

Distinguished Fellows Lecture Series
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New York University School of Law, Hauser Global Law School Program
FINAL DRAFT TRANSCRIPT:

Speaker: Judge Olivier Dutheillet de Lamothe
Moderators: Professor Joseph Weiler
Michel Rosenfeld

Professor Joseph Weiler:

Good evening to everybody.

My name is Joseph Weiler and I am the Director of the Global Law School Program. It's my pleasure to welcome as my co-moderator, Professor Michel Rosenfeld, who is the professor at Cardozo – just up the road from us – and one of our regular collaborators in the Global Law School Program.

Our guest of honor, as you know, is Mr. Olivier Dutheillet de Lamothe, a member of the Constitutional Council of France, the highest jurisdiction in France. Normally in events like this I would now present a capsule of his distinguished career, but our practice in these events is to walk him through his distinguished career. It is not every day that we have the privilege of having with us a judge of the Constitutional Council of France.

We are interested not only – although very much so – in your views and your experience as a judge both on the *Conseil d'Etat* and the Constitutional Court, but we are also interested in a person like yourself in France. So, how did you come to be what you are and what is your background? You were born – is it a secret?

Judge Olivier Dutheillet de Lamothe:

No.

Professor Joseph Weiler:

In 1949. And where were you born?

Judge Olivier Dutheillet de Lamothe:

In Paris.

Professor Joseph Weiler:

So you actually grew up as a child in the period right after the Second World War. In fact, your life is almost contemporaneous with the Council of Europe and the European Union; as you know, the

treaty of the coal and steel community, the Treaty of Paris was signed in 1950. And where in Paris? Which *arrondissement*?

Judge Olivier Dutheillet de Lamothe:

I was born in *Neuilly*, in fact, as *Michel*, probably at the American Hospital. I am not quite sure, but I think so.

Professor Joseph Weiler:

What was it like to be a ten-year-old boy in 1959? What was it like to grow up in Paris in that period?

Judge Olivier Dutheillet de Lamothe:

That was a very happy time, something that we have forgotten today: that the period after the war was a very happy one. My parents were really and truly alive. I sit in the Council with Simone Veil and she says the same thing, for a very simple reason: that the people who survived the war were just really happy to be living, and so they were enjoying life.

Both of my parents made war. My father joined the Free French Forces, so he made the campaign of Italy and Germany under U.S. command.

Professor Joseph Weiler:

Was that something that was talked a lot at home? For example, we had Bruno Simma sitting exactly in this seat in this room just a few months ago, and he told us that the experience of the war was never a subject of conversation, as if it had never happened. In France was it something that was part of your life?

Judge Olivier Dutheillet de Lamothe:

It was different between my father and my mother. My father, who had been in the army, and made the campaign of Italy and Germany, he loved to speak about that. I keep a very good memory of a pilgrimage to the site of the Cassino battle, a very decisive battle in Italy where the troops were blocked by the Germans on a monastery on the top of the mountain of Cassino. So, we went there, we went to Strasbourg. Now, my mother, during the war, was in the French Resistance and she did not speak about that.

Professor Joseph Weiler:

Never?

Judge Olivier Dutheillet de Lamothe:

Never. She never spoke about that period.

Professor Joseph Weiler:

Let me fast-forward and then quickly go back but I remember when we met the first time at *La Pietra* a couple of years ago. We were then talking about this great future of the European constitution and there was a meeting of five justices of the Supreme Court and many constitutional law judges like yourself. It was quite striking because you were quite strongly pro-European in your outlook. Was that something that was shaped also by that experience of the post-war generation and this kind of conversation with your father?

Judge Olivier Dutheillet de Lamothe:

Yes, certainly. My father was a great European—it was the great dream and project of his life. Just after World War II, he entered the first promotion of the National School for Administration. When he got out, his first job was to work to implement the Marshall Plan with Pierre-Paul Schweitzer who was, at that time, the head of the Administrative Office implementing the Marshall plan—the same Schweitzer who later became Managing Director of the International Monetary Fund, and who happened to be my godfather. He and my father were very good friends; he knew Jean Monnet, he worked during the Fourth Republic with René Pleven, who was a great European. He finished his life too early, unfortunately, as Advocate General at the European Court of Justice.

I had been brought up in a very European mood and personally, one of the saddest parts of the recent referendum for me is that when you look closely at the vote, you can see that the young generation voted no. Fifty-six percent of people under twenty-six voted no and the old generation (over sixty) voted yes. That is very sad for me, because I had been brought up with the dream of Europe, whole again. In this country you talk about the American Dream—the European dream was Europe.

Professor Joseph Weiler:

We will get back to that, I assure you, but now let us return to your childhood in Paris. You have said it was a happy time. When I look at your curriculum vitae, when you finished your studies, you went to the most distinguished institutions of high education. You completed the degree for *Sciences Po*, and then you go to *L'Ecole National d'Administration*, and there is a caricature that we have here which says, “For anybody to get into *L'Ecole National d'Administration*, you have to start preparing at the age of eleven.” Is there a reality behind that myth?

Judge Olivier Dutheillet de Lamothe:

Not really. It is highly competitive, and to be honest, I was not admitted the first time. I had to pass the exams a second time.

Professor Joseph Weiler:

Now we know you are human. In the educational choices that your parents made for you, was something in their mind: “I would like Olivier to go to *ENA*, and if I want him to go to *ENA* I have to choose this *lycée*?” Which *lycée* did you go to?

