion, and how this in turn impacts on the opinion of judges and politicians. Professor Denis Galligan introduced the workshop and co-chaired with Dr Fernanda Pirie, before a series of presentations from Professor Richard Davis, Sir Mark Potter, Professor Raymond Kuhn, Professor RonNell Andersen Jones, Professor Daniela Piana, and Mr

Lance Price. In each case, the presentation was followed by a period of open comment and discussion involving the invited discussants and the floor. Whilst purely coincidental, it was a timely discussion given recent media events regarding News International and the phone hacking scandal.

In what follows, each presentation is summarized, and the ensuing discussion documented alongside an element of critical analysis on the subject in question and arguments propounded.

Journalists and Judges

Professor Richard Davis, *Political Science Department, Brigham Young University*

The central argument in Professor Davis' presentation was that the US Supreme Court has always had a relationship with the media, but that this has become significantly more public in the last fifteen years due to a combination of political, media, and technological factors. He assessed the reasons for, and nature of, the Justices' public profiles, described the changes in their attitudes towards public relations, and discussed the implications of these changes for the Court as an institution.

Professor Davis began by highlighting the mystique surrounding the Court. He noted that there is a pervading lack of awareness amongst the public of what it does and who is involved. Despite this, the court has been generating more press coverage in recent times, at least in part due to the forum for expression they have in C-SPAN. Analysis of coverage of the Justices in the *New York Times* and NBC showed dramatic increases, particularly over the last decade. Among the more remarkable appearances were Justices appearing on Larry King Live, throwing the first pitch at a New York Yankees baseball game, making the front cover of Time Magazine, salsa dancing, releasing autobiographies whilst still on the Court, and campaigning for diabetes sufferers.

Professor Davis argued that this increased profile in recent years was part of a deliberate strategy to manipulate the press in order to cultivate an image that maintains a high level of diffuse public support for the judiciary. Cultivating this image, he explained, was a necessity. If the Court did not do this, then other forces would. In the words of Justice Wiley Rutledge, 'we here cannot allow our judgment to be

swayed by the anticipated unpopularity of our views, but this does not mean either that we can be unconscious of that probability....'

Professor Davis identified the goals of the Court's public relations activities as being institutional image-making to cultivate the image of a judiciary independent from political influence, immune from lobbying efforts, and with a sense of authority emanating from the constitutional basis of their decision-making. Whilst acknowledging lapses from this ideal image, such as that of Justice Samuel Alito, who was caught on camera mouthing the words 'not true' in response to a State of the Union speech by President Obama criticizing a Supreme Court judgment, Professor Davis reaffirmed this intended aim of the Justices to project a sense of distance from the political sphere, as evident in Justice Alito's subsequent refusal to be drawn by the media on this apparent criticism of the President.

Justice Samuel Alito, who was caught on camera mouthing the words 'not true' in a State of the Union speech by President Obama ... refused to be drawn by the media on this apparent criticism of the President.

The methods of the Justices were then analysed, with Professor Davis concluding that they create their image by focusing attention on their 'products and not the process'. They do this by:

- limiting access to information by avoiding press conferences and 'on the record' interviews;
- feeding the press corps with a deluge of information and lengthy opinions to keep them busy focusing on the product;

- allowing access to the Justices only in return for favourable coverage;
- wrapping their product in unchallengeable authority through reliance on stable precedent, legal language, authoritative rituals; and
- closing ranks when threatened as a group.

These image-making tactics are not new, however, and can be seen to be at work right from the inception of the court in the 1780s.

The individual Justices also have image-making objectives. Professor Davis summarized these as:

- influencing public opinion, for example through dissenting opinions, announced in a way designed to gain more attention from the press;
- influencing other judges (astonishingly, in Justice Hugo Black's first term, the other Justices carried on a whisper campaign against him in the press as his judgments were seen as blundering and too political);
- publicly defending themselves when the need arises;
- shaping the historical record in order to show how they ought to be interpreted by history; and, on occasion
- gaining political office.

