
THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS
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Reith Lecturer: Jonathan Sumption
Lecture 1: Law's Expanding Empire

ANITA ANAND: Welcome to the 2019 BBC Reith Lectures and to the magnificent Middle Temple Hall in central London. This splendid Elizabethan edifice is the centrepiece of one of four Inns of Court which date back to the 14th century and it has been a home to lawyers for hundreds of years. We could think of no more fitting place for this year's lecturer to begin his series about the relationship between the law and politics. Right now, with the world looking as it does, could there be a more timely intervention?

Having spent a career at the Bar, this year's lecturer has been called a man with a "brain the size of a planet." Recently retired as one of Britain's top judges, after sitting in the Supreme Court, he has returned to his primary passion; history. His appropriately forensic accounts of the One Hundred Years War have been widely praised.

Over a series of five lectures he will set out a critique of what he regards as law's expanding empire intruding into every corner of our lives. He will explain why he thinks this is a corroding influence in our democracy and how, and why, we should revive our political system.

Please welcome the BBC 2019 Reith Lecturer Jonathan Sumption.

(AUDIENCE APPLAUSE)

ANITA ANAND: Jonathan, welcome. Now, I did say you were once in full-time academia, a historian, and then you became a Supreme Court Judge. What went wrong?

JONATHAN SUMPTION: Well, there were 37 years between those stages. I started as an academic. I loved being an academic but I was fed up with being broke. The

Supreme Court was an opportunity that I never expected to have, not having served as a full-time judge before, and I was lucky to be coming to the end of my career as a barrister just at the moment when that opportunity became available.

ANITA ANAND: And the opportunities have been extraordinary. You have worked in some of the most famous trials that we, as journalists, have covered in recent years. You represented the Russian billionaire, Roman Abramovich, against the fellow oligarch Boris Berezovsky. You have also represented the British government, Alistair Campbell, the Queen. Just between us, who was the most difficult of all your clients?

JONATHAN SUMPTION: You're trying to get me censored by someone. All clients have special idiosyncrasies. I don't think Alastair Campbell will object if I disclose that he is the only person that I have ever met who can eat spaghetti while talking into a mobile phone.

ANITA ANAND: This series is all about the dangers you feel we're facing because of the rise of law. Some may say that is a strange argument to have when so many of the estates that we once trusted are under attack. The media, sometimes we rank below the spirogyra politicians being introduced all the time, and people look to the law as something that is stable and something that is neutral. Why critique them now?

JONATHAN SUMPTION: Well, the latest Hansard Report on political engagement suggests that judges are somewhere near the top of the list of public confidence and politicians pretty close to the bottom. I don't think that that reputation is really justified. We need to realise, perhaps more acutely than we do, what the political process can contribute to reconciling our differences.

ANITA ANAND: Well, your first lecture is called *Law's Expanding Empire.* Jonathan Sumption, over to you.

(AUDIENCE APPLAUSE)

JONATHAN SUMPTION: In the beginning there was chaos and brute force. A world without law. In the mythology of Ancient Athens, Agamemnon sacrificed his daughter so that the Gods would allow his fleet to sail to Troy. His wife murdered him to avenge the deed and she, in turn, was murdered by her son. Athena, the Goddess of Wisdom, put an end to the cycle of violence by creating a Court to impose a solution in what today we would call the public interest, a solution based on reason, on the experience of human frailty and on fear of the alternative.

In the final part of Aeschylus's great trilogy, the aristea, the Goddess justifies her intervention in the world of mortals with these words, *"Let no man live uncurbed by law or curbed by tyranny."* Now, that was written in the 5th century BC but the message is timeless and it's universal. Law is not just an instrument of corrective or distributive justice, it is an expression of collective values and an alternative to violence and capricious despotism.

It is a vice of some lawyers that they talk about law as if it was a self-contained subject, something to be examined like a laboratory specimen in a test tube, but law does not occupy a world of its own. It is part of a larger system of public decision making. The rest is politics. The politics of ministers and legislators of political parties, of media and

pressure groups, and of the wider electorate.

My subject, in these lectures, is the place of law in public life. The twin themes that I want to explore are the decline of politics and the rise of law to fill the void. What ought to be the role of law in a representative democracy like ours? Is there too much law? Is there, perhaps, too little? Do judges have too much power? What do we mean by the rule of law, the phrase that so readily trips off the tongues of lawyers? Is it, as cynics have sometimes suggested, really no more than a euphemism for the rule of lawyers?

