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(Policy Exchange)

WHAT IS THE ROLE OF THE JUDICIARY IN A DEMOCRACY?

Discussion and debate
12 November 2013
PPCU
Faculty of Humanities and Social Sciences
4.00pm
1088 Budapest Mikszáth tér. 1.

Bio

Prof. Dr. **Michael Pinto-Duschinsky** is Senior consultant on constitutional affairs to the leading British think tank Policy Exchange. A former research fellow and lecturer at Pembroke College, Oxford, Merton College, Oxford and Brunel University, he is the author of *Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK*. In 2011-12, he was a member of the UK Commission on a Bill of Rights. He was a founder governor of the Westminster Foundation for Democracy.

Course description

The role of the judiciary is a subject of great current interest in a number of countries. Why?

(1) In many countries with written constitutions, senior judges who are members of constitutional courts are able to declare laws enacted by the legislature and actions of the executive invalid because - in their view - they conflict with the constitution. This is called the power of "Judicial Review".

(2) A "Bill of Rights" is normally expressed in broad language. It is for senior judges to decide the meaning of these rights. It is also for judges to decide cases where there is a conflict between different rights (for example, the right to privacy versus the right to freedom of expression).

(3) The growing powers of international courts such as the European Court of Human Rights raise the question of whether the international court should be able to declare invalid a law enacted by a national parliament.

Examples of controversial recent cases:

- the Citizens United decision of the US Supreme Court (2010). The case overturned much of the existing US law controlling the funding of election campaigns.

- the decisions of the European Court of Human Rights declaring invalid British law which denies those serving prison sentences the right to vote. (Hirst, Greens, Scoppola).

- Voting rights of those with mental illness: the Kis case before the European Court of Human Rights (involving Hungary)

SUGGESTION: perhaps different students can look at each case and summarise its implications for the topic of our debate.

Some questions:

- Is it necessary to give power to judges in order to protect members of minority groups against the "tyranny of the majority" (laws and actions taken unreasonably by elected governments and legislatures)?
- if judges have the power to declare laws invalid, how are the judges themselves to be held to account? Can the independence of judges be assured without making them unaccountable?
- should senior judges themselves be elected? Should the legislature be able to approve or veto the appointment of judges?
- are problems for democracy raised by international courts

Readings

- (A) Michael Pinto-Duschinsky: Bringing Rights Back Home. Making Human Right Compatible with Parliamentary Democracy, London: policy Exchange, 2011
<http://www.policyexchange.org.uk/publications/category/item/bringing-rights-back-home-making-human-rights-compatible-with-parliamentary-democracy-in-the-uk>.
Especially: pp 26-30.

Memorandum of Evidence To The Joint Committee on the draft Voting Eligibility (Prisoners) Bill By Michael Pinto-Duschinsky (Senior consultant on constitutional affairs to Policy Exchange) and Lynne Middleton (Research Fellow on Constitutional Affairs at Policy Exchange) (see in attachment)

- (B) For the growing conflict between the UK House of Commons and the European Court of Human Rights on the prisoner voting issue, see:

Isobel White: "Prisoners' Voting Rights - in brief"
www.parliament.uk/briefing-papers/SN06480.pdf

- (C) There is a basic argument between supporters of judicial authority against majority-elected legislatures (for example Ronald Dworkin) and supporters of parliamentary supremacy.

An influential statement of the argument for judicial supremacy is
Sir John Laws "Law and Democracy" PUBLIC LAW 1995.

For arguments against judicial supremacy see:

Waldron, Jeremy (2006). "The Core of the case against judicial review," The Yale Law Review, 2006, Vol. 115, pp 1346-1406. (see in attachment)

Mark Tushnet (2003) "New Forms of Judicial Review".
<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1259&context=facpub>

A longer though influential work is:

Jeremy Waldron Law and Disagreement

(Also works by Bruce Ackerman and Richard Bellamy)