On the challenges facing the court in the twenty-first century, Professor Davis cited the technological challenge of television, the internet, and the blogosphere, which combined to erode the Justices' anonymity and expose them to less reverent comment. Secondly, 'in an age when transparency is so much expected in politics', the pressure for transparency is a particular challenge to the Justices, who have to balance the increased demand for personal information with the integrity of the institution they represent. He concluded, 'The challenge for the court will be to find a balance between historical traditions and the new media culture they live in today'.

Comment and Discussion

The discussion centred around certain tensions evident in Professor Davis' thesis. These included the discrepancy between a lack of name recognition of the Justices by the public on the one hand, and increased levels of publicity on the other; secondly, the tension between public disclosure and responsiveness on the one hand and immunity from external influence on the other; thirdly, the effects of the 24-hour news media; and finally, an examination of the wider political landscape and its potential effect on the Court's relationship with the media.

On the first point regarding lack of name recognition yet greater publicity it was questioned whether the general public pay much attention to the Supreme Court. By way of confirming this, Professor Davis clarified that the increase in awareness was indeed stemming from academics, responsible media, and politicians. It was noted that there is a troubling dichotomy between the power the Court wields and the anonymity of the Justices.

On the second point, one commentator advanced the notion that the press help to create the sense that the Supreme Court is immune from the pressures imposed on it. There is another stream of thought, however, that the court should be responsive to public opinion. An example of this is the amicus brief that helps various interest groups filter their views into the Court's decisions. The tension between immunity on the one hand and reflecting the range of beliefs and attitudes in the general public warranted further discussion. While the courts are supposed to be an independent institution, in the nomination process there is a significant emphasis on this model of representation and the need to have more women and ethnic minorities on the court. However, whether this gets to the point regarding the court as a reflection of public opinion or not is still open to debate.

This question was taken up in the discussion, with the observation that the fact of the Court's being reflective of, and responsive to, the people are two separate issues. It was argued that it is desirable for

the Supreme Court in the US to reflect public opinion as this would lead to more confidence in their decisions and jurisprudence. With respect to direct responsiveness, this is a dangerous phenomenon. To talk about the court being reflective of popular will in individual decisions is problematic as it is not a democratically elected branch, and for good reason: it is meant to act as a check on the political branch.

Whilst Professor Davis' argument had focused on some 'front of stage' activities that the Justices engaged in, it was felt that the light of informed discussion needed to be shone on the Justices' 'backstage' activities with the press, and on any anonymous journalistic revelations. The current Supreme Court Justices simply do not talk about this, whereas past Justices have been known to meet with correspondents from Time Magazine and The Economist on a periodical or monthly basis, often over lunch. Others have met once every couple of months, with the United Press International reporter covering the court for 'off the record' interviews. The suggestion was that this was to gather background information, and that no direct stories came from it, but such a close, unaccounted working relationship between Justices and the media may be questioned. By way of comparison, however, these meetings were nowhere near as frequent as those between the media and the Whitehouse or State Department.

The demands placed on journalists by the 24-hour news media was also raised, with the argument that it trivialized much reportage with an undue focus on irrelevant minutiae and personal details such as a judge's sexuality.

Finally, with regard to the wider context of these changes in the Supreme Court's relationship with the media, it was argued that the extreme polarization of the political parties in the US meant that the court is increasingly being seen as a battleground for a variety of social issues, and indirectly being affected by the hyper-partisanship that is evident in the political and wider social spheres.

Do the Media Influence the Judiciary? A Judge's Perspective

Sir Mark Potter, *former President of the Family Division, High Court of England and Wales*

Sir Mark Potter's argument was underpinned with the belief that the decisions of judges are not, on the whole, influenced by the views of media commentators, nor are they motivated by any concern as to how their decisions may be reported once delivered. He conceded that judges engage with the media in a similar way to all of us and as such, in a broad sense, are open to the influence of the media like everyone else, but asserted that 'historically, judges' backs have been broad and they remain so'. He was clear that their task is to apply the law to the facts and that they have an obligation to put both personal opinions and media comment aside, since the latter is often misinformed as to the full details of the case at hand.