Judge Olivier Dutheillet de Lamothe:

One lycée in Neuilly. We lived in Neuilly and I went to the lycée Pasteur, which was a very good lycée. My father handled the whole thing very gently and in a very clever way; he did not say, "You should do that," which means he created the mood and I had no idea to do anything else. So I went to Sciences Po. A particularity of Sciences Po, especially at that time, was that you could enter Sciences Po just after the Baccalauréat at the end of secondary school without upper classes, like Hypokhâgne, Khâgne, etc.

At that time in the first year of *Sciences Po*, which was called the preparatory year, you had the real training. It was a very good transition between secondary school and university. I went to *Sciences Po*, and I also have a law degree. I followed the law degree in the law faculty and I prepared the National School of Administration exam.

Professor Joseph Weiler:

Then you were admitted to the National School of Administration?

Judge Olivier Dutheillet de Lamothe:

Yes, the second time.

Professor Joseph Weiler:

When you are admitted, it is a great ticket for life. That is the aspiration of many young French men and women.

Judge Olivier Dutheillet de Lamothe:

The French version of tenure, I guess.

Professor Joseph Weiler:

Tenure for life. So how long was the *ENA*?

Judge Olivier Dutheillet de Lamothe:

Unfortunately, I lost my father just when I entered the National School.

It took me two-and-a-half years: one year training in an internship in a *prefecture*, a local administration, which is the best part of it because it is the only time when higher civil servants can see how it works on the ground. After that, we often lose contact with reality, but for one year, we are on the ground in a *prefecture* looking at how local society and business administration works.

There is also an internship in a company, which is very useful because that is the only time you can see how a company works.

Professor Joseph Weiler:

Private company?

Judge Olivier Dutheillet de Lamothe:

Yes, a private company.

Professor Joseph Weiler:

What company were you doing an internship in?

Judge Olivier Dutheillet de Lamothe:

I did it at BSN (*today DANONE*).

Professor Joseph Weiler:

What do they produce?

Judge Olivier Dutheillet de Lamothe:

They produce a lot of food and beverage. And I made my internship—my apprenticeship—in production in the factory itself in 8-hour shifts. I did that in their factory which produced bottles for champagne, which is a very difficult thing to produce; if there is a single default, then the bottle bursts out because the champagne is under pressure. The company is responsible for that, so you have to look very closely that there is no default at all.

So that is what I did for one month; the rest of it is studies, which are less interesting and mainly competition. It is a competing process to rank the people, and after the ranking we choose, according to the rank, in which administration we want to serve.

Professor Joseph Weiler:

The gold medal, the prize is a position at the *Conseil d'Etat*.

Judge Olivier Dutheillet de Lamothe:

The three gold prizes are the *Conseil d'Etat*, the Inspection of Finance and the Court of Accounts.

Professor Joseph Weiler:

And you went to the *Conseil d'Etat*?

Judge Olivier Dutheillet de Lamothe:

I went to the *Conseil d'Etat*. My father was a member of the *Conseil d'Etat*, and I was very much involved in law.

Professor Joseph Weiler:

Before we move to the *Conseil d'Etat* and begin to talk a bit more about the intellectual content of your work, there are still two biographical things that interest me. I think when Pascal Lamy was

here and we were talking about *Conseil d'Etat*, he insisted that it is very meritocratic. But the critique that one hears is that when you get to the *Conseil d'Etat* it is very meritocratic but *to* get to the *Conseil d'Etat*, it is limited to a fairly narrow section of French society. When one looks at the people admitted to *ENA*, they tend to be from the same social-economic background. Even though among themselves they are competing on a meritocratic basis, to actually get there, the school that feeds the higher administration of France—it is from a very narrow part of society. Do you agree with that critique?

Judge Olivier Dutheillet de Lamothe:

Partly. It is true of what is called the students' competition, but there is one part which is much more open: each year, you have two exams. The exam for students matches closely with your critique, though there are some exceptions and some merits.

But the other exam is for civil servants who are already in the administration and who may be from very modest origins. The state gives them one year to prepare the exam and then, if they succeed, they will get out of hiding. For example, in the last promotions of the *ENA*, very often the major was an ex-civil servant. The second exam is much more open to civil servants.

Professor Joseph Weiler:

That is illuminating because one hears less about that.

Here is my second question. If we take a period on your life up to and including the completion of your studies at the *Ecole Nationale d'Administration*, and I ask this question because so often so many of our sensibilities are formed during our adolescence – in our very early adulthood – who were the persons you would say were most formative in that period of your life as a young man? Was it your father or your mother? Maybe a particular teacher at high school stands out?

Judge Olivier Dutheillet de Lamothe:

Well, clearly one teacher who had great impact on me was my professor of philosophy. In my last year of secondary school, I had the privilege to have a fantastic professor of philosophy who is the last representative introducer of Heidegger in France. As you know, Heidegger is a very controversial philosopher and Jean-Paul Sartre tried to make a devil out of him and yet utilized his ideas. Heidegger was introduced in France by Jean Beaufret, who is now dead, and who was a great philosopher; my professor was the main disciple of Jean Beaufret, called François Fédier, who also translated Hölderlin in French. So he was really a fabulous professor...

Professor Joseph Weiler:

He taught at your high school?

Judge Olivier Dutheillet de Lamothe:

Yes.

Professor Joseph Weiler:

Isn't that something about society where you can have an amazing intellectual person and he is not a professor, he is just a high school teacher?

Michel Rosenfeld:

Others started like that too, by being a professor in *lycée* and teaching philosophy. The last year in French *lycée* you can concentrate in philosophy.

Judge Olivier Dutheillet de Lamothe:

That was my case. Now the second man, but less important, who had a great influence in law is Georges Vedel. I had the privilege to have Vedel as a teacher in *Sciences Po*. I still use his lecture in the Constitutional Council when I really want to get to a basic element of law. For example, on judicial review here, I go back to Vedel. He was a fantastic teacher.