The expanding empire of law is one of the most significant phenomena of our time. This splendid hall has been used by lawyers since it was built four and a-half centuries ago but for most of that time these lawyers had very little to do. Until the 19th century, most human interactions were governed by custom and convention. The law dealt with a narrow range of human problems. It regulated title to property, it enforced contracts, it protected people's lives, their persons, their liberty and their property against arbitrary injury, but that was about all. Today, law penetrates every corner of human life.

The standard modern edition of the English statutes fills about 50 stout volumes, with more than 30 volumes of supplements. In addition, there are currently about 21,000 regulations made by ministers under statutory powers and nearly 12,000 regulations made by the European Union, which will continue to apply unless and until they are repealed or replaced by domestic legislation.

In a single year, ending in May 2010, more than 700 new criminal offences were created, three-quarters of them by government regulation. Now that was, admittedly, a bumper year but the rate of increase continues to be high. On top of that, there is the relentless output of judgments of the Courts, many of them on subjects which were hardly touched by law a century ago.

The powers of the Family Courts now extend to every aspect of the wellbeing of children, which once belonged to the enclosed domain of the home. Complex codes of law enforced by specialised tribunals regulates the world of employment. An elaborate system of administrative law, largely created by judges since the 1960s, governs most aspects of the relations between government and the citizen. The special areas that were once thought to be outside the purview of the Courts, such as foreign policy, the conduct of overseas military operations and the other prerogative powers of the State, have all, one by one, yielded to the power of judges.

Above all, since 2000, a code of legally enforceable human rights has opened up vast new areas to judicial regulation. The impact of these changes can be gauged by the growth of the legal profession. In 1911 there was one solicitor in England for every 3000 inhabitants. Just over a century later, there is about one in 400, a sevenfold increase.

The rule of law is one of the clichés of modern life which tends to be invoked, even by lawyers, without much reflection on what it actually means. The essence of it can be summed up in three points. First, public authorities have no power to coerce us, except what the law gives them. Secondly, people must have the minimum of basic legal rights. One can argue about what those rights should be but they must at least include the protection from physical violence and from arbitrary interference with life, liberty and property. Without these, social existence is no more than a crude contest in the deployment of force. Thirdly,

there must be access to independent judges to vindicate these rights to administer the criminal law and to enforce the limits of State power.

At least as important as these, however, is a clear understanding of what the rule of law does not mean. It does not mean that every human problem and every moral dilemma calls for a legal solution. So why has this vast expansion in the domain of law happened? The fundamental reason is the arrival of a broadly based democracy between the 1860s and the 1920s. Mass involvement in public affairs has inevitably led to rising demands of the State as a provider of amenities, as a guarantor of minimum standards of security and as a regulator of economic activity.

Optimism about what collective action can achieve is natural to social animals. Law is the prime instrument of collective action and rising expectations of the State naturally lead to calls for legal solutions. In some areas a legal solution is dictated by the nature of the problem. Take, for example, the unwelcome side effects of technological and economic change, what economists call externalities. Industrial sickness and injury, pollution, monopoly, climate change, to name only some of the more obvious ones. Economic growth is the spontaneous creation of numberless individuals but spontaneous action cannot address the unwanted collective costs that go with it. Only the State can do that. So we have laws against cartels, against pollution and so on.

But there are other areas where the intervention of law is not forced on us, it's a collective choice. It reflects pervasive changes in our outlook. I want to draw attention to two of these changes which have, I think, contributed a great deal to the expansion of law's empire. One of them is a growing moral and social absolutism which looks to law to produce conformity. The other is the constant quest for greater security and reduce risk in our daily lives. Let's look first at law as a means of imposing conformity. This was once regarded as one of its prime functions.

The law regulated religious worship until the 18th century. It discriminated between different religious denominations until the 19th century. It regulated private and consensual sexual relations until quite recently. Homosexual acts were criminal until 1967. Today the law has almost entirely withdrawn from all of these areas. Indeed, it's moved to the opposite extreme and banned the discrimination that was once compulsory.