To formulate his argument, he drew distinctions both between the law applied in the criminal courts and that applied in the civil courts; and between the substantive law applied in individual cases and, more widely, the Rules of Court procedures and Practice Directions and the hearing of cases in open court. On the first point concerning criminal law he reaffirmed that, 'no magistrate or judge does other than decide each individual case by reference to the law', but that, interestingly, juries may bring in verdicts which are surprising to some observers, not least the judge, following intense media coverage of a particular case.

On sentencing, Sir Mark was distinctly more open to the possibility of media influence, indeed arguing that, since judges have been appointed by society as the persons responsible for punishing criminals, in deciding what punishment to deliver, they should

have regard to public opinion, without necessarily following it. Two instances where the media did indeed influence sentencing were those in which persistent media criticism in the 1990s concerning rape and death by dangerous driving led the Court of Appeal Criminal Division to alter judicial guidelines on sentencing. In these situations, judges are reliant on the responsible media to accurately reflect public opinion, considering this alongside the statistics and figures pertinent to the case.

Turning to civil decisions, his focus was drawn to cases raising interesting or undecided points of law that gain media attention as they proceed on appeal. These tend to involve difficult questions of human rights, such as those involving suspected terrorists or asylum seekers. Drawing on personal experience, Sir Mark restated that media comment is ignored in deciding these cases, but that, where key parts of the judgment are vulnerable to being misunderstood by the media, it is helpful if these are clearly spelt out, such as Foskett J did in the case for judicial review of the OFSTED report in connection with Baby P.

Sir Mark Potter then considered appellate judgments. He referred to a book by Professor Alan Patterson concerning the potential reference groups that influenced the Law Lords when deciding appeals. Four main influences on the judge's decision-making process were identified:

- quality of the judgments in the courts below;
- counsel's argument;
- interaction and discussion with their colleagues about the case (this was held to be the most influential); and
- legal academic opinion.

None of the Law Lords interviewed for the research thirty years ago mentioned the media as an influence or saw it as their function to address the media in their judgments, and whilst he acknowledged that today's Supreme Court Justices may lead less insulated lives than their predecessors, Sir Mark cited a number of their judgments that indicated a similar imperviousness to media influence.

Sir Mark concluded by citing three examples of progressive behaviour by the modern judiciary in terms of their responsiveness to 'informed criticism in the media'. The first was Sir Mark Potter himself opening up the Family Courts to the press during his time as President of the Family Division for England and Wales. This was done to confront allegations of secret justice and reduce the opportunity for attacks on judges and their decisions based on incomplete information. The second example was that of the recent report on super-injunctions by Lord Neuberger, which, he argued, had set in train a process to improve practice in this area and prevent abuse of process. Finally, in the case of the bail application of Julian Assange, Sir Mark Potter noted how Lord Judge took a different line to the High Court judge below him concerning whether or not a reporter was allowed to tweet the judgment whilst still in court. Lord Judge noted the absence of any statutory prohibition on live text-based communications in court and issued interim guidance pending a full public consultation.

Comment and Discussion

Four key points emerged from the discussion. Firstly, of significance was the ambiguity surrounding the increasing media influence on the judiciary over the issue of sentencing. Secondly, in analysing this media influence further, the appropriateness and feasibility of the judges relying on the media to provide them with accurate information on public sentiment was questioned. The third point concerned the ways in which the judiciary reflects the 'climate of an era' without responding too capriciously to the 'weather of the day'. Lastly, the ways in which the judiciary defend themselves as a collective were examined.

In relation to the first point, the courts' sensitivity to criticism of process as opposed to outcome was noted. The real interest of the court is to maintain the focus on the rule of law, and it was observed that, generally, there is less focus on the outcome of a case where the process followed is fair.

The second point concerned the examples of rape and dangerous driving, where the effect of public opinion had influenced the sentencing guidelines. In these situations, the press is rarely a neutral conduit of public sentiment; more often, the media is actively engaged in constructing and driving public opinion. Serious questions have to be asked about the appropriateness of the judiciary drawing on the media as an accurate barometer of public sentiment.

