

**Courts and the Making of Public Policy**

# The Role of Courts in a Democracy

REPORT AND ANALYSIS OF A WORKSHOP AND PUBLIC DEBATE  
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## Introduction

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This academic workshop, held at Magdalen College as part of the Foundation for Law, Justice and Society's programme on Courts and the Making of Public Policy, examined a wide range of empirical, theoretical, and normative questions, while re-visiting long-standing controversies in light of new evidence about the role of courts in a democracy. Questions examined in this workshop included:

- What ought to be the role of courts in a democratic society?
- Ought judges intervene in policy processes or controversies between the branches of government, or should they confine themselves to deciding the guilt or innocence of individual persons?
- Does judicial activism promote or undermine democracy?
- Do courts serve as important participatory venues for citizens and groups to engage in the development and enforcement of law?
- Is the supremacy of the judiciary branch in constitutional matters, or in cases of dispute with the elected branches, incompatible with the democratic ideal of popular sovereignty?
- If judicial activism were to become excessive, how and by whom ought it be curtailed?
- Do alternatives to the judicialization of politics exist that are more compatible with democracy yet do not compromise the rule of law?
- Is the nature of judicial supremacy fundamentally different in post-communist East Europe compared with the West?

Featuring theoretical, historical, and comparative papers, this workshop addressed these questions by bringing together political scientists, legal scholars, and political theorists.

## Judicial Supremacy?

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### Professor Eivind Smith, *University of Oslo*

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Professor Smith opened the workshop with a presentation that questioned the exact meaning and reality of key terms that frequently feature in debates about the role of courts in a democracy: 'constitutionalism', 'democracy', 'judicial activism', 'the judicialization of politics', and 'judicial supremacy'. He argued that these value-loaded concepts have become 'trump words', strategically deployed by actors in ideologically opposed camps in the political controversies surrounding the role of courts in a democratic polity. He then presented the two competitive models of the judiciary-elected branch relationship.

Professor Smith rejected the idea that the 'American model of judicial supremacy' would be adequate for Europe. He doubted its relevance to making sense of recent developments in judiciary-elected branch power relations in the UK, or in Europe more generally. Presenting two radically different perspectives on the role of courts in a democracy, he placed particular emphasis on one issue that has been especially hotly debated by philosophers, political scientists, and legal scholars: what is the substance of constitutional rights and who ought to vindicate these rights – judges or democratically elected politicians? Professor Smith reminded the audience that these two different perspectives have become known, in landmark works such as that of Professor Richard Bellamy, as 'legal constitutionalism' and 'political constitutionalism' respectively. Concluding in favour of the virtues of political constitutionalism, Bellamy had faulted legal constitutionalism (also known as judicial supremacy) for making the untenable normative and empirical assumption that judges are morally superior to, and

independent of politics (Bellamy 2007:2-3). Such a puzzling assumption derived from an 'idealization of US constitutional arrangements and the role of the Supreme Court' by scholars such as Rawls and Dworkin (Bellamy 2007:10).

Professor Smith proceeded to comment that the realms of law and politics are not easily prescinded. Where exactly does 'the legal' end and 'the political' begin? Do constitutional court judges interpreting abstract language and vague statements of principle in a constitution really confine themselves to purely legal reasoning? Or do they in fact make political choices between competing values and norms, choices that might be better left to democratic deliberation? A classical example of judicial overstepping into the realm of politics is the US Supreme Court decision in *Roe v. Wade* (1973) on abortion. Based upon a peculiar reading of a 'right to privacy' not in fact mentioned in the US Constitution, the Court majority made a political choice on a highly controversial issue that divides not only scholars and lawyers, but more importantly, the putatively sovereign people. Professor Smith concluded that on this occasion 'the US Supreme Court "stole" a matter of legitimate political concern from the States of the Union'. If this is the judicial paradigm that is becoming the norm in the UK or Europe, Professor Smith argued, then it ought to be rejected, not least for the fact that judges are not morally superior to politicians.

However, this paradigm is not the only one to derive from the US system. An alternative perspective is embodied in the self-restrained behaviour of judges like Justice Scalia, who famously argued that it is not for a 'committee of nine lawyers' to change the constitution (Scalia 1997), and that judges ought to be guided by the 'original intent' of the democratically delegated framers of the constitution

as it stood when ratified, or as amended according to the formal procedures therein. Of course, original intent has its own problems, particularly whether any original intent is discoverable for every conceivable constitutional question that demands interpretative resolution. Professor Smith concluded that both US perspectives are inadequate as a model for Europe, as the US system is too unique to be applied elsewhere. Both, however, have been drawn upon by political actors in Europe, depending on where they have stood ideologically regarding the role of judges in a democracy.

### *Justice Scalia famously argued that it is not for a 'committee of nine lawyers' to change the constitution.*

In practice, Professor Smith argued, judicial review by Constitutional or Supreme Courts has little impact, notwithstanding the expectations of lawyers and human rights activists, and the harm they cause has been overstated. Professor Smith supported this claim with statistics about the comparative impact of judicial review on national legislation across polities. Although methodologically the data are imperfect, taking no account of factors like the wider social meaning of setting aside legislation or the political importance of what is being set aside, it provides some insight nonetheless into the practical impact of judicial review. 'Between the beginning of the system' and until 1980, only 0.13% of the total number of Federal statutes were set aside by the US Supreme Court, compared with 4.57% in Germany by the Federal Constitutional Court and 1.4% in France by the Constitutional Council.

Professor Smith pointed out that important differences exist between the European and US judicial review mechanisms, such that those applicable in the US would not be appropriate in Europe. One difference is the excessive formal rigidity of the US Constitution, which renders constitutional amendment a tool too difficult to use adequately for correcting poor judicial decisions. This enables the US Supreme Court to impose its preferences on the other powers.

A second is the 'separation of powers' system which prevents Congress from carrying out lawmaking in the same way as Europeans. A third is the high expectations entertained by the American public that the Supreme Court will settle controversial issues. A fourth is US academics' propensity to idealise 'rights' and their consequent tendency to side with the courts. Finally, a fifth difference is the relatively low level of public trust in lawmakers in Europe.

By contrast, Professor Smith claimed, general trust in the legislature is much higher in Europe, and as legislation originates with the 'legislative machinery', so public dissatisfaction is generally channelled through 'ordinary political forums' such as elections and debate. Constitutional court judges are selected according to political criteria and have been able to justify their decisions strictly on 'legal' grounds. As a result, constitutional courts enjoy a high level of public trust and legitimacy. This is somewhat surprising, given that the decisions of constitutional courts in Europe have *erga omnes* effect, which makes of them 'positive legislators'. Finally, most European constitutions are easier to amend than the US Constitution, and may be amended more frequently to correct judicial choices.

### **Discussion**

Professor Smith's presentation provoked a number of comments from the other participants, as outlined below.

The first comment concerned the use of statistics. Because of its limited institutional capacity, the US Supreme Court is forced to filter the cases it reviews, and it does not review most cases that reach it. It is true that the amount of review that happens is small in volume, but to compensate for this, the US Supreme Court cherry-picks the most strategically important cases for resolution; these are cases that matter to them the most for ideological as well as legal reasons. The Supreme Court is thus able to 'punch above its weight' because of its ability to strategically manage its caseload, and because of the strategic impact its decisions have on the future behaviour of the other powers of government.

Moreover, there is a vast amount of legislation that courts care little about reviewing because it is uncontroversial. For example, the courts hardly ever set aside tax law, partly because they themselves are supported by tax revenue and also because the government cannot function without taxation. Yet the tax code is enormous; it is probably the most voluminous part of the US Code. Other examples include regulations for the disposal of nuclear material, which is also very detailed and voluminous, and hardly controversial. Judges would have no reason to oppose such legislation. Vast areas of legislation raise no disputes. The important question is what happens when disputes do arise: who then has the 'last word'? Finally, the statistical reasoning is flawed in the following sense: the Supreme Court did not toss a coin to decide which Acts of Congress to review, and only 0.13% of these Acts happened to turn up. Statistical comparisons of this sort assume random occurrence, but if the Supreme Court can manage the sample, then obviously the court can make an impact with a few well-chosen cases.

Regarding constitutional flexibility as check and balance on judicial decisions, the question raised was whether there is any empirical evidence supporting the reasoning that European constitutions can be more easily amended? The Californian Constitution is a good example of a flexible constitution, running for 200 pages. This is what happens when one can amend the constitution whenever there is a need to override a judicial decision. Are there any national European constitutions that are 200 pages long? It is not just the number of pages that matter, either, but the number of pages of amendments. The German Constitution appears to be the exception in Europe rather than the norm.

Another challenge was to the question of whether supreme or constitutional courts actually follow public opinion and restrain themselves. It is true that Supreme Court Justices are not perfectly autonomous, nor do they transcend the culture of their time altogether, so whilst inevitably the Supreme Court will often reflect the spirit of the age, this does not constitute evidence of judicial restraint. Being

beholden to the spirit of the age is an indication not of self-restraint, but merely the limitations of human nature. It is questionable whether one can attribute intentionality to supreme courts or constitutional courts, by suggesting that they are choosing to obey popular will as some kind of informal rule of judgment. It is also questionable, on a normative level, whether such intentionality, if it existed, would somehow render the judiciary 'democratic'. One might make a similar case respecting kings and aristocrats. They too reflected the spirit of their age, being far from absolutely autonomous.

Notwithstanding the potentially unlimited power they had over everyone else in society, they behaved far from unrestrainedly. But it does not follow that they chose to behave democratically or in line with public opinion.

A final observation was that US influence on Europe may be more significant than claimed by Professor Smith. US influence is surely 'filtered' by European institutions, yet the trend towards judicial supremacy in Europe is so strikingly similar generically to what has already taken place in the US, that it is difficult to resist a conclusion of US influence, however much filtered. It may be that the Nordic countries have felt US influence less than others, but everywhere some influence is felt, and especially in post-Communist central and Eastern Europe.