Yet, in other respects, we have moved back to the much older idea that law exists to impose conformity. We live in a censorious age, more so perhaps than at any time since the evangelical movement transformed the moral sensibilities of the Victorians. Liberal voices in England, in Victorian Britain, like John Stuart Mill, were already protesting against the implications for personal liberty. Law, Mill argued, exists to protect us from harm and not to recruit us to moral conformity. Yet, today, a hectoring press can discharge an avalanche of public scorn and abuse on anybody who steps out of line.

Social media encourage a resort to easy answers and generate a powerful herd instinct which suppresses, not just dissent but even doubt and nuance. Public and even private solecisms can destroy a person's career. Advertisers pressurise editors not to publish controversial pieces and editors can be sacked for persisting. Student organisations can prevent unorthodox speakers from being heard. These things have made the pressure to conform far more intense than it ever was in Mill's day.

It is the same mentality which looks to law to regulate areas of life that once belonged exclusively to the domain of personal judgment. We are a lot less ready than we were to respect the autonomy of individual choices. We tend to regard social and moral values as belonging to the community as a whole, as matters for collective and not personal decision.

Two years ago the Courts and the press were much exercised with the case of Charlie Gard, a baby who had been born with a rare and fatal genetic disease. The medical advice was that there was no appreciable chance of improvement. The hospital where he was being treated applied to the High Court for permission to withdraw treatment and allow him to die. The parents rejected the medical advice. They wanted to take him out of the hands of the NHS and move him to the United States so that he could receive an untested experimental treatment there.

The American specialist thought that the chances of improvement were small but better than zero. The parents wanted to take the chance. Unusually, they had raised the money by crowd funding and they were able to pay for the cost without resorting to public funds. This was a case that raised a difficult combination of moral judgement and pragmatic welfare considerations. The Courts authorised the hospital to withdraw therapeutic treatment and the child died.

Now, there are two striking features of this story. The first is that although the decision whether to continue treatment was a matter of clinical judgment, the clinicians involved were unwilling to make that judgment on their own, as I suspect that they would have done a generation before. They wanted the endorsement of a judge. This was not because judges were thought to have any special clinical or moral qualifications that the doctors lacked, it was because judges have a power of absolution. By passing the matter to the Courts, the doctors sheltered themselves from legal liability.

Now, that is an entirely understandable instinct. Doctors do not want to run the risk of being sued or prosecuted, however confident they may be of their judgment, but the risk of being sued or being prosecuted only existed because we have come to regard these terrible human dilemmas as the proper domain of law.

The second feature of the case is perhaps even more striking. The Courts ruled that not only should the hospital be entitled to withdraw therapeutic treatment but the parents should not be permitted to take the chance of a cure elsewhere. It wasn't suggested that moving him to the United States and treating him there would actually worsen his condition, although it would obviously have prolonged it, the parents' judgment seems to have been within the broad range of judgments which responsible and caring parents could make. Yet in law it was ultimately a matter for an organ of the State, namely the family division of the High Court. The parents' decision was, so to speak, nationalised.

Now, I should make it clear that I am not criticising this decision for a moment. I merely point out that it would probably have been a different decision a generation before, even if the question had reached the Courts, which it would probably not have done. Now, I cite this agonising case because although its facts are unusual, it is illustrative of a more general tendency of law. Rules of law and the discretionary powers which the law confers on judges, limits the scope for autonomous decision making by individuals. They cut down the area within which citizens take personal responsibility for their own destinations and

those of their families.

Now, of course, the law has always done this in some areas. The classic liberal position, again, it was John Stuart Mill who expressed it best, is that we have to distinguish between those acts which affect other people, and are therefore proper matters for legal regulation, and those which affect only the actor, in which case they belong to his personal space. So we criminalise murder, rape, theft and fraud, we say that the morality of these acts is not something that should be left to the conscience of every individual. Not only are they harmful to others but there is an almost complete consensus that they are morally wrong. What is new is the growing tendency for law to regulate human choices even in cases where they do no harm to others and there is no consensus about their morality.