Countering these observations, Sir Mark Potter argued that it was accepted in the UK judiciary and legal philosophy that judges are there to reflect the views of society and that this is legitimately achieved by taking soundings from identifiable bodies of public opinion. A similarly nuanced distinction was drawn by Lord Bingham, who made the point that judges should not talk directly with government, even though they must reflect parliamentary will.

On the third point, an incongruity between the assertion that the judiciary must ignore press campaigns yet be aware of societal concerns was highlighted. Sir Mark argued that certain cases do necessitate a degree of judicial discretion and that, whilst academics want to produce norms scientifically, 'one has to accept that many matters reside in the conscience of the judge' in order to do what is just. By way of recognition of the limitations of this position, Sir Mark added that judges will 'acquaint themselves with the issue with means other than the press', paying close regard to objective statistics and the views of trusted advisors. He also argued that, whilst not elected, the judiciary is one of the pillars of the constitution and comprises members of society who are in touch with everyday life. Whilst on the face of it this left his argument intact, the description of judges as right thinking members of society who engage with the media, left

open to more detailed analysis the question of exactly how this influence surfaces in their decisions.

Finally, the discussion moved onto whether the judiciary felt a responsibility as a collective to defend itself against public criticism, especially in the light of 24-hour news media and the explosion of social media. In suggesting such a defence was unnecessary, Sir Mark asserted that judges are held in much higher public regard than politicians, or, latterly, sections of the media, as is attested by the insistence on a judge-led inquiry into the phone hacking scandal, among other inquiries. The sense of incorruptibility and detachment that judges enshrine in the public's eyes is of greater value than ever, given the degree to which politicians and the police have been shown to be embroiled with parts of the media.

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Whilst it was Sir Mark Potter's opinion that the UK judiciary are making progressive strides towards embracing the modern media landscape, he was very open in suggesting there was still some way to go in this. In referring to a press conference following the publication of Lord Neuberger's report on super-injunctions, he noted the danger of 'ill-timed remarks' concerning the use of parliamentary privilege, which unscripted appearances in front of the media can induce.

The Effects of Media Ownership and Competition on Political Elites

Professor Raymond Kuhn, *School of Politics and International Relations, Queen Mary University of London*

Professor Kuhn began by examining the concept of ownership and control, through which he demonstrated the complex relationship between the plurality of news outlets and diversity of news content. Media outlets in the United Kingdom operate in highly competitive markets for product, revenue, and audiences, and in this environment, the high concentration of media ownership in a few main players is hardly surprising. Moreover, there is frequently a tension between the desirability of plurality of supply in the domestic market and the perceived need to create the conditions for the emergence of global media players – a policy debate that plays out in many Western European democracies.

In focusing on the socio-political aspects of media concentration, Professor Kuhn maintained that our focus here should be on media outlets as information providers, involved in the process of informing and educating citizens, and in developing and maintaining a healthy democratic public sphere. In this context there is no simple correlation between plurality of outlets and diversity of content. Single outlets (such as the BBC) may provide much diversity, whereas multiple outlets may provide very little, often simply regurgitating the same press releases sent out on newswires worldwide. The regulator for the UK communications industries, Ofcom, recently brought to light this paradox of the explosion of news sources online and the similarity of content across them.

Playing devil's advocate to a degree, Professor Kuhn commented that, whilst it is usually assumed that

concentration of ownership is undesirable, it may well be necessary, at least in the world of the traditional media, since any serious news organization needs substantial organizational resources to compete in global information markets and cover world events in depth.

In assessing different styles of proprietorship, Professor Kuhn drew a similarly nuanced picture, arguing that proprietorial interventionism in the political content of their outlets can vary not only between owners, but across different outlets, as evidenced by Rupert Murdoch's strategy of allowing more autonomy to editors of his broadsheets than to those of his tabloids. Others, such as Robert Maxwell in the 1980s, attempt to be interventionist, but their interventionism may be successfully resisted by journalists, and some proprietors have been interested in their media holdings purely as business concerns and have not intervened in editorial decision-making.