## Political Constitutionalism and the Human Rights Act

**Professor Richard Bellamy, *University College London***

By contrast with many commentators who claim the Human Rights Act (HRA) spells the demise of the British Political Constitution, Professor Bellamy argued that the HRA has the potential to reinforce the British tradition by putting the judiciary's deference to Parliament on a stronger statutory basis. This is because: (1) the HRA 'brings rights home', strengthening the UK's power to define rights domestically; (2) Sections 19 and 4 of the HRA maintain and even enhance Parliament's scrutiny of rights and its sovereignty over the courts in defining and upholding them; and (3) the UK system of judicial review remains 'weak' in that courts defer to the legislative 'scope' determined by Parliament.

*Professor Bellamy argued that the HRA has the potential to reinforce the British tradition by putting the judiciary's deference to Parliament on a stronger statutory basis.*

Professor Bellamy began by outlining the peculiar features of British constitutionalism. Although Britain does not have a written constitution and has a tradition of parliamentary sovereignty and of political constitutionalism, it has been able to protect individual liberties more effectively than a legal constitution might have done. After reviewing claims that the HRA is incompatible with this tradition, he proceeded to assess, from a normative and analytical standpoint, whether the HRA and political constitutionalism could in fact be reconciled. Professor Bellamy then discussed the arguments for and against political constitutionalism on the one

hand, and legal constitutionalism on the other, pointing out that at the core of the debates surrounding these two modes of constitutionalism is the issue of sovereignty; specifically, where sovereignty lies in cases of conflict over policy outputs. For political constitutionalists the final word ought to rest with the legislature; legal constitutionalists argue that it ought to rest with judges.

Professor Bellamy proceeded to outline the many virtues of political constitutionalism, including its democratic legitimacy, and argued that the HRA strengthens political constitutionalism rather than replaces it with legal constitutionalism. Moving to the relationship between the HRA and the European Convention and European Court of Human Rights (ECHR/ECTHR), he sought to establish whether the Act strengthens domestic control over rights in line with two tenets of political constitutionalism: (1) that Parliament can legislate whatever it wants; (2) no institution may 'disapply' parliamentary legislation; and concluded that both conditions are still being met. The first condition is met because the ECHR allows the contracting parties to decide how to secure the rights under the Convention within their own jurisdiction. Moreover, being an international agreement between sovereign states, in theory nothing prevents Parliament from deciding to withdraw from or renegotiate the Convention (although some believe that withdrawal from the ECHR would be too costly for Britain as it would also entail withdrawal from the EU). The second condition is being met, Bellamy argued, because of the 'intergovernmental logic' that can be found in the membership and organization of the ECTHR. The 'margin of appreciation' aims to ensure that the Court's decisions may diverge so as to take into account particular member state circumstances and

traditions. Furthermore, states are able to derogate temporarily from certain ECHR provisions. Finally, no supremacy or direct effect exists under the Convention regime and as a result the ECtHR cannot guide domestic courts to disapply national law or to give a particular interpretation. Although even pre-HRA British courts voluntarily cited the Convention they still deferred to Parliament.

Professor Bellamy examined the provisions of the HRA that have the strongest implications for political constitutionalism in the UK. Section 3 in particular has been the most controversial, having been attacked by both legal and political constitutionalists for having the potential to challenge parliamentary sovereignty in Britain. It states that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights' (Section 3, Human Rights Act 1998). However Professor Bellamy argued that the power granted to courts under Section 3 ought not to represent such a threat as long as Parliament retains the power to define the extent of the courts' jurisdiction ('scope'), while the courts retain autonomy over ensuring the impartiality and fair conduct of a trial ('sphere'). The latter means that judges can ignore Parliament to the extent of governing their own internal processes because the internal governance of the judicial processes rests on how judges go about seeking the truth in a trial. Internal processes are decisional processes which if controlled in detail, would mean no judicial independence. Professor Bellamy ended his exposition by examining the implications of his theory for two leading cases under the HRA: *R v. A* and *Ghaidan v. Mendoza*.

### Discussion

In the ensuing discussion, a number of contemporary cases and issues were raised. One comment was that Professor Bellamy made a sound case that the HRA in the UK has not changed the power relationship between Parliament and the domestic judiciary, but he addressed too little of the larger picture, which is the overall effect of the ECtHR on political constitutionalism in the UK. It may be that the HRA

reinforces the deference of domestic judges, but since there lies an appeal to Strasbourg, the question comes back in a different form. The ECtHR's decision over voting rights for prisoners is an example of judge-made law, which the Court is imposing on all the signatory parties, Britain included, regardless of parliamentary sovereignty.

In theory Britain may renegotiate the Convention, but this is not something that the British Parliament can do by itself; it must have the consent of the other signatory states, and the transaction costs of such a renegotiation are prohibitively high. The only option left to the British Parliament would be to withdraw from the ECHR, which would in turn force Britain to withdraw from the EU. If Britain were to 'hang tough' and refuse to withdraw, the EU would be faced with the prospect of having to expel Britain, a momentous decision and one the EU would surely avoid, as it would bear the potential to initiate the unravelling of the EU itself. Thus, the likeliest outcome of a tough British stance on membership would be precisely a renegotiation of the Convention, or at least that part of it which concerns the powers of the ECtHR.

### *Section 3 of the Human Rights Act has been the most controversial, having the potential to challenge parliamentary sovereignty in Britain.*

Arguably, it is more costly for Britain to withdraw from the EU or to perturb its culture of consensus than to comply with any single ruling of the ECtHR. These rulings come down one at a time, so that the cumulative effect of them is only felt over many years. Cumulatively they may prove more costly than withdrawing from the EU, yet at no point in time is the cost of withdrawing from the EU less than the cost of submitting to a particular ruling of the ECtHR. The result is that in the long term, the ECtHR is effectively sovereign over Parliament. The political cost-benefit calculus will always favour the ECtHR and its quasi-legislative rulings, unless one considers the cumulative effect of these rulings on the power

relationship between the ECtHR and the UK Parliament over the next forty to fifty years.

One further argument is that Professor Bellamy's two definitive principles of political constitutionalism, namely (1) that Parliament can legislate in any areas it pleases, and (2) that no other institution may dis-apply parliamentary legislation, are not actually being followed currently in Britain. Parliament may pass any law it wants, but if a higher authority, such as the ECtHR, can nullify it, then that law was passed in vain. In practice, then, legal constitutionalism has become the arrangement *de facto* because political constitutionalism has been disabled. Professor Bellamy admitted that the question of politics is foregone in favour of continuing membership of the EU, which suggests that there are now legal constraints on parliamentary sovereignty, such that it only exists *in extremis*. The danger is that the UK Parliament will become subordinated to the ECHR to a comparable degree as the subordination of the States of the American Union to the US Supreme Court, with one difference: Britain could in theory leave the EU without violence being done to it, whereas the American Civil War settled that a State cannot leave the Union.

## Judicial Reform in Post-Communist Eastern Europe: Falling in Step with the West?

**Dr Cristina Parau, Centre for Socio-Legal Studies, Oxford**

Dr Parau presented an original normative typology of the possible relationships between the judiciary and elected politicians, drawing on trans-Atlantic Western experience. She then used this to gauge the path taken by judicial reforms in post-Communist central and Eastern Europe, arguing that as a result of accession to the EU this region has followed the global trend toward the judicialization of politics. Dr Parau revealed that essentially all of the checks and balances formerly wielded by the elected branches over judiciaries in East Europe have been abolished, and that judiciaries have become insulated from democratic accountability. Dr Parau argued that this outcome stems from a specific combination of domestic motives and external pressures, viz. domestic and transnational elite self-empowerment, the lack of domestic resistance ('veto points'), and EU accession conditionality. She then presented the evidence supporting this argument and warned that the trend towards the judicialization of politics may well exacerbate the democratic deficit, both in the EU and domestically.

### Discussion

In response to Dr Parau's presentation, questions and comments covered a range of issues related to domestic courts throughout Europe, and the relative roles of different elites. Some participants suggested that the theory developed by Dr. Parau might also explain judicial reform in other contexts such as the UK, a topic which deserves to be investigated empirically. One commentator cited the German Constitutional Court as an example of a domestic court that resisted the judicialization of politics driven by the European supranational courts, but this was

shown to be in contrast with the central and Eastern European courts, which imitate the supranational courts rather uncritically.

Other points raised addressed the movement towards the judicialization of politics, including speculation on whether it could be attributed to the fact that courts are among the most trusted government institutions in post-Communist Europe. Moving from the popular will to that of the transnational elites, questions arose around those elites that have been found to be empowering themselves through judicial empowerment, and whether they are fully conscious of this outcome, or if other paradigms control their thinking. Another point concerned the other elites, such as business interests and the media, besides those identified by Dr Parau, that may be influential in shaping the judiciary-elected branch power relations.

*Dr Parau revealed that essentially all of the checks and balances formerly wielded by the elected branches over judiciaries in East Europe have been abolished.*

As comments turned to Dr Parau's typology of the judiciary-elected branch power relationship, further examination was given to her advocacy of the co-equality model (also known as departmentalism), used by the US Supreme Court before the Civil War, which allows for the other branches of government to decline enforcement of judicial decisions. Some participants wondered whether co-equality between the judiciary and the elected branches of government was best illustrated by drawing on Madison. It is true that Madison was no democratic enthusiast, since he advocated checks on the majority, and drew from

Aristotle his belief that any form of government can be corrupted, not excluding democratic ones. Nonetheless, it is plain from his correspondence that it was democracy that he favoured, but within the framework of a general distrust of government. The checks and balances he built into the American constitution were but a reflection of this.