A good example is provided by some recent animal welfare legislation. Take fur farming. England and Scotland, in common with some other European countries, have over the last few years banned fur farming. The reason is not that the farming and humane slaughter of furry animals for human use is itself objectionable, most people accept that rearing and killing animals for food, for example, is morally acceptable but we don't eat beavers or minks. The sole reason for farming them is their fur. The idea behind the statutory ban is that the desire to wear a beaver hat or a mink coat is not a morally sufficient reason for killing animals, whereas a desire to eat them would be. Yet many people would disagree with that judgment. Some of them are happy to wear fur, even if others disagree, but Parliament has decreed that fur farming is not a matter on which they should be allowed to make their own moral judgments. Similar points could be made about the extremely elaborate legislation which now regulates the docking of dogs' tails. It allows the practice where it has a utilitarian value, for working dogs, for example, but not where it's only value is aesthetic, for household pets or for dog shows.

Now, I don't want to get into an argument about the rights or wrongs of laws like these, I'm genuinely neutral about that. The point that I am making is a different one. These laws are addressed to moral issues on which people hold a variety of different views but the law regulates their choices on the principle that there ought to be only one collective moral judgment and not a multiplicity of individual ones. Now, that tells us something about the changing attitude of our society to law. It marks the expansion of the public space at the expense of the private space that was once thought sacrosanct. Even where there are no compelling welfare considerations involved, we resort to law to impose uniform solutions in areas where we once contemplated a diversity of judgment and behaviour. We are afraid to let people be guided by their own moral judgments in case they arrive at judgments which we do not agree with.

Let us now turn to the other major factor behind the growing public appetite for legal rules, namely the quest for greater security and reduced risk. This is particularly important in the areas of public order, health and safety, employment and consumer protection, which are the areas that present the main risks to our wellbeing and account for a high proportion of modern law making. People sometimes speak as if the elimination of risk to life, health and wellbeing was an absolute value but we don't really act on that principle, either in our own lives or in our collective arrangements.

Think about road accidents. They are, by far, the largest source of accidental, physical injury in this country. We could almost completely eliminate them by reviving the Locomotive Act of 1865 which limited the speed of motorised vehicles to 4 miles an hour in

the country and 2 in towns. Today, we allow faster speeds than that, although we know for certain that it will mean many more people being killed or injured, and we do this because total safety would be too inconvenient. Difficult as it is to say so, hundreds of deaths on the roads and thousands of crippling injuries are thought to be a price worth paying for the ability to get around quicker and more comfortably. So, eliminating risk is not an absolute value, it's a question of degree.

Some years ago the Courts had to deal with the case of a young man who had broken his neck by diving into a shallow lake at a well-known beauty spot. He was paralysed for life. The local authority was sued for negligence. They had put up warning notices but his case was that since they knew that people were apt to ignore these warning notices, they should have taken steps to close off the lake altogether. The Court of Appeal agreed with that. But when the case reached the House of Lords the judges pointed out that there was a price to be paid for protecting this young man from his own folly. The price was the loss of liberty which would be suffered by the great majority of people who enjoyed visiting the lake and were sensible enough to do it safely.

The law lords had put their finger on a wider dilemma. Every time that a public authority is blamed for failing to prevent some tragedy like this, it will tend to respond by restricting the liberty of the public at large in order to deprive them of the opportunity to harm themselves. It's the only sure way to deflect criticism. Every time that we criticise social workers for failing to stop some terrible instance of child abuse we are, in effect, inviting them to intervene more readily in the lives of innocent parents in case their children too may be at risk.

The law can enhance personal security but its protection comes at a price and it can be a heavy one. We arrive, therefore, at one of the supreme ironies of modern life. We have expanded the range of individual rights, while at the same time drastically curtailing the scope of individual choice. Dilemmas of this sort have existed for centuries. What has changed in recent years is the degree of risk that people are prepared to tolerate in their lives. Unlike our forebears, we are no longer willing to accept the wheel of fortune as an ordinary incident of human existence.

We regard physical, financial and emotional security not just as a normal state of affairs but as an entitlement. Some people will welcome this change. Others will deplore it. Most of us probably take different views about it at different moments of our lives but none of us should be surprised. It is a rational response to important changes in our world. Improvements in the technical competence of humanity have given us much more influence over our own and other people's wellbeing but they have not been matched by corresponding improvements in our moral sensibilities or our solicitude for our neighbours.

Misfortunes, which seemed unavoidable to our ancestors, seem eminently avoidable to us. Once they are seen to be avoidable consequences of human agency, they tend to become a proper subject for the attribution of legal responsibility. So, after every disaster we are apt to think that the law must either have been broken or be insufficiently robust. We look for a legal remedy, a lawsuit, a criminal prosecution or more legislation. "There ought to be a law against it," is the universal cry. Usually there is or soon will be.