Professor Kuhn went on to address the interdependence of media and politics, describing a complex, two-way, mutually reinforcing relationship of reward and control. He noted that political elites devote significant resources to news management in their attempts to set the news media agenda and influence the framing of issues, through briefings, planting stories, official and unofficial leaks, manufactured events and the like. At the same time, it is clear that news media organizations are not simply neutral transmitters of messages from elites to public opinion. They are themselves political communication actors involved in the process of public opinion formation, sometimes acting on behalf of the public in a watchdog capacity (such as over the MPs expenses scandal), sometimes simply advancing their own self-interested agendas.

The agenda-setting power of the media is most evident in the area of media policy: on issues such as privacy legislation, ownership rules, and aspects of content provision, the media, especially major organizations such as News Corporation, have been major players. Informed commentators point to 'behind the scenes' deals between New Labour and Murdoch: an exchange relationship to the mutual advantage of both parties. Perhaps more significantly, some commentators have argued that on the issue of Europe, the Eurosceptic line of various media outlets has not only had an influence on public opinion directly, but also has acted as a brake on pro-Europe initiatives by Europhile elites across the mainstream of UK party political opinion. In this context the alleged power of the Murdoch titles, plus the *Daily Mail*, are frequently cited.

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Professor Kuhn concluded that concentration of ownership does give some media companies and their outlets a privileged position from which to seek to influence political elites. However, he was not convinced that concentration facilitates editorial collusion so as to maximise impact on elites, arguing that mobilization of the structural power of certain media companies on certain issues was more relevant. He concluded by noting that we are not yet fully aware of the ways in which technological advances are impacting on the relationship between politics and the media, and that we may yet see tighter regulation of the media following the recent News Corporation hacking scandal.

Comment and Discussion

The first point to emerge from the discussion was that the media landscape has seen the implicit convergence of the philosophical concept of the marketplace of ideas with the actual economic marketplace: two concepts which do not map well

onto each other. A case in point was the situation in the US, where, over the last thirty years, public perception of the role that media plays in society had changed from that of an important check on government to a large corporate interest that is unhealthily conglomerated.

Moving to a comparative Western viewpoint, the discussion addressed the constitutional differences between the US and the UK, alongside the differences in the respective media systems. In the UK the press is largely partisan, and the more closely regulated broadcasting industry is seen as upholding the professional values of impartiality, balance, and fairness, whilst in the US the reverse is true. Furthermore, the UK has publicly funded broadcasting, represented by the BBC. Ofcom surveys show very high support for impartiality and accuracy in broadcasting, of which the BBC is a part. There is an argument that if pluralism of broadcasting providers exists, there is no need for regulation to ensure internal pluralism, since external pluralism ensures that the public can then choose which media they consume. There is a place for partisan journalism but also a place, however imperfectly it is achieved, for media outlets reflecting multiple points of view. People in the United Kingdom, especially young people and minorities such as the Muslim community, feel they are not adequately represented in the mainstream media, and are consequently turning towards alternative news sources such as Twitter and online blogs.

On the subject of new digital technologies, it was observed that the 24-hour news cycle has positioned broadcasters ahead of print journalists in terms of their ability to cover breaking stories, redefining the role of traditional print journalists such that reportage is reduced and commentary increased, perhaps resulting in greater political bias in their coverage. In addition, the 'online clickstream' is having a major impact on journalistic production, allowing editors to measure the popularity of a story in real-time and direct resources to the stories they observe as being most popular.

The People, The Press, and the US Supreme Court

Professor Ronnell Andersen Jones, *Law School, Brigham Young University*

The focus of the first afternoon session by Professor Jones was on which factors presented a barrier to achieving the higher purposes that the press and US Supreme Court serve, identified as being the advancement of social learning, public education on legal affairs, and the continuation of a vibrant democracy through an informed populace. Professor Jones drew on her experience as both a newspaper editor and a clerk for Sandra Day O'Connor of the US Supreme Court, to characterize the interdependency of the media and the Court, and critiqued the 'blame game' played out over the difficulties in this relationship. The result is a failure of understanding of even the most basic functions and activities of the Supreme Court on the part of the American public, as evidenced in a range of overwhelming statistics confirming this.