Turning to theoretical matters, when asked if political discretion to enforce judicial decisions might pose a threat to legal certainty, Dr Parau answered by clarifying that the other branches of government would have no right to ignore judicial decisions in 'cases of a judicial nature' that revolve around the rights of persons in jeopardy, and that this is where legal certainty is paramount. Moreover, in general, co-equality does not mean that enforcement of judicial decisions will be at the whim of politicians, merely that the elected branches have the power to limit the effect of, or leave unenforced, decisions that promote injustice through judges acting *ultra vires*.

# Access to Justice and the Paradox of Legal Mobilization by the Environmental Movement in the UK

**Dr Lisa Vanhala, Centre for Socio-Legal Studies, Oxford**

Dr Vanhala presented the results of her recent research into the legal activity of four key environmental NGOs in the United Kingdom. She found that whilst all participated in judicial review court actions over the last twenty years, each lost more cases than it won, and despite this, NGOs have continued to pursue their policy goals in courts. Dr Vanhala found that this paradox was explained by two factors: (1) the broader strategic aims of the organizations; and (2) their ability to 'highlight restrictive levels of access to justice through unsuccessfully supporting cases before the courts'.

Dr Vanhala began by reviewing the main debates in the scholarly literature with regard to the role of courts and NGOs in a democracy, as well as the theoretical perspectives that address the question of legal mobilization. She pointed out that her research, by focusing on the 'indirect' effects of legal mobilization, adds value to a socio-legal studies literature that has focused primarily on 'formal legal action'. Coming to her research topic, Dr Vanhala outlined the use of strategic litigation by four environmental NGOs in the UK: the Royal Society for the Protection of the Birds (RSPB), the World Wide Fund for Nature (WWF); Friends of the Earth (FoE); and Greenpeace UK.

Dr Vanhala first reviewed the UK, EU, and international body of environmental law that constitutes the basis of these environmental NGOs' mobilization. This was followed by data evidencing the NGOs' rate of success in using judicial review, which showed that, between 1990 and 2010, each of

the four NGOs has lost more court cases than won, and that the movement as a whole succeeded only in one-third of all legal actions. Moreover, under the 'loser-pays' system in the UK, litigation can be very costly, yet the NGOs have continued to litigate, raising interesting questions regarding their strategy and goals in pursuing these actions.

*Legal mobilization, even when cases are lost, brings a host of indirect benefits, such as prompting the government to act; attracting media attention and public support; and improving access to justice.*

Dr Vanhala argued that legal mobilization, even when cases are lost, brings a host of indirect effects that benefit the organization as a whole, such as prompting the government to act; attracting media attention, and with it, public support; and advancing the NGOs' common agenda of improving access to justice. She evidenced her argument with data drawn from two case studies: the liberalization of Legal Standing; and the Campaign against the Expansion of Heathrow Airport.

## Discussion

Dr Vanhala's thesis raised a number of comments in the ensuing discussion.<sup>1</sup> One suggestion was for precise clarification of the terms 'legal mobilization' and 'strategic litigation', as well as further exploration of the variety of benefits that might be derived through litigation by the environmental movement,

1. Thanks to Dr David Erdos for providing the author with his full commentary on Dr Vanhala's paper, on which the Discussion section draws.

and the implications for democracy. The term, 'legal mobilization' has been used in different ways by different scholars, from Michael McCann's definition, which concentrates on deployment of legal discourse defined as 'a system of cultural and symbolic meanings [more] than a set of operational controls' (McCann 2004); to Charles Epp's focus on deployment of 'legal institutions', i.e. judges and courts, through 'strategic litigation' (Epp 1998). In Epp's account, strategic litigation is the means by which an organization can achieve its overarching vision; the deployment of law is linked to a broader strategic goal. Another suggestion was that Dr Vanhala could improve the strength of her argument regarding 'closed legal opportunity structures' by providing a standard by which this can be judged. Resort to litigation by environmental activists brings many indirect benefits such as providing a focal point for socio-political mobilization and allowing resort to a language of justice which might itself be useful as

a campaigning tool. Such benefits may be more easily achieved in a legal setting than a legislative one. On the other hand, uncertain and potentially ruinous costs make resort to legal institutions uniquely onerous. Thus, comparing 'legal opportunity structure' to other structures (e.g. legislative) may yield different results.

Finally, Dr Vanhala's contention that the environmental movement's use of the courts enhances democratic participation and deliberation came under scrutiny. A counter-argument was presented to the effect that this is only true if the aim of the movement is to achieve the direct enforcement of a democratic law, yet the evidence suggests that the environmental movement uses litigation strategically to empower themselves relative to other actors including their opponents (who may constitute the majority).

# The Rise of Eurolegalism and its Implications for Democracy in Europe

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## Professor Dan Kelemen, *Rutgers University*

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Professor Kelemen explored the normative consequences of the trend towards Eurolegalism, which he identified in Europe empirically. Eurolegalism is defined as the spread in Europe of US adversarial legalism. The rise of the EU has led to a trend towards more detailed legal norms enforceable by public bodies or by private actors. This trend empowers private actors to play a greater role in regulatory processes and enforcement of rights. Professor Kelemen discussed two key implications of this trend: (1) the reinforcement of the more general, worldwide trend towards the judicialization of politics; and (2) the emergence of Eurolegalism or the judicialization of regulatory politics. Professor Kelemen gave an overview of how widespread Eurolegalism is. He then focused on the normative implications of Eurolegalism by addressing the key criticism of this trend: the counter-majoritarian difficulty whereby courts, non-majoritarian institutions, are substituting their will for that of democratically elected representatives.

Professor Kelemen argued against the idea that judicialization of politics is anti-democratic, contesting instead that judicialization and Eurolegalism are merely changing the nature of democracy in Europe. One should reject the claim that these trends undermine democracy on the grounds that, most of the time, both national and supranational courts are doing what they have been asked to do by political actors. For example, as Moravcsik claims, the ECHR regime was a commitment to democracy by post-Second World War nation-states, which has seen courts asked by democratically elected political actors to play an

enhanced role. Subsequent conflicts between courts and legislators are not evidence that courts are overstepping their role, but that they are merely doing what they were asked to do, i.e., stopping parliaments violating the constitution. Conflicts between courts and parliaments are a sign of a healthy democracy, not of anti-democratic behaviour by courts.

Moreover, it is a mistake to say that courts are undemocratic institutions. High courts such as constitutional courts in Europe and the US Supreme Court are not composed of one judge. Judges are independent and can do what they want, but the judiciary as a whole is shaped by politics. A high court is made up of judges appointed by different political actors over time and therefore the output of a majority of majorities who have been in power in different institutions over the past decade or two. The court, the creature of a majority of majorities, when it sets aside an Act of Parliament is overturning the act of one majority that happens to control government at one point in time. There is no reason to fetishize the current majority in any one parliament. Because a series of political majorities have played a role in appointing the judges that staff a high court, one can argue that that court has been shaped by democratic politics.

On the other hand, Eurolegalism involves the lower courts more often than the high courts. Lower courts generally have less democratic input over time compared to the high (constitutional) courts. How might one respond to this criticism? In line with other scholars, such as Professor Cichowski and Professor Guarneri, Professor Kelemen argued that one cannot say that courts are anti-democratic, because litigation is a form of political participation. Democracy entails more than voting. Voting is not enough, as it occurs

infrequently. One way of holding the administration accountable between elections is through participation and litigation. One of the effects of judicialization is to push for greater transparency; greater administrative accountability. Administrations have to give reasons for their decisions and justify and explain their acts, which in turn enriches democracy.

*Eurolegalism might make it difficult for policymakers to pursue policies that would serve the public interest, in cases where the public interest might be trampled by individual rights.*

How is Eurolegalism changing democracy? Two aspects are worth discussing. The most common type of democracy in Europe is the consensual model, not the majoritarian or Westminster model of democracy. A culture of consensus characterizes Continental European democracy. Modes of regulation or governance based on this consensual approach rely on cooperation between key stakeholders collaborating on mutually agreeable solutions. This contrasts smartly with the adversarial legalism of the US. The judicialization of politics undermines this consensual model. Professor Kelemen shared the concern of other participants that Eurolegalism might make it difficult for policymakers to pursue policies that would serve the public interest, in cases where the public interest might be trampled by individual rights. There is also some evidence showing that a judicialized mode of regulation is more costly, slower, and less effective.

### **Discussion**

In the ensuing discussion, some participants pointed out that the growth of EU rights is problematic as few democratic instruments are in place to control the rise of judicial litigation at the EU level. EU regulation in the name of rights has proliferated: consumer protection, anti-discrimination, health and safety laws. This is not necessarily democratic, partly because no demos exists at the EU level. It was also questioned whether there was empirical

evidence to support the claim that Eurolegalism has indeed increased transparency, legal certainty, and access to justice. One counter-example would be that, under qualified majority voting in the European Council, often very unrealistic rules have been enacted around health and safety and data protection, which result in diminishing legal certainty for business.

Other participants raised the issue of access to justice, arguing that since litigation is expensive, only those who have adequate financial resources get to 'participate'. Eurolegalism can withstand cross-examination as a democratic process only in contrast with the immediately preceding regimes in Europe, which were perhaps not so democratic in the first place. If one compares the stakeholder-consultative supranational regime set up by the EU with the previous state-managed approach at the national level, Eurolegalism might seem an improvement. But if one compares Eurolegalism with de Tocqueville's America, characterized by much smaller government and a fermenting civil society, then the claim does not stand. Arguably, democracy was already undermined before the rise of Eurolegalism, but Eurolegalism accelerates this process, consolidating elite power all the more.

The judiciary has many virtues, and to conclude that judicialization of politics is undermining democracy is not to detract from these virtues. It is a commentary upon the expansion of judicial power beyond its sphere, beyond the limits of its undoubted competence. There is no doubt that the judiciary is the right forum (compared with other governance processes) for determining the truth about individual conduct, but the expansion of judicial competence beyond the sphere of particular cases to rules of universal applicability is an entirely different matter. Judicialization encroaches upon policy areas where courts have neither the institutional capacity nor the legitimacy to decide.