Professor Joseph Weiler:

To those of us in the audience who are interested in the European Union and European affairs, in terms of the diagnosis of what is wrong with the European Union, the Vedel report is as current as anything that is ever written. It is still the blueprint for reform, so he has had a lasting impact in that respect too.

Was there any particular book or work in that period that you remember had an influence on your intellectual formation?

Judge Olivier Dutheillet de Lamothe:

On the intellectual formation, my father made me read the Treaty of Civil Law—Civil Law in the technical sense of it, as opposed to criminal law—by the brothers Mazeaud, who are the uncles of the president of Constitutional court, Pierre Mazeaud. They are two great civilists who have written the treaty, which is just fabulous. My father said to me, “You have to sum it up.”

Professor Joseph Weiler:

At what age were you?

Judge Olivier Dutheillet de Lamothe:

I was making my law degree. I was already a student, and it is true that I think the core of law is civil law. Perhaps I should not say that, but public law – at least French public law – is easy law. The core of law is civil law. The theory of the cause, obligations, liability, that is what I think is the heart of law. That is where law catches philosophy.

Professor Joseph Weiler:

That is an interesting observation coming from a public lawyer. All my life I have remonstrated against that position. I feel betrayed.

So you graduate from *ENA* and you get the gold medal, so to speak, because you go to the *Conseil d'Etat*. In our popular Anglo-American world, when we think about the *Conseil d'Etat*, we think about it in monolithic terms: that it is the highest administrative court in France. But of course, there is much more to the *Conseil d'Etat* than being the highest instance of appeal of administrative law. So tell us a little bit about the *Conseil d'Etat* and your experience there as a way of broadening the picture of what the *Conseil d'Etat* is.

Judge Olivier Dutheillet de Lamothe:

The *Conseil d'Etat*, the Council of State, is probably the only British French institution. It is highly British because it is not rational, it is not Cartesian. It is three things, the *Conseil d'Etat*.

First, it is the Supreme Administrative Court – that is the judicial part to which you referred.

Second, it is the legal advisor to the government – that is, all major bills and regulations are submitted for legal advice to the *Conseil d'Etat*. Now, the government is not obliged to follow the advice of the *Conseil d'Etat*. It is normally secret, but it has strong influence.

The third role of the *Conseil d'Etat* is that it is a reservoir of higher civil servants who serve in the active administration – very often, in ministerial cabinets or in the presidency.

That explains, for example, that I have spent half of my career in social affairs, in industrial relations, in various positions as an advisor to different ministers, and an advisor to the president. My father, who, as I mentioned, was a member of the *Conseil d'Etat*, used to say it was the only religious Order which is both secular and regular: secular because you can go in the active society if you wish to, and regular when you are in the judicial part of it, which is very monastic work because you are given a sheet of paper, a treaty of administrative law, and you spend days and days studying cases and writing reports.

Professor Joseph Weiler:

How many years were you on the *Conseil d'Etat*?

Judge Olivier Dutheillet de Lamothe:

Ten years.

Professor Joseph Weiler:

As a *Conseiller d'Etat*?

Judge Olivier Dutheillet de Lamothe:

First as an *auditeur* and *rapporteur*, then as a *commissaire du gouvernement* for five years and then when I left the presidency I spent one year in the *Conseil d'Etat*.

Professor Joseph Weiler:

And how does one become a *Conseiller d'Etat*? We know how one goes from *ENA* to be an *auditeur*, but you're not yet a Councilor of State. You're just working for the *Conseil d'Etat*. But how does one become an actual Councilor within the *Conseil d'Etat*?

Judge Olivier Dutheillet de Lamothe:

That is very simple: uniquely by seniority. Whether you are good or not, whether you work or not, you advance. You are first *auditeur*, then *maître des requêtes*, then *Conseiller d'Etat*, and this is based only on seniority. I think it is a very good system because it is the greatest guarantee of independence: no one can do anything to hurt your career.

Professor Joseph Weiler:

I was going to say: whether you are good or bad, you get appointed? Sounds like a very British institution—I am just teasing.

Let us focus for a minute on your function as a judge on the *Conseil d'Etat* in both as *commissaire du gouvernement* and actually involved in deciding cases. Here I will be interested in your experience as a judge.

The European Court of Justice for many years emulated the *Conseil d'Etat* in the way it wrote its decisions. Vu, vu, vu, Considérant, considérant, considérant. Two and two is four, four and four is eight, eight and eight is sixteen, so sixteen and sixteen has to be thirty-two. *Voilà!* You have a judge. In other words, if x is y and z is a then there is only one possible legal answer and we have worked it out scientifically.

We in the Anglo-American tradition, who grew up on the maxim that the life of law is not logic but experience, think that is ridiculous and fraudulent, that nobody can believe in such rhetoric that says judicial decision-making can be so scientific that if you only get the premises right and you reason correctly you will come up with the correct result of a case.

I say that is the caricature, but tell us about your view of the caricature and to what extent it is a reality. There is a real distinct difference in the style at least outwardly in the way one reads decisions of *Conseil d'Etat* and the way one would read a decision of the House of Lords or the Supreme Court of the United States – or even the German Constitutional Court; it has a very different, more contextualized narrative style of analysis and reasoning.

Judge Olivier Dutheillet de Lamothe:

I think there are two levels of answer to that question. The first level is the difference between civil law and common law. It does exist. That is, civil law is based on statutes and on written law. Basically, a civil lawyer or civil judge will consider that his role is to look at the statutes and the provisions which are applicable to the case, interpret them, and then apply them to the specific case. That is the deductive reasoning of civil law.