The press is blamed for:

- disappointing depth, frequency, and fairness of its coverage of the court;
- intermittent coverage of the court from most newspapers;
- stories that rarely give context, explanation, impact, or reaction by affected groups or individuals;
- covering only a tiny fraction of the Court's decisions, primarily those concerning freedom of press issues;
- providing misleading and damaging focus when the court is covered;

- over-emphasizing the political appointment process to imply that the Justices are merely representing a particular ideological standpoint;
- over-simplification.

The courts on the other hand are blamed for:

- being snobbish, fearful, cloistered, and deliberately uncooperative with the press;
- failing to provide visible news stories on a continual basis;
- not providing personal contact with the Justices for press interviews to help clarify judgments;
- not institutionally assisting the press by providing timely information to fit with news cycles; video coverage; or same-day transcripts of oral argument.

Before addressing possible solutions, Professor Jones admitted that some tensions are inevitable and that the interests of the Supreme Court will never be fully served by the media. Both the nature of the medium and the audience it addresses prevent the press from becoming ideal articulators of detailed legal analysis, but greater tolerance and understanding, alongside various practical measures, could move both sides in a more democracy-serving direction.

Firstly, the press could become better versed in legal terminology and reasoning by employing legal specialists to improve legal literacy. Moreover, by committing to avoid 'bench bashing' and distortions of the judicial role for the sake of ratings, relations would be significantly improved and the press would strike a better balance between educating the public and entertaining them, a balance that has significant implications for reportage of the Supreme Court in particular.

Professor Jones accepted that the Court could not make too many concessions to accommodate the press, but that, as a supporter of greater court access, she believed there was much 'monastic tradition that it could give up that would pay huge dividends at very little cost'. By turning around argument transcripts more quickly and allowing the release of audio at the end of the day, the court could help to accommodate the tighter news cycle and avoid being seen as 'overly protective and undemocratic'.

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Comment and Discussion

Further clarification was sought on what type of information needs to be transmitted to the public and why, to which Professor Jones responded by arguing the importance that the public have a clear sense of what the Court's relationship is to them. The current failure to deliver news of the case decided, the issue at play, arguments made on either side, the outcome, and possible implications for future cases or social policy has potentially serious consequences for public engagement in issues directly affecting their lives.

A suggestion was made for how improvements could be achieved. It was posited that the three sets of actors – the Court, the press, and the public – are all behaving rationally: the public show little interest as most decisions are irrelevant to them, the press are merely conforming to news agenda values, and the Court needs to preserve a sense of distance from media commentary and public opinion. The underlying assumption that the public will wish to inform itself on issues of civic governance is questionable, as more often, the public behaves in irrational and disinterested ways at odds with idealized theories of well-functioning, engaged democratic polities.

An alternative suggestion for the education of the masses on matters of law was the use of popular entertainment rather than the media, although it was acknowledged that this would be at the risk of sensationalizing the often dry legal debates conducted in court. Professor Jones pointed out this was the criticism of the television shows that have featured the Court in the last few years, but that thought does need to be given to how to engage public interest on a general level.

The reasons why the public is harmed by not being better informed about the work of the Court was left somewhat undeveloped, although Professor Jones observed that there is a thin line between informing the public on the process of jurisprudence and involving them in it. She cited Justice O'Connor as being a strong advocate of civil education, in part because a democracy is not self-functioning, and that democracy relies on the people's ability to understand the legitimacy of the opinions that are handed down by the Supreme Court. Professor Jones concluded by arguing that if we lose this sense of who the Court is and what they do, respect for the Court as an institution is also eroded, and the foundation of the justice system as part of a well-functioning democracy is diminished.

Speaking Aloud Would Make You Better? Courts and Politics in the Italian Media

Professor Daniela Piana, Law Department, University of Bologna

Professor Piana began by establishing that no complete understanding of the role of the media is possible without first analyzing the social and political system at play, and set about demonstrating this by analyzing the socio-political landscape in Italy since the establishment of the Italian Republic in 1948. The early days of this relatively young democracy were characterized by a shift from authoritarianism through, amongst other measures, the introduction of guarantees of judicial independence, both at a systemic level, and that of the individual judges. In the beginning, both the constitutional and ordinary courts eschewed public visibility, but this radically changed in the 1970s and 80s with Leftist terror attacks on public prosecutors, which embroiled the judges in the very public fight against terrorism, and saw a widescale expansion of the courts' agenda.