Of course, the law doesn't in fact provide a solution for every misfortune. It expects people, within limits, to look after their own interests. It assumes that some risks may have

to be accepted because the social and economic costs of eliminating them are just too high. However, public expectations are a powerful motor of legal development. Judges don't decide cases in accordance with the state of public opinion but it is their duty to take account of the values of the society which they serve. Risk aversion has become one of the most powerful of those values and is a growing influence in the development of the law.

These gradual changes in our collective attitudes have important implications for the way that we govern ourselves. We cannot have more law without more State power to apply it. The great 17th century political philosopher, Thomas Hobbs, believed that political communities surrendered their liberty to an absolute monarch in return for security. Hobbs has very few followers today but modern societies have gone a long way towards justifying his theories. We have made a leviathan of the State, expanding and harnessing its power in order to reduce the risks that threaten our wellbeing. The 17th century may have abolished absolute monarchy but the 20th century created absolute democracy in its place.

How to limit and control the power of the State is an evergreen question. A modern State's monopoly of organised force and its growing technical capacity have made it a more urgent question for our age than it ever was for our ancestors, but the nature of the debate is inevitably different in a democracy. Our ancestors looked upon the State as an autonomous power embodied in a powerful monarch and his ministers. It was natural for them to talk about relations between the State and its citizens in us and them terms but in a democracy the State is not other, it is not either with us or against us, it is us, which is why most of us are so ambivalent about it. We resent its power, we object to its intrusiveness, we criticise the arrogance of some of its agents and spokesmen but our collective expectations depend for their fulfilment on its persistent intervention in almost every area of our lives. We don't like it but we want it. The danger is that the demands of democratic majorities for State action may take forms which are profoundly objectionable, even oppressive, to individuals or to whole sectors of our society.

In the next lecture I shall turn to the challenge of taming the leviathan, of controlling the actions of the democratic State.

(AUDIENCE APPLAUSE)

ANITA ANAND: Jonathan, thank you very much indeed. We're going to open this up for questions in just a moment from our audience here at Middle Temple but one thought that I had when I was hearing you speak, the expansion of law, surely isn't that just a natural consequence of a more complex society? You know, we have more lawyers but we also have more accountants, we have more actuaries, more of us, doesn't this just show that we live in a more complicated service economy?

JONATHAN SUMPTION: I'm sure that we do but we still have a choice as to whereabouts, and quite a broad spectrum, we place the intrusiveness of law and of the State. My point is that in areas where we do have a choice, we have opted for the more intrusive end of the scale.

ANITA ANAND: Okay. Let's, first of all, take a question here.

NICK HARDWICK: Hello, I'm Nick Hardwick from Royal Holloway University of London. If it is the case, as you suggest, that lots of people think that the State can and

should prevent some of the public tragedies that occur, does it not also follow from that that if they fail to do so, that there is some individual to blame and don't the interests of justice require those individuals to be held accountable or does that increase the kind of risk averse behaviour by public officials that maybe have a whole set of untoward consequences?

JONATHAN SUMPTION: I fundamentally disagree with your view about that. I think that it is one thing to say that we need a system of regulation which reduces risk - we want such a system, there's absolutely no doubt about that - and it's another thing to conclude that someone is to blame whenever it breaks down. All human institutions break down at the margins, all of them, and of course there's a large element of judgment in deciding where to pitch the standard of care. You can pitch it at a level which would be extremely effective but unpleasantly intrusive. You can pitch it at a level which is so low as to be ineffective. I think most of us believe that it should be somewhere in between. But I don't think that the exercise of reducing risk is a tool assisted by the search for scapegoats or for objects of vengeance.

ANN WHALEY: My name is Ann Whaley from Chalfont St Peter in Buckinghamshire. Lord Sumption, you criticised the expansion of the law into areas that have historically been the remit of politicians but when we have a broken law that is causing a great deal of suffering to many people, where else do we turn to but the Courts if politicians refuse to act? The blanket ban on assisted dying is one example. It forced my husband Geoffrey to make the difficult decision to travel to Dignitas in Switzerland earlier this year. He was dying of motor neurone disease and simply wanted to avoid the final agonising weeks that lay ahead. I helped him by arranging his final flight and accompaniment. By doing this I was criminally accused by an anonymous notification of our plans and I was interviewed under caution.