I think this is the true difference with common law, which is based on the *stare decisis* principle. The idea is that the judge creates the law. For example, there is a very beautiful sentence of Tocqueville

in “Democracy in America” that says there is no major issue in American society that will not eventually be solved by the judiciary. He wrote it because it struck him as a civil lawyer, because that is totally contrary to the civil law tradition. So that is, I think, one first element of answer.

Now the second element, where I agree partly with you, is a more philosophical point. The decision as you describe it is based on the philosophy that the decisions of French courts, the decisions in civil law, are first collective decisions. It is the court, not Mr. A and B. It is collective and unanimous—you never know if it was unanimously decided or if it was a majority, 5 to 4. Finally, it is truth. It is supposed to be the truth. It is how the provisions should be interpreted.

The most distinctive feature I think of common law judgments when you read them—and I now read a lot of them from the U.S. Supreme Court—is that they are much more humane. It is not the truth. It is one element of truth, at one moment; there are many people who are hesitating, divided, and some of them dissent, but the majority decides that it is so. I think the attractive part of it is that it is more relative. That is, it is not based on the idea that it is *the* solution. It simply states, “Here is what the majority of people think, at this moment, of how the case should be settled.”

Professor Joseph Weiler:

Before I pass the word to Michel, can I press you on this? Because when one looks at studies made of French judicial decisions of the highest senses, it is to say that they are also humane as you call them, they are contextual, and even the judges involved in the decision understand that.

What seems different is an unwillingness to admit it, and that one writes in that style because one wants to project—or pretend—that it is an impersonal scientific objective rather than shaped by human passions and prejudices. But in fact, the judges who are involved in the process know that it is every bit as humane as, say, a decision of an English court or an American court or a South African court, or even some civil law courts. What is your reaction to that? Is there some truth to that?

Judge Olivier Dutheillet de Lamothe:

Not really. I think the real philosophy is that there is nothing personal in decisions. That is a great difference. In a decision of the Supreme Court, everything is personal, because the votes are stated in the decision, who votes for the solution, who is against, and why they are against. Here, it is considered that the judiciary is invested with a mission to interpret the law, statutes, as decided by the sovereign parliament and to give the right interpretation.

I think that even from a psychological point of view, the people who decide are convinced that it is the *right* solution – that it is the good solution. Of course they may have doubts. I remember some advice in the *Conseil d’Etat* on how to write decisions: the more dubious you are, the more affirmative you should be in the wording; never show any hesitation in the wording. If it was six o’clock, it was dark and he drove into the tree, even if you are not totally sure it happened, you do not have to expand your doubts and your regrets, because you have to tell the truth. You are here to say, in the name of the people, what is the correct solution of the case you are submitted.

Michel Rosenfeld:

Let me share a little bit of my amazement each time I hear this line which you have expressed very well. It took me the longest time to understand what the general will is. I have read through it so many times, backward and forwards, and to me the general will is not the will of the majority. It is not this, it is not that, but I could not figure out what a general will was until a French law professor who you know very well—Michel Troper—explained it to me in one sentence. The general will is whatever parliament decides. There is a certain circularity about that, and we do not have to go into it. If parliament decides the law is x, then that becomes the general will, and it seems to me that your description of judging is little bit like that too.

First of all, as I understand from talking to people—although this is, of course, not official—is that sometimes within an institution like the *Conseil Constitutionnel*, you may decide 5 to 4, although the public never sees that. A decision of the *Conseil* appears to be the decision of the entire body, but in fact 4 of the 9 may disagree concerning the truth. One can always say that in truth—like in math—there is one answer, but some people may make mistakes. There is always another possible answer. So I want to ask you about a case to focus our discussion; to take an American view, you have to do things incrementally.

Let me give you an actual case decided by the *Conseil Constitutionnel* way before you were there, so I am sure you had nothing to do with it. This is one of the broadest provisions. It may be that what you said about statutes perhaps does not apply when you are dealing with broader constitutional norms. But since you are in the *Conseil Constitutionnel* let me take advantage of your experience and ask you this question.

There was a case decided in the 1980s concerning a law in France that made it a crime to have homosexual sex with somebody under eighteen, but it was not a crime to have heterosexual sex with somebody aged fifteen to eighteen. In a very short decision by the *Conseil Constitutionnel*, the judgment utilized the equality clause, saying that equals should be treated equally.

These two relationships are not equal relationships, which is obviously subject to great debate, as in our society we are divided. I am sure French society is divided as to whether or not heterosexual sex and homosexual sex should be treated the same way.

Now I give you this example because is it the truth what the *Conseil Constitutionnel* decided because it decided it? Or is there something that you can explain in terms of the French equality clause that requires this decision? Or is it because it is constitutional law and not strictly speaking statutory law that we can have all these doubts?

Judge Olivier Dutheillet de Lamothe:

First of all, to avoid any confusion about what I explained about the mentality, it applies to the *Conseil d'Etat*, to the *Cour de Cassation*, and to ordinary courts. But it does not apply, of course, to the Constitutional Council. The Constitutional Council is here to review statutes, so it does not have to apply them. As you know, since 1971, we review statutes with regard to substantial law and all the rights and liberties provided by the preamble of the constitution—which itself refers to the declaration of human and civic rights of 1789 and to the preamble of the constitution of 1946—which contains the economic and social rights especially necessary to our time, to quote the preamble itself.