By 1992, the 'Clean Hands' investigations into the political corruption that was destroying the political system further politicized the judges and brought them into public view. Professor Piana described one of the most prominent public prosecutors working on these investigations, Antonio Di Pietro, whose efforts resulted in the disbandment of the previous ruling parties. Despite previously stating that he would not exploit the popularity he gained in his role as public prosecutor to enter politics, Di Pietro did indeed start his own anti-corruption political movement, 'Italia dei Valori' or 'Italy of Values', an illustration of just how inseparable the media, courts, and politics are in Italy.

Professor Piana supported this illuminating example of the public profile of the Italian judiciary with empirical data concerning the amount of coverage of

court cases in the Italian media. She cited a study that showed 103,900 articles relating to the courts in *La Repubblica* between 1994 and today as compared to only 4000 similar items in a French national newspaper between 1997 and today. She portrayed a system in which courts, prosecutors, and the legal process have a uniquely visible, vocal position within Italian society that is not seen in many other democracies.

Professor Piana moved from empirical evidence of the social and political system in Italy to an assessment of the role played by the media in this context. Since 2002, the Berlusconi family has owned ninety per cent of the Italian media landscape, seriously damaging media plurality and eroding any public trust that may have been held in the media. This weak media sector is open to manipulation by both politicians and prosecutors eager to promote their image and acquire legitimacy through this public self-promotion rather than through the independence and impartiality of their actions in office.

Rather than ensuring political actors are answerable to the public, thereby helping to shape public awareness and political identity, the media is more often seen as an arena in which the conflicts between the politicians and judiciary are played out. Professor Piana showed how the prioritizing of newsworthy cases of political corruption in the media was serving to fuel the politicization of the courts and undermine judicial independence and integrity.

Comment and Discussion

The discussion began with the observation that in a healthy democracy, each branch of government, as well as the Fourth Estate, should perform its own function, and the convergence of judicial and political actors in a very public conflict played out through the

media was a worrying one. Speculation over how general the problem may become centred on the particular structures of governance and culture of Italy, which was characterized as having a long history of the politics of clientelism, compounded by the current Prime Minister and his control of the media landscape.

Berlusconi's media ownership was more closely examined, and questions were asked about the ability of the law effectively to regulate in order to impose limits on monopoly media ownership. In response, Professor Piana outlined how the usual role of opposition is not represented in the Italian Parliament, and that the checks and balances that would help to regulate the media are simply not in place.

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The Italian perspective threw considerable comparative light on the dynamics of media, politics, and the judiciary in the other Western democracies previously discussed. The graphic representation of the role of the three actors in Italian society served as a timely warning of the adverse effect of an unhealthily close relationship between three key branches of any democracy, particularly in an age of expansion of judicial power.

Where Power Lies: Media vs. Politics

Lance Price, former BBC journalist and Labour Party Director of Communications

Having arrived from a meeting earlier in the day with Tony Blair, Mr Price opened his remarks with reference to the news that one of his successors as Director of Communications at No.10, Andy Coulson, was being arrested for his involvement in the phone hacking scandal while working at the News of the World. In the course of his meeting that morning, Mr Price discussed Blair's speech of 2007 in which he described the media as 'feral beasts' – a speech which now seems all the more prescient, and warrants re-reading in light of current events.

Mr Price described his increasing concern during his time in office at the nature of the relationship between politicians and the media, which was seriously impeding the ability of each to function as they should according to democratic principles. He described the close relationship between the government and News international, Rupert Murdoch, and his editors during his time in Downing Street, and how Alastair Campbell would effectively dictate what tomorrow's headlines would be. Whilst acknowledging the culpability of New Labour in exploiting the media, Mr Price asserted that the new coalition government had an opportunity to redress this relationship, but that David Cameron, by employing Andy Coulson, had followed this model of media collusion and manipulation.