We were terrified that Geoff might be stopped from travelling or that I might be arrested. The investigation was eventually dropped but the police intrusion into our lives devastated our family. The current law on assisted dying is not working and a huge majority of the public wants to see a change.

ANITA ANAND: Okay. Let – do you mind if I just put that to Jonathan Sumption?

JONATHAN SUMPTION: I entirely understand the concern that you have but I think that what I would not accept was that it necessarily means that decisions on these matters have to be made by judges. The problem is that this is a major moral issue and it is an issue on which, although you say that the public is overwhelmingly in favour, a lot of polling evidence suggests that that rather depends on the degree of detail which goes into the asking of the question. But on any view, this is a subject on which people have strong moral values and on which they disagree. There is a large number of people who feel – I'm not expressing my own opinion, I am simply pointing out that there are many people who feel – that a - changing the law so as to allow assisted suicide would render large numbers of people vulnerable to unseen pressures from relatives and so on. There are others who feel that the intervention of somebody in the life of another so as to end it is morally objectionable.

Now, the question that one has to ask is how do we resolve a disagreement like that? It seems to me that where there is a difference of opinion within a democratic community we need a political process in order to resolve it.

ANITA ANAND: May – may I ask you a question? I'm going to come back to you. Even though you're retired, you seem very unwilling to state what you feel and what you think.

JONATHAN SUMPTION: I'll tell you exactly what I think about this. I think that the law should continue to criminalise assistance in suicide and I think that the law should be broken. I think that it should be broken from time to time. We need to have a law against it in order to prevent abuse but it has always been the case that this has been criminal and it has always been the case that courageous relatives and friends have helped people to die, and I think that that is an untidy compromise of the sort that I suspect very few lawyers would adopt, but I don't believe that there is necessarily a moral obligation to obey the law and, ultimately, it is something that each person has to decide within his own conscience. That – that's something that I think. That is where it ought to be decided.

ANITA ANAND: I am very grateful that you answered that with as much candour. Can I just go back to the person that raised the question?

ANN WHALEY: Me.

ANITA ANAND: How do you react to the point that was made by Jonathan, which is don't change the law but break the law, which is essentially what he said?

ANN WHALEY: No. The law needs an adaption. I thoroughly agree with Lord Sumption that there has to be a law against suicide.

ANITA ANAND: Okay.

ANN WHALEY: There's two points. The fact that somebody assisting obviously has to be covered.

ANITA ANAND: Yes.

ANN WHALEY: But there's a compassionate point as well, which should be not that I should have had to go through caution and all that time before the case was obviously finally dropped, and the second point is the law can be adapted to accommodate those of sound mind with a terminal illness who've had – and it can be proved, psychiatrically, that there is no – no pressure from anybody and my husband had to go through a great deal to prove this himself.

ANITA ANAND: Thank you so much. Thank you very much for sharing a very personal and, I appreciate, a very painful case with us. Yes, over here?

HELENA KENNEDY: Helena Kennedy. I'm a barrister, member of the House of Lords. Lord Sumption, I think that you're rather nostalgic about the past and that you see it through rather rose-tinted glasses. One of the things that has happened is that people have actually turned to the Courts to deal with abuses of power and that has been a very important development, and so the expansion of law has actually been a good thing because many people are able to take their claims to the Courts and the Courts are the right place to take them, otherwise we would have either people feeling totally disempowered or they

would take to, perhaps, the streets instead.

JONATHAN SUMPTION: Your question assumes that I am opposed to the expansion of the domain of law. All that I am doing is pointing out that it has expanded, and the reason why I'm doing that is to try and explain why it is that law has acquired a greater space in our lives and in order to explain why we have enormously empowered the State in ways that, I quite agree with you, do need to be controlled. Whether law is the best way of doing that is one which I propose to deal with in the second and third lectures in this series.