Clearly, even if there is a textual basis, we are in the field where interpretation takes a major place, and that is why comparative constitutionalism is so useful and important for us, because in that field we are very close to the issues which the other Constitutional Court and the Supreme Court are confronted with. We have to interpret what the non-discrimination clause means, what the equality clause means, and so on. So, of course, there is much more room for an interpretation there of the principle.

Now I do not remember precisely the case you were mentioning. I thought there was no decision on homosexual and heterosexual relationships.

Michel Rosenfeld:

The law was held constitutional. By the way, just to follow up on this because part of what you said about the *Conseil d'Etat* seems to work – at least informally – at the level of the *Conseil Constitutionnel*; as I remember it, the decision is a paragraph long. Now there is an issue concerning whether to extend certain rights that heterosexuals have to homosexuals in the Canadian Supreme Court, for instance, and that decision is close to one hundred pages. So, just visually, we have the one paragraph. It is very much what Professor Weiler said where 2 and 2 is 4, 4 and 4 is etc and then with the conclusion. Even though this an incredibly controversial issue in society and very difficult in terms of theories of equality and in terms of philosophical implications and so forth – the decision of the *Conseil Constitutionnel* is extremely brief.

As you well know in general—this may not be known by an American audience—up until fairly recently, those decisions have been incredibly cryptic and completely impossible to understand to a non-French person. I was very relieved that French people do not understand them either.

A common friend of ours, who recently passed away, Louis Favoreu, compiled "*Les grands décisions du Conseil Constitutionnel*." Even if you are a law professor in France, you do not learn very much from a decision of the *Conseil Constitutionnel*, you have to go to this book by the eminent authority. But he thought that clearly you cannot read a decision of the *Conseil Constitutionnel*, at least a past decision, without some kind of commentary; I think you have had a little change. Whereas the first-year law student in the United States can—if he or she does it with intention—read the decision of the United States Supreme Court and understand pretty much what it is about.

Judge Olivier Dutheillet de Lamothe:

No, I partly disagree with this analysis. If you take the French style, the civil code tradition which I described, the deductive reasoning, very short, there are three stages. Since we have three supreme courts—the *Cour de Cassation*, Civil and Criminal Law, the *Conseil d'Etat*, Administrative Law and the Constitutional Council, Constitutional Law. Now the only court which sticks to the tradition that you have just described is the *Cour de Cassation*. It is impossible to understand the scope of a decision of the *Cour de Cassation* just with the decision, and they still stick to the old manner and style: you have a very concise paragraph which settles the point of law. You do have the annex to the decision, the legal argument, but the decision itself is very concise. This is true of the *Cour de Cassation*.

The *Conseil d'Etat* has already made some efforts to be more understandable, but it partly fits with your description. Where I disagree is the Constitutional Council now does not fit the description. It is something between civil law tradition and common law. For example, contrary to the *Conseil d'Etat*

and the *Cour de Cassation*, we explain the arguments in the decision. That is, we say on each point that is raised before us, here is the provision, here are the arguments against it, here are the constitutional provisions which settle the matter, here is how we interpret these constitutional provisions, and finally, we draw the consequences.

Now we try—to the point of honor, that is why I disagree on this last point—to be readable by people. Since we introduced the arguments of the party that makes the referral, we even tried to make it not only in legal terms. Now, if you look closely at the decision, you will see that there are many quotations for the argument; we take the political argument between quotations, so that the people—the journalists, for example—can understand.

Why? That is a very important point. We are under very strong political pressure because all the major political issues come to us. As you know, in our system the statute is referred just after it has been voted and just before it is promulgated. That is, the political debate is white-hot and we have one month to take a decision, a very strong constraint; we cannot use that weapon that all courts in the world use, including the United States Supreme Court, which is time.

The first weapon of any judge around the world is time. For example, in the French judiciary in criminal law, the more sensitive and difficult the case, the more time they take. They make a public hearing one day and they rule the decision six months later, after a cool-down. Now we do not have that because the constitution demands us to make a decision in one month, and so many of our decisions are highly criticized.

When you strike down a statute which is very important for the government, the government is not happy. When you do not strike it down, the opposition which has made the referral is not happy either. So whatever the solution, we take critiques, and since we take critiques, in our modern society we have to be understandable and we have to be understood. Thus, we make terrible efforts to try to be understandable and understood. That is the reason why I do consider, and claim, that our decisions can be read just with the decision.

Professor Joseph Weiler:

When and why did it happen that suddenly the *Conseil Constitutionnel* felt that it had to change the style of its decision and its reasoning to be more transparent and accessible? Presumably, all along you were controversial. So what was the change in modern society? Was it '68? Was it much later? When do you feel suddenly there was this feeling we need to communicate better?

Judge Olivier Dutheillet de Lamothe:

I think the answer is easy. The change came as the Constitutional Council developed its activity as a true constitutional court, which was not at all the case at the beginning.

Before 1971, you are absolutely right, we were on that model, but at that time the Constitutional Council did not play any role in the judiciary or in politics. Now, since 1971, it has decided by his own decision that it will now make constitutional review, not only on the questions of procedure and competence as provided for by the constitution, but on substantive grounds that is rights and liberties. That is quite a different process.

Since the constitutional amendment of 1974, sixty senators can make a referral to us, and a referral to the Constitutional Council has become the main weapon of the opposition in France. And all hot political debates start in Parliament—where it gets very hot—and end before the Constitutional Court. That is the last stage.

Professor Joseph Weiler:

That being the case, in the United States, for example, that is why the issue of who gets to be on the Supreme Court seems to be so critical, because it is the hot political issues that end up in constitutional jurisprudence. How does one get to be on the Constitutional Council?