Mr Price drew a distinction between the statutory obligation for impartiality imposed on the BBC and the relative lack of regulatory oversight of the press. He described how 'the Lobby', a coterie of senior journalists allowed access to the cabinet, were

managed by the government Press Office, such that particular access to key figures in cabinet was only granted in return for favourable coverage. Equally, he had seen journalists willing to go to extraordinary lengths to secure an exclusive story in the face of fierce competition from rival news outlets. Whilst in Downing Street he also saw distinct collusion between right-wing politicians and certain journalists with vested interests in 'dishing the dirt' on Blair and Brown respectively, and observed that these practices were common over the course of the last century.

In the course of his meeting, Mr Price discussed Blair's speech of 2007 in which he described the media as 'feral beasts' – a speech which now seems all the more prescient in light of current events.

In identifying reasons for the unhealthy reliance of politicians on the media, Mr Price argued that too many politicians lack the confidence that they accurately reflect public opinion, instead suspecting that newspapers are able to flexibly reflect, and indeed drive, public sentiment much more effectively. This invests the media moguls with too much political influence, and clearly in the light of recent events, a more healthy equilibrium needs to be reached.

With the backdrop of recent events in mind, Mr Price concluded by stating his hope that the phone hacking scandal and ensuing fracturing of this relationship between media and politics will bring about a healthier relationship between the two. Looking to the future, he foresaw a distinct diminution of the power of the media to influence public opinion, partly as a result of this rebalancing process, but perhaps primarily due to the emergence

of other non-traditional forms of news and commentary.

Comment and Discussion

The bulk of the discussion sought to illuminate the often murky relationship between the media and politics. In relation to whether the current scandal would taint the wider media or whether it was limited to specific journalists, Mr Price argued there would always be a variety of views, and that, although the media is talked of in the collective, it is a very diverse group, again drawing a distinction between the BBC and other, less reputable news organizations.

The line of questioning moved on to focus on the distinction between political spin and media manipulation and outright misinformation and deception of the public. Mr Price's view was that it is a dangerous situation, but that one of the protections is blogging and social media, the effect of which is that secrets have a much shorter shelf-life, and the bargaining power held by politicians with respect to the press is thereby diminished.

On the issue of the 24-hour news culture, Mr Price responded with a generally positive analysis of this in terms of increased political representation, transparency, and exposure of the politicians to scrutiny by the public. The downside was the tendency for the position of the Prime Minister to be undermined by having to respond to unfolding news events on an hourly basis, without sufficient time for consultation and advice on the implications of public statements. Mr Price argued that the best Prime Ministers are the ones who maintain a healthy disdain for the media and employ other people to deal with them in order to focus on implementing their vision for the governance of the country.

The impact of today's non-stop media culture was, argued Mr Price, more heavily felt by the journalists themselves, the demands on whom are exacerbated by falling revenues and staff shortages, and additional pressures to engage in broadcasting and blogging which reduce the time available for thorough investigative journalism. This has left

journalists even more vulnerable to manipulation by political spin doctors, who are able to feed them synopses of government speeches or reports to ensure that they are reported in a favourable light.

In conclusion, the biggest casualty of the collusion between the media and politics, argued Mr Price, is a residual lack of trust by the public in both politicians and journalists – a common cause he saw for both. Whereas during the politician's expenses scandal the media adopted the moral high ground, now it is the politicians who are relishing giving the media a kicking. The result will be a far less cosy relationship between the two, which should be encouraged with increased transparency concerning meetings between senior cabinet members and media moguls. That this position should be adopted by someone who was once an integral part of the media and government machine serves only to underline the urgency with which this malaise in UK democracy must be addressed.

Participants

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Sir Mark Potter, former President of the Family Division, High Court of England and Wales

Lance Price, former Government Director of Communications and BBC journalist



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Matt Barker studied Law at Durham University, specializing in Commercial Law. His dissertation on Insolvency Law focused on the ranking in insolvency of shareholder claims – claims by shareholders who have been induced by misrepresentation to purchase shares in an organization prior to it becoming insolvent. He works in London for a European IT Systems and Services provider and for a legal charity part-time. Committed to a career at the Bar, he is returning to study for an LLM in 2012 and the BPTC in 2013.

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