Other concerns centred on the claim that Eurolegalism enhances enforcement of rights, since this may impact negatively on policymaking, which must

balance different interests in a utilitarian way. When people begin to litigate such rights, this balancing of competing interests through the political process is undermined.

Some participants found that the evidence presented shows that Eurolegalism is making things better for some individuals and worse for others, disproportionately boosting the bargaining power of some groups while diminishing that of others. This can occur because of the judges' ideological orientation, which can play a larger role than the law in determining who will win in court. Money also matters. The taxpayer who is paying to satisfy these claims of right, especially the marginal taxpayer, is being disempowered the most. For example, cases involving the NHS have cost taxpayers £807 million in damage claims awarded by courts, simply because courts have few or no other remedies.

It was also suggested that the definition of democracy needs to be rethought. One of the key features of Eurolegalism as described is individual rights protection. However, this is not a feature exclusive to or even necessarily characteristic of democracy. Individual rights can coexist with any form of government, whether democratic or not: Magna Carta (1215) and the Petition of Right (1628) are good illustrations of this.

The fact that courts have been delegated power by the people and their representatives is an insufficient basis for arguing that courts are democratic in themselves or that the self-expansion of their power without democratic consent does no harm to democracy. The agent drift problem has been overlooked. The first order of agency (voters to elected representatives) is already problematic; a second order of agency (courts as agents of agents) further undermines this claimed association between the courts and the demos.

In support of the claim that Eurolegalism is not undermining democracy, case studies were given as examples where courts protected certain parties against discrimination. But to evaluate whether these

case studies support the claim or not, one needs a fuller picture. The root of many anti-discrimination issues taken on by the courts cannot be addressed by the courts, which must be addressed directly by democratic deliberation. Court processes are not conducive to addressing such fundamental systemic problems, and the danger is that the policy process becomes distorted by judicialization. In addition to issues of court competence, concerns were raised about the legitimacy of judges stepping in to arbitrate on policy areas that are sidestepped by the legislature.

Finally, participants raised the question of how much of Eurolegalism is actually a consequence of the unique nature of the EU itself? Should we expect similar trends with different or similar outcomes in other parts of the world, due to globalization and/or other supranational legal instruments?

## International Courts and Democracy

**Professor Rachel Cichowski,**  
*Washington University*

Professor Cichowski argued that over the last fifteen years courts have incrementally transformed international politics. Arbitrating on everything from war crimes to trade disputes, judicial organizations have empowered as well as constrained nation states. Individuals now more than ever are governed by a growing body of international law. Professor Cichowski has been examining the ways in which multilateral organizations have enhanced democracy. Given the proliferation of international courts and tribunals, understanding their effects on domestic democracies has become more important. Professor Cichowski framed her thesis by assessing the merits of a series of questions: Are international courts changing the protection of rights? Are international legal processes allowing individuals to participate in politics and the policy process in a different way? Are international legal institutions providing a forum for democratic deliberation? If democracy is defined as a process that ensures greater accountability, transparency, and participation, are international courts changing these processes?

*Arbitrating on everything from war crimes to trade disputes, judicial organizations have empowered as well as constrained nation states.*

Professor Cichowski answered these questions by examining the dynamic interaction between legal mobilization and democratic governance. In any system of governance, mobilization and litigation can be useful avenues for understanding changes in that system. She assumes that a judicial resolution can

lead to the clarification of a societal question brought before the court, as well as to an expansion of rules and procedures, which are structures of governance. This creates opportunities for political action and mobilization in any governance where the judiciary has some judicial review powers. In any such system there is an opportunity for the judiciary to expand and create law. Courts do not operate at their own initiative; they have to be petitioned by an individual or group who act strategically to promote change in a given policy area and thus resist a set of rules that disadvantages them. Thus for international courts to enhance democracy two conditions must be met: (1) these courts must have some review power; and (2) an individual or a group must make a claim before that court.

Professor Cichowski then examined in detail the effects of international courts on democratic participation. The permeability of international organizations to non-state actors has been linked to a strengthening of international laws and the subsequent strengthening of domestic democracy. These are critical to participatory politics. Individual access has also led to an increase in the case loads of international courts. This potentially gives courts a greater opportunity to decide important political issues, which in turn may lead to an increased petitioning of these courts by private parties and NGOs.

Professor Cichowski then used a complex dataset of ECtHR decisions – obtained by coding data for: (1) respondents involved, (2) the role of NGOs, (3) plaintiffs involved, (4) national implementing measures – to evidence her claims. The courts' jurisdiction only covers the Convention, not domestic constitutional law. Member states remain sovereign, but the Convention as interpreted by the court serves as a higher body of norms that have constrained

nation states and democracy. Given these review powers, what procedures enabled groups and individuals to invoke the ECHR and bring claims before the court?

Under the original Convention, individuals or NGOs did not have access to the ECtHR, the original text having been crafted to protect national sovereignty. Today the Convention has created rules and procedures by which individuals and non-state groups (Art. 34) have access to the Court. Over time, social activists/NGOs and the ECtHR itself have interacted, mutually empowering themselves. This has gone beyond the creation of provisions allowing non-state access to the Court, to the expansion of the Convention's very meaning. The basis for these non-state actors bringing claims before the ECHR is now enshrined in the Convention. They have also played an important role in educating the public about the ECtHR's role and its case-law. This has led to transnational participation, which enhances the quality of democracy and strengthens human rights.

Professor Cichowski concluded that although courts in theory endanger democracy, international courts can at times enhance democracy, and do so by enhancing protection of rights and by fostering participatory and deliberative democracy. Further questions that need be answered by future research would include: Do these findings 'travel' across the world, or is the ECHR an exception? How will the European supranational courts' democracy-enhancing potential evolve in the future? How best can we study similar courts? Principal-agent theory has led to an overemphasis on state delegation and, though it helps us understand how supranational courts are created in the first place, it does not help us understand how they evolve over time.

### **Discussion**

Participants commended Professor Cichowski for engaging with broad normative themes, unlike other research on the same topic that shies away from such questions. Professor Cichowski's framework in particular is dynamic and her mixed-methods approach is refreshing. In bringing together the

literature on legal mobilization and on the impact of courts on democracy, her findings are likely to have an impact on developments in judicial power in countries including the UK.

Participants wondered whether all delegation of powers to international courts will be democracy enhancing or whether there might be any cases where the opposite is true. Whilst all the cases presented arguably supported democracy enhancement, it might be beneficial to investigate other cases that indicate alternative outcomes. Another question that one might ask is whether the impact of the ECtHR is uniform across all state parties. Could it be that in some states international courts enhance democracy, while in others – those that are most democratic already – they subvert it? For example, a large number of cases brought before the ECtHR are against the UK government. Does that really prove that human rights are not well protected in the UK, or rather is it an indication that the UK has a vibrant civil society which is proactive in mobilizing to exploit the Convention? The most democratic countries are also the likeliest to comply with the Court's decisions. Has the ECtHR had any democracy-enhancing effects on Russia, for example? What explains the variation across the states in the degree to which their democracy is enhanced?

Professor Cichowski's definition of democracy also includes 'equality' and 'informed citizenry'. Does Professor Cichowski's work show any impact on these components of democracy? In the US, for example, the Supreme Court has been criticized because its decisions cannot be easily understood by the average citizen and this can undermine engagement. Some critics have claimed that courts contribute to the disengagement of citizens with democracy.

A question also arose in relation to Professor Cichowski's argument that participation by NGOs enhances democracy and participation at the transnational level. Could it be that this participation may actually undermine democracy at the domestic level? What if the relationship between domestic democracy and transnational democracy is zero-sum

rather than win-win? Distinguishing between these different levels of governance would enhance the argument.

The criticism of NGOs as being unrepresentative should also be addressed. It might be useful to see how much public opinion as a whole supports the issues that NGOs bring before the ECtHR. Is the NGOs' participation the same as democratic participation? One might also need to consider the internal politics of NGOs. Some have even argued that legal mobilization may actually have a disempowering effect on NGOs. How do NGOs relate to big business groups? Who actually puts forward these claims?

Professor Cichowski was prompted to make more explicit her definition of democracy. Rights are not unique to democracy, and individual rights are not the cornerstone of democratic government. Aristocratic and monarchic forms of government are known to have protected (some might even say invented) individual rights in the past. Magna Carta (1215) and the Petition of Right (1628) are cases in point.

The evidence presented by Professor Cichowski includes horrendous examples of mistreatment of the Kurdish minority by the Turkish government. Some participants found that this evidence shows one fundamental problem underlying all of these cases, which is not being addressed, as such, by supranational courts, and yet which ought to be the front and centre of attention: the rule of law itself and the extent to which the rule of law is lacking in countries like Turkey. The examples show that the uppermost problem is the lack of ordinary, workaday justice, not a lack of substantive rights; therefore, it is the overarching problem of the rule of law that needs to be addressed. The EU might well have enough political leverage over the Turkish state through accession conditionality to exact conformity with the rule of law. But to actually bring that off, the EU would need to define much more clearly what the 'rule of law' consists of. This would go much farther toward remedying the kind of abuses perpetrated by the Turkish government. It would not

only enhance democracy, but also constitute a more effective (because more fundamental) change. The Turkish government is at present simply lawless; judicialization of politics, with its piecemeal and tunnel-visioned fixation on a limited repertory of legal rules proscribing government from acting in certain cases, will never solve a problem so deep-seated and ubiquitous. There are limitless ways in which a government can be lawless; a rights-based approach may always fall in arrears in trying to plug every hole.