For example, last week we had Justice Gertrude Luebbe-Wolff from the German Constitutional Council, and she told us something that to American ears might sound strange: that exactly because of the role of the Constitutional Court which you described, in Germany it appeared natural that there is a rotation, one judge nominated by the Social Democrats, the next one nominated by the Christian democrats. They do it responsibly, because it needs two-thirds approval by the legislature, but it is understood that because of the charge it would make sense that the constitutional court judges would reflect the different political forces in society.

So tell us who gets on the Constitutional Council? How does one get to be on the constitutional council and, given that very political function you described, to what extent is the Constitutional Council by terms of its composition—not only the way it writes its judgment—perceived or not perceived to be a legitimate organ to make those decisions?

Judge Olivier Dutheillet de Lamothe:

First, what are the rules? The rules are very simple. There are nine members appointed for nine years on a non-renewable basis. Three by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate. It is purely at their discretion. There is no legal background which is demanded. There is no age limit. Those three major political bodies are free to choose. These are the rules.

Professor Joseph Weiler:

Who appointed you?

Judge Olivier Dutheillet de Lamothe:

The President of the Republic. What has been the practice? Since 1958 when the Council was created, the practice has been to nominate politicians who have ended their career with a very distinguished record, generally former ministers or formal political leaders who have finished their political career, that is, who were generally above 65 or 70, so they spend nine years and then they retire. Now this was the first category; originally there were only this kind of people.

There have been two more categories as time progressed. The first new category was professors of law. There are always one or two professors of law sitting in the court. I just referred to Vedel; he has been a member of the Constitutional Court.

The third category, which is more recent and to which I belong, are professional lawyers. Since the Constitutional Council has developed its role as a court, there are many cases of these appointments. You have, what I would say, professional lawyers, like barristers, judges—like me, for example, I am a member of the *Conseil d'Etat*—or civil servants, but very often with political background and experience.

Next, the question of legitimacy and how it is perceived. First, I must explain that it is a nine-year term, but every three years, three members are renewed. There are nine members. They change every three years so every three years, the President of the Republic, the President of the National Assembly and the President of the Senate appoints one.

This has one great advantage: we have a very active political life and the majority has changed at each general election in France since 1978. It is unthinkable, for example, that in France, like in the United States, President Bush would be reelected, or President Clinton would be reelected. Since 1978, it has never occurred; each majority in power has lost the power at the next general election. This makes for a frequent and swift move politically. You have members who have been appointed by socialist leaders and members who have been appointed by right-wing leaders.

Now, the Council, I think, has slowly but truly acquired true legitimacy in French politics, especially since the 1974 constitutional amendment which—as I explained—was designed by President Giscard d'Estaing to allow the opposition to refer a statute to the council.

The real decisive moment in that respect was 1981, a great date of French politics under the Fifth Republic. It was the first time that the socialists came to power since 1958. They came to power with the Communist party, so it was a very strange and difficult situation. At that moment there was a deputy who had a very famous saying in the house. He said, “You are legally wrong since you are politically a minority.”

I think the true legitimacy of the Council is that this is no longer right. You may be legally right even if you are a political minority; that is what happened when the 1981 shift arrived. He struck down some statutes of the nationalization because there was no proper compensation. So we have reinvented checks and balance with the Constitutional Court and I think – along with the political class reluctantly, but the public opinion much more warmly – that it is progress, and a good thing.

Michel Rosenfeld:

First of all, this is very interesting for an American, as we are confirming Judge Roberts to be Chief Justice for, perhaps, forty years. The idea that you have a window of no more than three years and thus are not out of touch with the political forces is quite interesting.

I was told that depending on political views and on who was on the council, for a long time there was a dispute over different views of the role of the Constitutional Council. It is well known that when Badinter was president he had a vision of the Constitutional Council as a full-fledged constitutional court. But I was told, and I heard him say it himself up to some extent, that when Yves Guena was president of the council, he had a much more modest view of the role of the council and viewed it much more politically, and in a much more limited, narrow framework than Badinter did. Is that true? Does that have an influence on how the council has evolved?

Olivier Dutheillet de Lamothe:

I think that Badinter's view is more near to the reality. There has been a big debate, but what I think is most difficult to understand for Americans is that the idea of constitutional review is totally contrary to all our legal tradition. France is the daughter of Jean- Jacques Rousseau. The very idea that a judge, who has no legitimacy at all, could break down a statute which expresses the general will, as you explained it, which was voted by the parliament which is sovereign, it is a very strange idea and not totally accepted yet.

So what you are referring to: at the beginning of the Fifth Republic there was a big debate whether it was a court or not. The framers of the constitution avoided the word, very deliberately. That is why it is called Constitutional Council and not Constitutional Court. But now all lawyers—and I think all the political class—agree that it has really become a court. There is a very strong legal argument in article 62 of our constitution which says that our decisions are binding for all authorities—political, judicial or administrative. If our decisions are binding for the judiciary—since we are not the parliament, since we are not executive—it can only be a judicial decision.

Professor Weiler:

How long have you been on the Constitutional Council?

Olivier Dutheillet de Lamothe:

I was appointed in 2001. So I am halfway through my term.

Professor Weiler:

Can you tell us the most difficult case that you have faced, and why it was difficult for you?

Olivier Dutheillet de Lamothe:

Probably the most difficult case for me was the first one I had to report. I can tell you—it is not secret because there was a lot of controversy. When I arrived in the Constitutional Court, since I am a specialist of labor law, the president told me, “You are going to take this statute, because it's about labor law.”