PATRICK O'CONNOR: Patrick O'Connor, barrister. Lord Sumption, you do suggest that the expanded scope of the law has restricted personal liberty and there was more than a whiff of nostalgia, your mentioning an earlier society featuring custom convention and personal autonomy, so perhaps there was a little bit of a tease in your answering Helena Kennedy. I think you are taking an implicit position here which will no doubt become clearer in the next lectures. In fact, people in that earlier society before the law had little effective freedom, didn't they, not least because of unrestrained power and exploitation in the marketplace and in politics?

You do seem, in some of your statements, to be uncomfortable with the rise of broad democracy and the welfare state. You wrote in your book *Equality*, and I quote, "It is more comforting to think that one is poor because one belongs to the class whose lot it is to be poor." Now, your view that the law should be a separate thing from social justice is simply tired, old near-liberal dogma, isn't it, taken straight from F A Hayek. So what practical proposal do you have today for how the law should disengage from involvement with sustaining social justice, because without such a proposal, are you not just whistling in the wind?

JONATHAN SUMPTION: I greatly admire the psychological penetration with which you claim to have analysed my true views when I haven't actually expressed them. I do not feel the slightest nostalgia for the earlier period. I have not said so and what you claim to have detected in my tone of voice is simply not there.

ANITA ANAND: Let's – let's take a-----

(AUDIENCE APPLAUSE)

ANITA ANAND: Let's take a question from the gentleman there?

IMRAN KHAN: Imran Khan, lawyer, not cricketer turned politician, just to be clear. Referring to the issue of law as a blunt instrument, I don't know whether you'd agree, the state through its politicians, notably, set the tone and tenor of how society operates and oftentimes, and I'm talking particularly recent times, certain communities, minority communities, are targeted and vilified. And it seems to me, from my professional work, that the only way to provide the rights to those minority communities is through the application and the use of the law, particularly because it has principles of natural justice and fairness and rights, and I wonder whether I could get your comments on that, please?

JONATHAN SUMPTION: Well, there's nothing that you have said that I would disagree with, although, I mean, you speak generally of rights and an enormous amount depends on the particular right that you are talking about. There are many rights which are

absolutely properly embodied in some kind of entrenched form, as with our Human Rights Act. There are other rights which lend themselves much less well to that kind of treatment. I think one needs to be a great deal more specific.

ANITA ANAND: Did you want to be more specific?

IMRAN KHAN: Yes. It's really about the use of the law in order to promote the rights of minorities. The only way to get the rights of those individuals and protect that community which is, by its very nature, a minority community and a vulnerable community, it's only the use of the law that you can achieve positive rights or the rights for the – that section of society. That is not, it seems to me, a blunt instrument.

JONATHAN SUMPTION: Well, it would depend on what law you're talking about. I mean law, essentially, operates on ordinary citizens through criminal sanctions. It operates on governmental ministers and officials through the device of quashing their decisions. I think that there are times when the only way in which you can achieve a result is to go in for a measure of overkill, so I'm certainly not saying that blunt instruments are wrong in all cases.

ANITA ANAND: A law against holocaust denial, how do you feel about that? Jonathan?

JONATHAN SUMPTION: I would be opposed to a law against holocaust denial because I think that there is absolutely no nonsense - with one exception and I'll come to it – there is no nonsense that people should not be allowed to spout if they are foolish enough to want to do so. The exception that I would make is that free speech is perfectly legitimately curtailed in circumstances where it would lead reasonable people, or reasonable groups, to violence and that's, broadly, the position that the law does take. But the idea that one should actually criminalise, as many European countries do, the expression of opinions simply because they are rubbish, strikes me as – as repellent.

ANITA ANAND: Yes, a question over here. Thank you.

SAILESH MEHTA: Sailesh Mehta, barrister. Are the politics of judges becoming more and more important for us to know about?

JONATHAN SUMPTION: A short answer to your question is that I think that it would be a very bad idea to vet the politics of judges. The oddity is that the – the rule we currently have is there's nothing wrong with judges having an opinion but there is something wrong when they're expressing it or allowing it to become known. Now, that might be thought not a particularly logical state of affairs but pragmatically it works in a sensible way. It means that judges do not make public statements which diminish the confidence that litigants and others will have in their decisions.

One of the problems that I have, and it's something that I want to expand on in future lectures in this series, is that there are some issues that are put before judges for decision which are, frankly, impossible, areas where it's impossible for them not to be influenced by their opinions, because they are questions which really are not so much what is the law but what should the law be. It is very difficult to answer the question what should the law be without expressing an opinion of your own on the subject.