The evidence presented also shows that those individuals who win in supranational courts are being empowered by these courts to 'punch above their weight' in the democratic process, so that, representing but 2% of the electorate, they in fact enjoy significantly more than 2% of the bargaining power. This inevitably means that bargaining power is being taken away from whomever may be the losing party in court.

Professor Cichowski concluded that judicialization of politics enhances democratic deliberation. The evidence, however, would indicate that it is elites who are being empowered by the processes of litigation in supranational courts: they are the ones defining what rights are and thereby prescribing much of the political agenda for the masses. Agenda-setting by litigation might not reflect what the people believe or what really concerns them, but rather what transnational elites think they ought to be concerned with. The only democratic deliberation fostered thereby is deliberation on the elites' agenda.

## Courts: Threat or Resource for Democracy?

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### Professor Carlo Guarnieri, *University of Bologna*

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Professor Guarnieri argued that historically there is no clearly defined role for courts; courts have traditionally had different roles. He then introduced two different paradigms governing the role of courts: (1) the 'bouche de la loi' wherein the judge merely applies the law faithfully as written (as in the traditional parliamentary supremacist systems of France and the UK); and (2) the 'mouth of the constitution' wherein judges interpret a higher law than parliament, namely the constitution, and are empowered to elaborate the rules of the political system (as in the US system). He then remarked that more and more countries are moving towards the latter paradigm.

Professor Guarnieri then surveyed the conditional factors that determine the role that courts actually play, including the power of judicial/constitutional review and the degree of judicial independence, but also the spread of an activist judicial role, in which judges take sides in policy disputes and thereby avoid due deference to the political branches. The spread of this activism has been supported by much of the legal scholarship, not only in the US, but also in Europe (viz. Italy, Spain and Germany). In these countries most legal scholars now support the activist, non-deferential role of courts. This trend has also been facilitated by the political system: the vacuum of power caused by political fragmentation is a necessary condition for the expansion of judicial power, allowing an opportunity for courts to step in to fill the breach.

Professor Guarnieri then brought in the concept of 'redundancy': if the political branches cannot any longer respond to social demands, courts may do so.

But this implies a political system flexible enough to allow the substitution of one institution by another over time. He then noted that excessive expansion of judicial power may make the political system too rigid. If in the past European courts may have lacked independence, the trend has been the opposite in the last twenty to thirty years: there have been greater guarantees of judicial independence as well as a spread of judicial and constitutional review of legislation. This trend has been complicated by supranational and international regimes, which have made constitutional texts more complex.

Professor Guarnieri then discussed this new role of courts. The expansion of judicial power has been confronted from different standpoints. On the one hand, critics point out that courts have not brought about significant social changes, or that when they do, they only bring in changes in favour of narrow interests (see also Ran Hirschl's hegemonic preservation thesis). Others claim that courts enhance democracy. Professor Guarnieri claims there is no clear answer to this debate; whether courts enhance or subvert democracy depends on contextual factors. What is important is that judges and the judicial power are kept integrated into the political system. Judges must be accountable and responsible. Traditionally, the view has been that judges are accountable to the law. But today it is known that law is complicated, and judges are actually supposed to tell us what the law is, and so they become accountable only to themselves.

*The vacuum of power caused by political fragmentation is a necessary condition for the expansion of judicial power.*

Professor Guarnieri suggested that one needs to open up this unaccountable system. The process of

adjudication already places limits on judges, in that courts have to follow certain procedures. If adjudication follows these procedures, the power of the court is thereby limited. If one wants to maintain an equilibrium, one may focus on changes in this procedure. The other way in which judicial power can be limited is through 'responsiveness', whereby courts take into account demands coming from the social and political milieu. Responsiveness matters because judges have to take into account the social milieu in which they work.

Judicial appointments therefore become crucial. They become the main way in which the social and political milieu can influence judicial power, if only indirectly. Recently, the Council of Europe recommended that its member states introduce self-government in judicial appointments even for constitutional courts. Professor Guarnieri commented that this was a very risky step. Judicial appointment is an important mechanism inasmuch as one can influence the (so-called) 'reference group' of judges. Independent judges decide cases 'according to the law', but also in conformity with their reference group, meaning their cohorts. In the civil law tradition judges are bureaucrats, civil servants, unlike in the common law tradition. This means that their reference group is internal to the system, whereas, in the common law the reference group was the much wider community of practising lawyers. In the past, lower court judges looked to the Supreme Court as their reference group, which in turn was influenced by the political power. Thus, the political branches were able to contain judicial power. Today this relationship has been dismantled, and the reference group of judges in the civil law tradition has become 'internal' to the judiciary, similar to a trade union. Professor Guarnieri concluded that judicial power is a good thing, but only if it can be moderated.

### **Discussion**

The discussion was opened with a comment regarding the type of courts that were being described in the foregoing analysis. The model of judicial autonomy through Judicial Councils may be suitable for certain contexts, but would be unsuitable for constitutional

courts, which, it was argued, should not be insulated, but be engaged with and accountable to both the law and the political system. The courts are agents of the law, but should not be more than this.

One participant commented that checking and balancing judicial discretion through appointments is unlikely to work. Appointment is not a check and balance proper in that it cannot correct any actual decisions, yet countries in central and Eastern Europe have embraced this view uncritically. Appointments (and control of the judiciary's budget) are blunt instruments that do not accurately distinguish problematic decisions from good ones.

In support of Professor Guarnieri's argument that appointments are the only way to ensure the courts' democratic accountability, one participant gave the example of the health care reform in the US which (at the time) was expected to end up in the US Supreme Court and result in a 5:4 decision; thus, one judge will in practice determine the fate of 60% of the economy and the lives of millions of people. One could say that this is anti-democratic. However, one could also argue that this perspective is mistaken. Appointments are not meant to check and balance courts in the sense of reacting to a bad judicial decision. Because judicial appointments in the US Supreme Court and the constitutional courts in Europe happen through supermajoritarian procedures that involve political actors in government (president, parliaments) and because they are done on a rolling basis over the years, the composition of these courts reflects a variety of inputs in the democratic process.

Some participants were also in agreement with Professor Guarnieri that the Council of Europe recommendations are a very negative development, because they try, in the name of impartiality, to cut off courts from political input into their composition. In the long term this would erode their legitimacy. Ideally, courts would be composed in an appointment process that reflected supermajorities. Constitutions are harder to change than laws, and the court that interprets the constitution should reflect a supermajority. However, supermajorities are deeply

undemocratic, because they have a status quo bias, and frequently the status quo is deeply unjust. If one is concerned with democratic equality, then supermajoritarianism in the system actually promotes unequal and often unjust actions.

Professor Guarnieri acknowledged courts as complementary to the political process, which is to be commended. The argument has been that courts' power is being limited by traditional principles (natural justice), and that courts are constrained by procedures and the nature of law. But what exactly are these procedures? When do they use them? What do they look like?

## Public Debate: The Role of Courts in a Democracy

**In this debate, chaired by Joshua Rozenberg, a panel of academics, lawyers, and politicians debated a topical issue: the role of courts in a democracy generally, and specifically whether the American model of judicial supremacy is right or inevitable for the UK. The debate took place in the Auditorium of Magdalen College, Oxford, on 11 February 2011.**

Joshua Rozenberg introduced the debaters, a panel of three proponents of differing positions on the subject from the fields of politics, the law, and academia, and three cross-examiners from corresponding disciplines. This was followed by a short introduction of the debating topic. Legal scholars and political scientists have documented a trend whereby elected politicians have been increasingly delegating public policy decisions to non-elected bodies (e.g. central banks, independent agencies, courts), with the consequence that judges in particular have become implicated in settling policy disputes. Constitutions both ancient and modern are famously open-textured, even vague and unclear. This creates opportunities for judges to treat these documents as grants of jurisdiction without definite boundaries; indeed, the European Court of Human Rights calls the Convention, imitating the activist ethos of much of the American judiciary, a 'living instrument'. Critics point out that this novel conception of jurisdiction tends to make judges supreme in the policy process, thereby undermining popular sovereignty, the underlying basis of democracy, which raises a series of questions:

- Will this trend affect Parliament's democratic sovereignty in the UK?
- Is the creation of the UK Supreme Court a significant step in this direction?
- Will parliamentary sovereignty be undermined by the trend towards 'governing with judges', whereby elected politicians delegate to judges policy decisions that ought to be taken democratically insofar as they affect the public?
- Are there any scenarios in which the UK government will be in the right to ignore or reverse the decisions of UK judges or the ECtHR?
- How will such a development affect the balance of powers in the UK in future?
- Should the courts decide, for example, whether prisoners have the right to vote, or should the decision be left to politicians?
- Does the recent vote in the UK Parliament give the government grounds to decline to implement the ruling of the ECtHR in the Hirst case?
- If courts are developing new rules (e.g. the 'right to privacy'), is it the fault of politicians for being too slow to develop these laws themselves?

The debating panellists were **Charles Clarke** (*former Home Secretary and currently Visiting Professor at the University of East Anglia*), **Professor Richard Bellamy** (*Director of the European Institute, UCL*) and **Lord Justice Robin Jacob** (*Court of Appeal*). Each presented his own position on the questions outlined above, in their introductory remarks. Subsequently, a second panel of experts commented on the questions and cross-examined the panellists *ad libitum*. The cross-examiners were **Professor Tony Wright** (*UCL*), **The Hon. Mr Justice Philip Sales** (*Royal Courts of Justice*), and **Professor Dan Kelemen** (*Rutgers University*). After a wide-ranging and productive debate, the moderator invited the public to question the arguments they had just heard, before the debate was brought to a close with concluding remarks from the panellists.