Now the problem is that the statute in question gave rise to the hottest political debate of Jospin's government, because, as you know, Lionel Jospin had a very narrow majority and he needed the Communist party. He had an alliance with the Communist party, who imposed on him a strict provision restricting the possibility for a private company to lay off workers. It said the company could only lay off the worker if its existence is at stake, if it is just about to shut down, an incredible position from any point of view. Even the majority of the socialist party, including the Minister of Labor, Madame Guigou, was against that. But Jospin, as you know, was a very political man, and did not care about what companies thought. He had an agreement with the Communist party. He gave them his pledge and so the provision was voted.

I had to report that very hot political debate. We struck down the provision because we said that the legislature had to conciliate two liberties and rights. One is the right to employment: everyone should be entitled to have a job. That is in the constitutional preamble of 1946. The other liberty is the liberty of enterprise, which means that each CEO, chief executive officer, should be able to hire and lay off their workers; you cannot run a company if you are not free to hire or lay off people. So we said the legislature has a responsibility to conciliate this right and this liberty, and by enacting such a narrow, binding provision on the companies, he had made a manifest mistake of appreciation in this conciliation. That was not an easy decision to make; there were a lot of reactions.

Professor Weiler:

Without breaching the confidentiality of the process, was it also difficult to persuade some of your colleagues on the constitutional council that that is the truth?

Olivier Dutheillet de Lamothe:

Not really. I cannot say more. When we gave the decision, it made headlines in all the papers. There were many critics, of course, from the socialist party, who said, “oh, that’s a shame—the communist party said we have to suppress the Constitutional Council. It is not acceptable in a democracy that those nine people can strike down the statute which we the people have voted,” and so on.

I was personally attacked because they knew my name. In principle, the name of the reporter is secret, but that is a poorly enforced rule. President Mitterand said: “The only way to keep a secret is to tell it to nobody.” We have a contradictory procedure; that is, a meeting with government officials. At these meetings, we have ten government officials and they see who the reporter is, of course, because we have to ask them questions—it is no secret anymore.

So that was my first big case, and I was personally attacked. People said, “See, the former collaborator of President Chirac, it is normal that he takes this position,” and that was a difficult time for me. I was very grateful to a law professor that you may know—a socialist professor, Carcassonne. He is a great professor of law, but he has also been involved in politics as an advisor of Michel Rocard. He wrote an article saying, “Look, it is a good ploy to have this provision voted knowing perfectly well that it does not stand from a constitutional point of view and it is going to be struck down. That is politics. You are entitled to do that. I have done it myself when I was with Rocard and so on. What you should not do is then hold it against them when they strike it down effectively.” I was a very grateful friend to him for that.

Michel Rosenfeld:

I have a comparative constitutional question. It sounds that the compromise you struck is very much the way that the German court works, proportionality and all that. Do you look at the foreign decisions when you deal with issues of this kind that must arise in some form or other in other European and even beyond European jurisdiction?

Olivier Dutheillet de Lamothe:

Yes, very much so. I totally agree on both points, an application of the principle of proportionality and the theory of conciliation of rights and liberties. That is, the basic job of the constitutional judge

is either to combine general interest and the defense of liberty or to conciliate two liberties and rights which are conflicting. We do use a lot of comparative law; which is why I am so happy to be here and to have all these exchanges; there is a true global constitutional society, I think.

Professor Weiler:

How does that happen in practice? Is there a service that prepares for you a résumé of the constitutional decision of courts in the United States, in Britain, in Germany, or is it up to the initiative of every member of the court? The looking to the experience of others—is it spontaneous or is it systematized? I know, in this country, it is very controversial.

Olivier Dutheillet de Lamothe:

In France it is not so controversial but it depends on the personality of the reporter and whether he is more or less inclined to look at what the other courts do. We certainly do it in a very systematic way for all the big issues of society. You were referring to homosexual relationships—for example, we had a new statute on abortion. Our legislation has changed. We have looked, of course, to what the U.S. Supreme Court and what the German Constitutional Court have done.

It is fascinating to make this comparison because the two courts started from absolutely opposite points of view. The Supreme Court in the first decision ruled that there is a great liberty of abortion for a long period, and the German court ruled that it is totally forbidden. Both opinions have evolved and now they have come to a very narrow position. The Supreme Court is more severe on the way state legislation can authorize abortion, and the German court has become much more liberal to admit abortion.

When we made that comparison, we realized that with the new rules, especially the period during which you can practice an abortion, we ran the line. We were right in the middle, and we were very happy with that. It is very interesting to see that in three major countries like Germany, the United States and France—and I am sure it is the same thing in many other countries—that you come to similar rulings on an issue as vital and as difficult as this one.

Professor Weiler:

I would like to move on, as we do with all our guests in this series of Global Distinguished Fellows from the judiciary, to ask you some questions which affect society generally. Here is a question that I have asked every visitor from Europe that we have had, and it is interesting to see. We ask about anti-Americanism in Europe. I want to nuance the question a little bit. The feeling is that, as a phenomenon, it is undeniable; is it consequential, and what are its motives?

There are two parts to the question. One is premised on the fact that especially in recent times after the Iraq war, my feeling is that it is not the Iraq war that can explain this outburst of anti-Americanism, but rather that the Iraq war legitimated the expression of anti-Americanism that was already existing. It would be interesting to hear your view on what explains it.

When Valéry Giscard d'Estaing was here a year ago and I asked him this question, it was "*Mais non*, you're exaggerating, it is a trivial phenomenon." I do not think it is trivial, and that is the second part of my question. In fact, I think that if we move to the European level, Europe's quest for

European identity displays a very strong strand in recent years regarding the definition of European identity. In some sense, European identity stems from the notion of how Europe is different and then—in a footnote—how they are superior.