**Joshua Rozenberg opened the debate by asking Mr Clarke whether politicians have given too much power to judges.**

**Mr Clarke** first commended the initiative of the Foundation for Law, Justice and Society for organizing such an important and timely debate. He emphasized the fact that such dialogues are ‘absolutely critical’ and ought to happen more often. Mr Clarke then outlined his contention that politicians have not given too much power to courts in the UK. This position was supported by reference to interrelated issues of concern to Mr Clarke during his tenure as Home Secretary. Firstly, the UK should remain, under all circumstances, within the regime of the ECHR. Secondly, it is the duty of the Executive to act by the rule of law. Thirdly, there is a need to simplify and clarify the law – a major consideration which the Labour Government took account of when passing the HRA in 1998. Whilst the HRA clarified legal procedures and brought the ECHR within the framework of British law, a separate British Bill of Human Rights, if implemented, may lead to a re-complication of the procedural aspects. Fourthly, it is essential that the UK criminal justice system retains the confidence of the people in effectively implementing the rule of law. Concern over this issue had already been raised by Mr Clarke in 2007 before the House of Lords Select Committee on the Constitution, when he warned that:

*the current relationship between the Executive, Legislature and Judiciary is not as it should be, and ... tensions between them could seriously erode public confidence in the ability of the State to uphold the Rule of Law in practice. Too frequently there are very public contradictory judgements by senior ministers, police and judges which give rise to confusion and a lack of confidence both within the criminal justice system and in the public.*  
(Rt. Hon. Charles Clarke MP 2007)

It is unavoidable that conflicts will arise between the judiciary and elected politicians over difficult issues. One example is the Court of Appeal's judgment to

give the right to remain in the country to Afghan hijackers of a plane to the UK, which many elected politicians regarded as an invitation to terrorist hijackers. Another is the deportation of suspected terrorists. Under the ECHR, terrorist suspects cannot be forcibly deported, despite the fact that many in the UK believed that nationals of other countries should be deportable in such circumstances. In his view the Chahal judgment (*Chahal v. The United Kingdom*), which created case law controlling when deportation could or could not take place, ought to be reconsidered and member-state governments ought to ask the ECtHR to reconsider the decision. Finally, as for voting rights for prisoners, Mr Clarke's position was that Parliament and the judiciary should collaborate to resolve this issue in a way that addresses the concerns of the British people. Mr Clarke was pleased to have had the opportunity to discuss this and other such difficult issues with the President of the ECtHR, and expressed regret that such a conversation with the Law Lords was impossible in the UK a few years ago.

***The relationship between the Executive, Legislature, and Judiciary is not as it should be, and tensions between them could seriously erode public confidence in the ability of the State to uphold the Rule of Law.***

Mr Clarke then explained the procedure by which it may be decided under the human rights regime which decisions Parliament or the courts may take, respectively. Before anything else has been decided, the Secretary of State certifies that a given Act of Parliament is compliant with the ECHR, or not. Then the judiciary is entitled to issue its opinion on (non)compliance. Parliament, however, has the last word on whether to modify its own Act to comply, or not. Following often intense debates in Parliament, which take into account well-qualified legal advice, Parliament may decide not to comply, but in that case it will make a case as to why non-compliance is

justified. The courts may then reconsider the same Act, and issue a declaration as to whether in their opinion the Executive was correct or not.

As an example, Mr Clarke referred to the controversy in 2006 over Control Orders. The Court of Appeal decided a case on the extent to which certain Control Orders amounted to a deprivation of liberty under the ECHR. The Control Orders had been issued under the Prevention of Terrorism Act 2005, an Act which had been exhaustively debated in Parliament over a long period of time. And yet the Orders were overturned by the Court of Appeal, which also rejected any suggestion that the Court itself might modify or direct the Secretary of State how to modify the terms of the Orders so as to bring them into compliance with the Court's own interpretation of the ECHR. The Court concluded that that matter was solely within the competence of the Secretary of State. This disposition of the case created frustration and confusion for the Secretary of State and his legal advisers. Indeed, nobody could figure out what was legal and what not with regard to the terms of Control Orders, leading to an 'absurd position' that 'disgraced the law before the people'.

In response to Joshua Rozenberg's question whether Mr Clarke expected the Home Secretary to be able to communicate with judges about the terms of Control Orders, Mr Clarke clarified that, in line with the principle of judicial independence, he had never intended to contact the judiciary on any particular case before the court. Being unable to foresee how the Convention would be judicially interpreted, he was merely seeking general advice on how the Control Orders might be viewed by the ECtHR or even what rights in the Convention actually applied to the case. Mr Clarke ended his speech by stating that a lack of all communication between the judiciary and elected politicians was detrimental to justice and to the democratic process.

**Lord Justice Robin Jacob** of the Court of Appeal began by clarifying that most judges in the Court of Appeal are not specialists in any particular subject, such as the ones raised by Mr Clarke. Judges

generally approach their cases without any prejudice as to the guilt or innocence of the parties involved, whether it be central government, a local authority, a multinational company, or a poor individual. Judges then inquire into what rules apply to the case before them. Discussing a particular case with one of the parties, as suggested by Mr Clarke, could be 'very dangerous'. A private discussion on an issue such as Control Orders, even in general terms, would undermine the rule of law.

Judges often have no choice but to step into the vacuum of policy left by politicians. The right to privacy is an example of this. This role of judges is fundamental to democracy: if the politicians do not act, judges may have to do so in order to decide the case before them. Lord Justice Jacob recalled a case involving asylum seekers. Politicians had enacted a law requesting asylum seekers to apply for asylum within two days of their arrival, otherwise they would receive no support from the state. What can one do in such a situation? There was no choice for these individuals; they had no money so they would be forced either to steal, prostitute themselves, or work for gang masters. Since asylum seekers are also unable to work, charities would have to look after them, but they too have no money for it. This created tensions between the law and the HRA. Judges had no choice but to deal with the issue because Parliament 'had no guts' to deal with it themselves. The Court of Appeal's decision was upheld by the Law Lords.

Lord Justice Jacob was keen to emphasize that UK judges are nonetheless deferential to Parliament. Their role is to apply the rules of Parliament as expressed in Acts of Parliament, and under no circumstances can it be demanded of them that they enter into dialogue with the Executive or Parliament. No Western democracies would regard such a dialogue as appropriate behaviour.

**Professor Richard Bellamy** argued that judges should defer to elected politicians in a well-functioning democracy. Politicians and courts perform complementary tasks, but judges are the ones who

should be deferential to the democracy. The purpose of democracy is to ensure that the policies made (inevitably) by elites are in the 'public interest', in the sense that all citizens have political equality, or an equal chance to voice their interests and see them vindicated. Individual interests are aggregated to form a 'collective interest'. Courts play a complementary role in that, ideally, they uphold general laws and apply them equally. Impartial application of the law is indeed crucial to a democracy.

However, two problems arise in practice. First, democracies do not always function as well as they ought. Legislation sometimes fails to treat minorities and particular individuals with equal concern and respect (the 'tyranny of the majority'). This shortcoming has given rise to the view that courts may be a fairer system for equalizing concern. The power of courts has grown in step with the spread of 'rights', which are often open-ended sets of values that invite and may even demand that judges define their substance. An additional consideration is that politicians too often prefer to shift onto the courts decisions unpopular with sizable constituencies. Moreover, fearing electoral competition, politicians have too often used constitutional devices to entrench particular preferences, lest these are reversed in subsequent elections. Finally, law is never perfect. Because every formulation must fail somewhere, some judicial discretion over the exact meaning of the letter of the law must be allowed. This opens the door to arbitrary uses of this discretionary power by judges.

Nevertheless, the shortcomings of democracy are easily overstated, whereas giving judges too much discretion, which rights regimes often do, can as easily undermine political equality. Legislatures may not work perfectly, but they are likelier than courts to serve the entire public interest, not just that part before the court in the persons of the parties in the case at bar, since legislatures represent a far broader spectrum of the population. Courts, by contrast, tend to undermine political equality by favouring powerful minority groups. In fact, empirical research has shown that minorities' interests are better realized through legislatures than through the courts.

The HRA has been attacked, even by judges, for having introduced into Britain an alien paradigm of the role of courts, whereby power is shifted to courts away from the demos. Professor Bellamy argued that this need not be so. The HRA, by requiring Cabinet Ministers and the Joint Committee of Houses of Parliament to declare on the compatibility with the ECHR of all other governmental Acts and proceedings, forces officials to give due consideration to any rights issues that may be involved. HRA Section 4 empowers Parliament to debate and ultimately to determine whether to conserve the original Act or modify it. Most controversial is Section 3 of the HRA, which requires that Acts of Parliament are to be interpreted as if compatible with the ECHR. This has been criticized for ceding too much discretion to judges, granting them unchallenged power to determine legality, viz. that the procedures are fair. But judges ought not rule on the substance of the law; here they must defer to Parliament, which defines the scope of their jurisdiction. Professor Bellamy concluded that we ought to improve our legislative and democratic, as well as judicial processes, the better to secure justice and political equality. However, courts should remain deferential to elected representatives in a democracy.

***Joshua Rozenberg then invited the cross-examining panel to question the debaters.***

**Mr Justice Philip Sales** asked Mr Clarke whether he thinks that politicians sometimes prefer to shift unpopular decisions away from themselves through a court ruling, which effectively provides them 'political cover'. When this happens, what are the consequences for democracy, and what ought Parliament do? Moreover, in what form does Mr Clarke envisage the dialogue between judges and the Executive? Does Mr Clarke have in mind a system similar to that in France where the Constitutional Court reviews statutes prior to their promulgation (*ex ante* review)? Would he in fact prefer such a review system?