But especially, how Europe is different from the United States. “Unlike the United States, we believe in social solidarity and we do not just leave the market to decide social relations. And they have a death penalty and we do not have a death penalty.” I think the anti-Americanism feeds a little bit into this quest for identity.

So again, when Giscard d’Estaing was here, his message was very optimistic: “We really, profoundly, do belong to the same community of values.” It was very political but also very moving. He was in front of the room talking about the European constitution and he says, “the real fathers of the European constitution are not Giscard d’Estaing or Giuliano Amato, but they are the Americans. It is the American inspiration.”

There is another voice in Europe which says, “No, actually, the notion of belonging to the same community of values was a creature of the Cold War.” It states that it was a convenient thing to say, but now after the Cold War, there are really profound differences; in a remote sense, we have the same community of values, but really, Europe is really quite different.

I have given you many ways in which to tackle this question, and we are very interested in your views.

Olivier Dutheillet de Lamothe:

I will separate very clearly the two parts of the question. First, anti-Americanism and Iraq. I will talk about what little I know of a Franco-American relationship, because I am involved in that. I am presiding over an association which is called the Jefferson Circle, which gathers all the French people who have followed the International Visitors Program. This association was created after September 11th to testify of the solidarity of the French people who followed that program to the American people. I am invested in that relationship and I do not believe in a deep French anti-Americanism.

My perception is that France and America are like an old couple. It has a very affective relationship. Especially on the French side; probably here, it is not a huge issue because it is such a big country and so on. But in France it is very affective, and I often say it is like an old couple. They dispute very often but it does not mean they do not love each other.

I think we have one important thing in common: our two democracies are based on a revolution. That is a big difference with the United Kingdom. Of course, there is this “special relationship” between the United States and the United Kingdom, but there is one strong historical and philosophical link between France and the United States in that both democracies are based on revolution and value that revolution—we consider the French Revolution to have been a good thing, and you consider the American revolution to have been a very good thing. Those revolutions are based on the same intellectual background: the philosophers of the 18th Century: Montesquieu and all those people. The founding fathers of your constitution had read all these authors.

I do think that there is no deep anti-Americanism in France. I think that was obvious last year for the anniversary of the D-Day in 1944. I do not know if you have seen the broadcast, but it was truly

moving. The French people on the spot in Normandy really welcomed the veterans with true emotion. Even given the political circumstances and the relationship with the Bush administration, this emotion was perceivable; I have talked about that with the U.S. Ambassador and he agreed. These were the ordinary people in the street who expressed their gratitude and so on.

We always talk about Iraq but we must not forget that September 11 and Afghanistan were the first two stages, the non-controversial stages, and there was a total agreement and solidarity between France and the United States. I do not want to deny that there is a tension sometimes. But there is a tension with the Bush administration and Iraq. It is not basic, fundamental anti-Americanism in my view.

Now on the second part of your question. I do think that there are two models between the U.S. model and the European model and that here we have a problem of understanding and of adjustment. It is true that the European identity, as long as it emerges—and as we can see it is a very difficult and painful process—is different. There is a focus on the social model and all that. I think this is a true difference, but we have to admit it. We can be friends and allies and do not share the same values, on some subjects at least.

I am a great admirer of Levi Strauss, and he has written a fantastic essay which is called “Race and History” where he explains that civilizations progress as long as they are in contact with other civilizations, either through war, or trade, or cooperation and exchanges. And the day they are no longer in contact with a different civilization, they start to die. And he explains that: he makes a demonstration with the Roman empire, with the Greek civilization and it is quite true. We are certainly different but it may be an asset as well as a drawback. It may be something positive as well as negative, and that is the way I hope it will be.

Professor Weiler:

We have already passed 7.30. I am going to present you with a little present and thank the audience, but before this we have just a few quick questions. When you go on holiday, what is your preferred location?

Olivier Dutheillet de Lamothe:

Well, I go to where my family comes from and that is the central part of France, south of Limoges.

Professor Weiler:

Would you tell us what is your favorite movie, in absolute?

Olivier Dutheillet de Lamothe:

My favorite movie in absolute is probably *La Règle du Jeu*, by Renoir.

Professor Weiler:

You are my generation, so what is your favorite rock?

Olivier Dutheillet de Lamothe:

I am still a great admirer of the Beatles.

Professor Weiler:

That dates us. And a book you would recommend to the people sitting in front? You say this is one book that if you have not read, I think you should read. A novel. Not civil procedure.

Olivier Dutheillet de Lamothe:

I am very fond of American literature, so I am not going to advise you.

Professor Weiler:

Probably, most people here are not American. This is the Global Law School.

Olivier Dutheillet de Lamothe:

Probably “The Crack-Up” by Francis Scott Fitzgerald. That is a fantastic book.

Professor Weiler:

My last question in this series and then the thank-you’s. We have to play to our stereotypes: what is your favorite dish to eat? I am not asking your favorite wine, I am asking your favorite dish to eat.

Olivier Dutheillet de Lamothe:

That is a very difficult question for a French man.

Michel Rosenfeld:

To make it easier, what is your favorite foreign dish?

Olivier Dutheillet de Lamothe:

I like lamb with mint sauce.

Professor Weiler:

On behalf of everybody sitting in the room, I would like to thank you. I would like to present you with this little gift from the Global Law School Program.

Olivier Dutheillet de Lamothe:

Thank you.

Professor Weiler:

It has really been magnificent. We are very grateful that you came here and that you are willing to undress in public and submit yourself to this—it is not the normal academic style of lecture, but in my view it is a bit more interesting. I want to always thank the people that help organize the event, the directors and staff of the Global Law School Program, and last but not least—Michel Rosenfeld and all of you that have come to this event. Thank you very much.