**Mr Clarke** agreed that sometimes issues that ought to be resolved by elected politicians are 'put aside'

for popularity reasons. However, he is not aware of politicians deliberately shifting difficult decisions onto courts. Mr Clarke agreed that when politicians fail to act, courts are obliged to take responsibility and find a solution. This then becomes a serious dysfunction of democracy, as the people are likely to lose confidence in democratic politics to solve their real-world problems. The solution is not only more virtue in political conduct but also a better relationship between the branches of government. As for dialogue between judiciary and Executive, the Executive must carry out its role in accordance with the rule of law, which entails that Executive acts may be challenged before judicial review. Any dialogue would address only the issue of how the law should be framed. Drafting an Act of Parliament is a process which often involves multiple teams of lawyers while Parliament sits 'on top in a very unsatisfactory way'. In Mr Clarke's own view, when the issue is one of certifying the compliance of the ECHR with an Act of Parliament, a case might be made for the UK Supreme Court issuing a declaratory judgment as to whether provisions of the Act are, or are not, likely to lead to cases whereby the Act in issue or provisions thereof are ultimately set aside judicially. A top judicial opinion at the outset would help the whole conduct of the criminal justice system. But such a dialogue should never be for deciding the fate of individuals in particular cases.

Mr Clarke believed the suggestion of an *ex ante* review system was a 'powerful point', but it need not necessarily be concentrated in the newly created Supreme Court. He brought up the example of counter-terrorism legislation, which Parliament had initiated after 9/11. The Act was passed but found to be illegal by the Law Lords. The Law was then extensively revised all through the parliamentary process, yet key aspects of it were still found illegal. The upshot was an Executive left in the lurch all along, never knowing what the 'legislative' outcome would be. In Mr Clarke's words, 'all this time, since 9/11, we don't know what the law is, nobody knows what the law is'. It is desirable for everyone to know what the law is as early in the legislative process as possible.

### **Joshua Rozenberg then invited Justice Sales to offer his own views on Mr Clarke's proposal.**

Would it be possible for somebody to decide, before a law was passed, whether it would comply with the ECHR? Or is it that laws must always incorporate a certain degree of discretion for judges, so that nobody can foresee what the law will mean until a particular case at a particular time reaches a judge for decision?

**Justice Sales** agreed that Mr Clarke was right to point out the lack of clarity one finds in court decisions. The French system of review allows for prospective review as to the compatibility of an Act of Parliament with the Constitution. The problem with court judgments is that they are factually specific. In the case of Control Orders, for example, a lot can depend on the individual circumstances of those subject to the orders.

**Professor Tony Wright** began his cross-examination of Justice Robin Jacob by remarking on the contrast between the unflattering view of Parliament offered by Justice Jacob and the flattering view put forward by Professor Bellamy. He then challenged Justice Jacob for his assertion that politicians shy away from controversies, having 'no guts to do what they ought'. In Professor Wright's view this is a misleading description of a trend that spans a whole generation and consists of a 'huge increase in judicial activism'. This has been sparked not so much by politicians shying away from making policy but by judges wanting to take up that role themselves. Importantly, some people also wanted judges to take up such a role. The result has been a shift of power from Parliament to courts over this period. He also remarked that, as a student, he was taught that Parliament's role was to make law and that judges' role was to apply the law, and the only room for disagreement was over how loose or tight the judicial interpretation was to be. But this is no longer the prevailing paradigm. There has been an explosion of judicial review cases in areas that would have been inconceivable in the past. The paradigm has been

changed and this is not the result of politicians ducking their responsibilities. Judges overreach if they decide questions not within their proper competence. Nobody in the UK believed, when the ECHR was signed, that this would lead to judges deciding for the whole UK whether prisoners had the right to vote or not. Professor Wright then asked Justice Jacob whether he agreed with these points, and whether he thought that this new role that judges have taken up entails risks for judges themselves.

**Justice Jacob** agreed in part with Professor Wright's evaluation. He admitted that people are bringing more cases before courts; as a result judges have to resolve more cases. However, one needs to remember the time when judges tended to be 'pro-Executive', as illustrated in John Griffith's view of the judiciary. He admitted the paradigm has shifted and that judges have become 'more law-conscious'. Judges therefore must face stronger criticism than before, an outcome disliked by judges. Nevertheless, in Justice Jacob's words, 'we don't really care, we'll do it all the same'. Judges may become as unpopular as politicians, but they do not place much stake in popularity in the first place. In the case of prisoners' voting rights, Justice Jacob agreed that this is not really a legal question, and expressed dissatisfaction that we are all 'stuck with this decision'. Such a situation is likely to result in conflict, and judges prefer not to decide such a question in the first place.

**Mr Clarke** intervened to point out that the tension between democracy and judicial power is less a problem of decisions by the UK Supreme Court. Once the ECtHR takes a decision, all kinds of consequences follow (e.g., the Chahal case). Yet it has been admitted informally that this Court decides on the basis of national considerations. The question then becomes, how can one get better decisions out of the ECtHR?

Professor Kelemen began his questioning of Professor Bellamy by examining the argument that democracy means one person, one vote. He asserted that democracy is about more than just political equality,

elaborating that, in liberal democracies, the rights of the individual must be respected, and the majority does not always do this. Should judges always be deferential to a legislature or Executive that has violated the fundamental rights of individual citizens? Furthermore, while a case might be made that UK courts ought to remain deferential to Parliament, why should they defer to the Executive? Finally, Professor Bellamy seemed to be arguing that judges ought to restrict themselves to applying the law. In actuality, however, judges make law. Is there any possibility of getting around the reality that when judges interpret the law they are, in fact, making it?

*Nobody in the UK believed, when the ECHR was signed, that this would lead to judges deciding for the whole UK whether prisoners had the right to vote or not.*

**Professor Bellamy** responded that it is rarer than often thought that rights are actually violated. One must distinguish between disagreements over what ought to be the content of rights and whether certain rights really are as fundamental as alleged, and cases where rights universally acknowledged to be fundamental have categorically and clearly been violated. It is often the perception that rights are somehow outside the political process. But it is the very political processes which create the institutions and the politics without which rights would not exist. Rights do not exist merely by virtue of parties claiming them. There are other parties who become swept into fulfilling the claims of right. Therefore, a balancing act needs to be achieved between the two opposing sides. This balancing act in a democracy ought to be performed by elected representatives, who have more legitimacy than courts. The HRA is a positive development insofar as it gives courts no more than the power to prompt the political branches to reconsider an act that might breach genuine rights. The final word rests with the legislature and this is how it ought to be; courts, too, can get it wrong. As for why courts should defer to legislatures when legislatures get it wrong, one might as well

turn the question around and ask why legislatures should defer to courts when courts get it wrong? Take for example the legislation passed by both Houses of Congress regulating child labour working hours (the Keating-Owen bill of 1916), which was ruled unconstitutional by the Supreme Court (*Hammer v. Dagenhart* 247 U.S. 251 1918). Who today would disagree that in this case Congress was right and the Supreme Court wrong?<sup>2</sup> The argument cuts both ways.

As for courts' deference to the Executive in cases where the Executive is also supposed to be implementing the will of Parliament, there is a stronger case for judicial non-deference, but this is a case of a different nature. Judicial review of administrative acts is in order, and has been the norm in the UK for a long time. But such cases ought to be distinguished from the more aggressive rights-based constitutional review of the underlying legislation itself.

When judges interpret law, they do not actually make legislation. They are hemmed in by their cases, in the particular circumstances of which they find themselves enmeshed; they are in no position to legislate universally. But if judges were to get involved in framing legislation, as Mr Clarke suggested, that would truly empower them to legislate universal norms, as in those European countries where constitutional courts have *ex ante* review power. It is inevitable that judges will have to apply the law in unforeseen circumstances. However, Professor Bellamy argued, when they do this, they ought to follow the legislative lead, not their own belief about what rights ought to be.

**Joshua Rozenberg** then commented that what seems to be at stake in much of the controversy surrounding the HRA in the UK is Section 3, which encourages the courts to 'read down' domestic legislation, that is,

2. Author's note: the US Supreme Court was in fact right in this case because the US Constitution vests in the Federal government limited powers which do not include jurisdiction over labour conditions; this is reserved to the States (see Constitution Sect. 8 & 10<sup>th</sup> Amendment). Perhaps a better example would be *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

attempt to interpret Acts of the UK Parliament so as to make them compatible with the ECHR. He then invited the participants to defend this 'reading down' of domestic legislation: are the judges simply doing what Parliament mandated, which is to use the HRA to interpret the legislation consistent with the HRA?

**Justice Jacob** agreed. Judges involved in criminal trials are very concerned with ensuring a fair trial. Parliament asked the courts to 'read down' domestic legislation in the way stated by Rozenberg, and this is what judges in fact do. **Justice Sales** concurred. The purpose of Section 3 of the HRA is to give judges not just the power but the duty to read subsequent legislation in a way compatible with the human rights regime of the HRA. Parliament chose to give courts that power. It is always difficult to specify in advance exactly how an abstract rule like Section 3 will be applied in practice, and there may be cases where courts and politicians might disagree over whether courts may have gone too far.

**Professor Kelemen** was then invited to comment on Professor Bellamy's response. He began by stating that his view of parliaments was much more skeptical than Professor Bellamy's. He concurred with Justice Jacob's position that what judges do is to decide the case in front of them by first deciding which law applies to it. If judges have been told by lawmakers to apply Section 3 to the case before them, they would fail in their duty if they do not do so, even if that meant coming into conflict with what current politicians want. In the context of democracy, tension and conflict between judges and politicians is not a 'bad sign'. When politicians empowered courts in the first place, they knew that one day it might lead to conflict, yet they conferred on courts the power to act as a check on them.

**Joshua Rozenberg then invited the audience to ask questions of any of the panellists.**

**Dr Cristina Parau** (Centre for Socio-Legal Studies, Oxford) began by asking Justice Jacob where he thought the limits of the courts' jurisdiction actually lay, given his claim that when legislators do not act,

judges believe they must step in to solve the cases that are being brought before them. Would he not agree that when judges hear cases without an Act of Parliament to confer jurisdiction (or without a recognized claim of jurisdiction under the writ of the Crown) they are in effect creating their own jurisdiction? And if so, is not such behaviour in contradiction with democracy? Would it not be better for them to decline to hear a case for lack of jurisdiction? If there is no law in place that regulates a particular type of behaviour, this might be because Parliament has decided for very good reasons not to regulate that aspect of life.

**Justice Jacob** replied that when somebody brings a case before a court, judges have to decide it. They have no basis for declining to hear a case. **Justice Sales** confirmed that it was the duty of judges to decide the case and that law will always give an answer. If Parliament has not set down a rule, then a question might arise as to what common law rule applies to a particular case.

**Professor Denis Galligan** (Centre for Socio-Legal Studies, Oxford) followed. He referred to the asylum case given as an example by Justice Jacob, commenting that in that particular case, Parliament did not 'duck' the issue but made an unjust and perverse decision. Do Professor Bellamy and Mr Clarke believe that even in such cases, Parliament should have the last word, allowing a hideously unjust decision to stand which violates asylum seekers' most fundamental rights? Should judges be deferential to Parliament in such a situation?

**Mr Clarke** challenged Professor Galligan to provide reasons why he thought Parliament's decision was unjust. He then commented that Justice Jacob did not seem to have looked at the asylum case in a judicial way, but decided according to his own views on asylum. The law mandated that asylum seekers seek asylum very soon after their arrival in the UK. Mr Clarke then argued that this was not a fundamentally unreasonable way of regulating asylum, and that most certainly the practicality issue raised by Justice Jacob (whether one can expect an asylum seeker to

regulate his status in so short an interval after his arrival in the UK) had been discussed at some length by the relevant committee in Parliament. One also has to take into consideration the views of the 50 million people in the UK. Are their views being taken into account? Did Justice Jacob decide on the basis of the legality of the case? Or did he impose his own view, having come to the conclusion that Parliament was wrong? As Home Secretary and MP, Mr Clarke learnt firsthand that many very difficult decisions have to be made on a very large number of cases, and that many decisions on deportation or asylum seeking are 'absolutely heart-wrenching'. But this does not prove that Parliament's decision was unreasonable.

**Justice Jacob** intervened to affirm that judges have decided the asylum case based on law. What judges had to decide in this case was whether the Act of Parliament was compatible with the ECHR. Judges could not have said to an asylum seeker 'you may not work, you have no money, and that's it. You must starve. We will provide you with no housing, you must starve on the street'. Judges had little difficulty in this case in deciding that the UK law was not very satisfactory and it breached the ECHR.

The British Academy President, **Professor Adam Roberts**, raised the issue of whether domestic legislation could be written in clearer and plainer language that can be comprehended by anyone. This would have a bearing on the role of courts in a democracy. **Mr Clarke** replied that law is sometimes complicated because ministers have 'ducked' a decision that ought to have been taken. This is not a question of plain English, but rather is the result of difficult legal conflicts. However, the failure rests somewhere else. The Law Commission is charged with reviewing legislative text. When he was at the Home Office the Law Commission did propose the simplification and clarification of language on complex legislation such as homicide. However, generally, the Law Commission's proposals are perceived as a 'low political priority' and not allocated sufficient parliamentary time because other issues had higher priority. A welcome reform would be to confer on the Law Commission a higher status, giving

it a route into legislation on a more regular basis.

**Justice Sales** commented that such a reform had already been introduced in some form.

**Dr David Erdos** (Centre for Socio-Legal Studies, Oxford) addressed a question to Professor Bellamy. He began by raising the issue of the implications for democracy in the UK of the ECtHR. He pointed out that one of the questions not addressed by the debaters was that of what the HRA as a law actually is. When the HRA was being debated, the issue was not about 'creating rights' but about 'bringing rights home'. UK judges tend to be deferential to Parliament, and they have been so on a number of policy issues. But the Strasbourg judges have not been. And as Britain is part of the Convention, which is international law, it has no choice but to comply with it. One might conclude that on democratic grounds the ECtHR is more judicially supremacist than any of the domestic courts. Yet Professor Bellamy defends the status quo and Britain's continuance in the ECHR regime. Why should UK judges be deferential when Strasbourg judges are not?

**Professor Bellamy** argued that Britain's membership in the Convention is up to Parliament, and that this might imply that sometimes Parliament has to bear the costs of decisions that go against its own legislative will. The ECtHR in the past has accepted that there are particularities, given differences in legal culture, and Parliament can always argue that the issue before the Strasbourg court has been given full consideration by Parliament and that this should add weight to the UK's position when the court decides that particular case. The Strasbourg court has no guidelines as to how they should adapt its jurisprudence to particular legal cultures or to political circumstances. What the HRA does, by contrast, is to give a lead to the UK courts.

**Dr Christopher Hodges** (Centre for Socio-Legal Studies, Oxford) pointed out that the process of deciding whether national legislation is compliant with the ECHR can be a lengthy one if the case ends before the ECtHR, and asked the panellists whether they thought a constitutional court would not be a

better arrangement. Moreover, much EU legislation is oddly worded because it is often the result of a political compromise, which courts then are obliged to make sense of in the absence of guidelines issued by Parliament as to what the language means. Couldn't this issue be solved beforehand so as to avoid courts being forced to take such decisions? Professor Bellamy responded that a constitutional court would not resolve such issues of obfuscation because, being multi-member courts, they too have to reach compromises.

**Professor Wright** then argued that, indeed, the parliamentary process may take a long time, but in the long run this is beneficial, because this is how an optimal balance of power might eventually be reached. The traditional view of parliamentary sovereignty has been that Parliament can do whatever it wants. However, in moving to the ECHR and adopting the HRA, UK politicians have proven that they do not believe Parliament should do whatever it wants. They have in fact asserted that a set of moral values exists which ought to underpin what politicians do, and signing up to the ECHR and adopting the HRA is a way of ensuring this. Tensions may arise between politicians and courts, but this is a process of iteration which in the long run produces better outcomes, as long as neither politicians nor judges overreach themselves.

A final question was raised by another member of the audience, who inquired into the issue of the politicization of courts as opposed to the judicialization of politics. She brought in the example of the US Supreme Court striking down major political decisions and even deciding the outcome of elections. This has led to a politicized process of judicial appointments. Is this a concern in the UK or in the European context?

**Joshua Rozenberg brought the debate to a conclusion by asking all the panellists to give their views on this issue.**

**Professor Kelemen** argued that judicialization of politics inevitably encourages the politicization of the

judiciary, which is indeed a concern in the UK and in Europe. It is not desirable for judges to be influenced in their decisions by politicians, but some political input through the process of judicial appointments is desirable, because this confers on courts some democratic legitimacy.

**Professor Wright** argued that judges are human beings and have prejudices like everybody else. In a democracy these prejudices have to be interrogated, and thus in some fundamental sense it is right that the elected politicians, who are conduits of the popular will, get to choose the judges. This is the belief in the US, and it rests on a very solid democratic basis. In the UK and in Europe more generally the contrary view is taken, that in the name of judicial independence politicians are kept out of judicial affairs, although in the UK the anomalous situation has been remedied to some extent through the recent judicial reform, which reduced the judicial appointment powers of the Lord Chancellor. Professor Wright stated his preference for the separation of the judiciary from politics, but he admitted that there are very strong democratic reasons for taking the view to the contrary.

**Justice Sales** agreed with Professor Kelemen that judicialization of politics has the effect of politicizing the judiciary. He also concurred with Professor Wright that in the British system there is a strong tradition of judicial independence and that there was no need to adopt the US model, which is not a good substitute for democratization. Judges are not there to fulfill a democratic role, but to be independent, and the politicization of the judiciary should be resisted.

By contrast, **Professor Bellamy** argued that the UK system that pre-dated the recent reforms was a superior system, especially from the standpoint of democratic legitimacy. If judges are being asked to take more political decisions, it is important that they operate within the long-term interests of public opinion: 'The law has to be the people's law, not just the law of lawyers and judges'. In any case, complete independence is a myth because judges are human beings with their own opinions, and it would be

wrong to believe that they are not. This calls for some democratization of the judiciary, which sensitizes judges to public opinion.

**Justice Jacob** agreed with Justice Sales. He found it strange that in the past, government appointed all the top judges in the UK. Yet the system worked, as was proven by the example of the Lord Chancellor under the then Prime Minister Margaret Thatcher appointing one of the most left-wing judges in the country. He concluded by rejecting the idea of candidates for the Supreme Court being interviewed by members of Parliament.

**Mr Clarke** resisted the idea of the UK following the US model, emphasizing the rectitude of the fact that laws on issues such as abortion are made by Parliament and not by the Supreme Court. He then repeated his conviction that UK membership of the ECHR was desirable and that the recent judicial reforms in the UK constitute a development in the right direction. However, Mr Clarke expressed concerns that, inevitably, as judges take decisions on difficult issues, their decisions are becoming more 'politically commented on' and possibly more politically significant, which in turn brings into question the whole operation of the judiciary. The solution is for politicians and judges to discuss the best way of solving these problems. If the views of the judiciary diverge from those of politicians and those of the people, the result may be an erosion of public confidence in both institutions, which must be avoided. Fora such as this one provided by the Foundation for Law, Justice and Society in staging this debate, where these kinds of issues are discussed, would therefore be very welcome in future.

### References

Bellamy, R. (2007) *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. Cambridge: Cambridge University Press.

Epp, C. R. (1998) *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*. Chicago: Chicago University Press.

McCann, M. (2004) 'Law and Social Movements' in A. Sarat (ed.) *The Blackwell Companion to Law and Society*. Oxford: Blackwell Publishing Ltd.

Rt Hon Charles Clarke MP (2007) *Opening Statement to the House of Lords Select Committee on the Constitution by Rt Hon Charles Clarke MP, 17 January 2007*. House of Lords: London.

Scalia, A. (1997) *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press.

## Participants

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