BEN DEAN: Ben Dean, I'm not a lawyer but I am a fan of Ally McBeal. If there were a number of people who were described in a newspaper as being "the enemies of the people", do you welcome that as a great expression of the freedom of the press or are you worried about the political and public pressure being placed on senior lawyers?

JONATHAN SUMPTION: I think that the criticism on that headline of the divisional court in the Miller case was, frankly, absurd. One of the interesting things was that when the case came to the Supreme Court there was no criticism along those lines and I think that the main reason for that was that the proceedings were broadcast. It was quite obvious to anybody who listened into extracts on the news or parts of the actual webcast that this was actually a dispute about law. However, there is another aspect of this which is that it is a traditional function of ministers to defend judges from abuse of that kind and that was a duty which the ministers involved, lamentably, failed to perform.

ANITA ANAND: Thank you very much. I have a supplementary. Do you know who Ally McBeal is?

JONATHAN SUMPTION: No.

ANITA ANAND: Okay. Question from the front.

JONATHAN SUMPTION: Aren't you going to tell me?

ANITA ANAND: Oh, yes. She's a lawyer in an American drama serial that went on forever.

JONATHAN SUMPTION: Okay. Right.

ANITA ANAND: Okay. I just wanted to go back to that very interesting question that we had here about the judges being described as saboteurs in a – in a newspaper, and you said that there was a lamentable failure from those who are in politics to do their duty, which was to protect judges. I notice that we have two former politicians. Malcolm Rifkind and Edward Garnier are both here. Do you recognise that characterisation?

EDWARD GARNIER: Well, I saw it happen. There was, as Lord Sumption says, a lamentable failure of the government, or the relevant ministers, to protect the judges who had been pilloried. The problem, it seems to me, and I spent 25 years in the House of Commons before being booted upstairs, is that there is a failure of understanding of the role that the law and the judiciary play in the constitution by members of Parliament and that's why we get these sorts of eruptions. A hundred years ago the Lord Chancellor would have been hot on that. Nowadays they don't seem to understand what the point of it is.

JILL RUTTER: Hello. I'm Jill Rutter from the Institute for Government. I want to ask a slightly different question, because you've talked about the borderline between law and politics and I want to talk about lawyers and politicians. Very often when politicians are presented with a, sort of, intractable problem or a crisis, their immediate reaction is to default to what we call a judge-led inquiry. The problem is too difficult, it's too toxic, too controversial for politicians to sort out and so we grasp for a judge, knowing slightly that that will mean that there's quite a long time before the issue comes back and they may very

well have moved on. But I wonder whether you've thought that we, the people in government, resorted too often to judge-led inquiries, whether you yourself thought that that was a good way of resolving some of these issues, whether we look at, sort of, Leveson, Bloody Sunday, lots of these sorts of really difficult issues? Is that right? When should people do it and when should actually politicians just say no, actually, this is something we politicians need to sort out?

JONATHAN SUMPTION: It depends wholly on the – on the issue which the inquiry is looking at. I – I'm inclined to agree that there are some inquiries, and it may be that Sir Brian Leveson's inquiry was one of them, which basically raised questions of political judgment on which the conclusions of a judge conducting an inquiry are simply not likely to be very helpful, as one can see from the fact that Sir Brian Leveson's recommendations were largely ignored, and the second part of his inquiry, which was going to trespass on more sensitive aspects of the relations between the press and the state, was dropped. The reason for that was that ultimately the politicians were unwilling to take the risk of having the second part of the inquiry, they'd rather decide it themselves.

To my mind, it is such an intensely political question, how far you regulate the press, that it would seem to me that it's a matter on which members of Parliament and ministers should make their own mind up but there are clearly many other inquiries where you need a substantial amount of information in order to make a sensible judgment. There are also, of course, inquiries into what I can loosely call scandals, so Matrix Churchill, for instance, where nothing short of an inquiry independent of government would have performed the essential function of reassuring the public that this had been properly looked into.

ANITA ANAND: We have time for one more question and there's a gentleman there who's been incredibly patient. So let us go to you, sir.

IMRAN KHAN: Good evening. My name's also Imran Khan. I'm not that one or that one. I'd like to stay on this theme of the law in Parliament because, Lord Sumption, I feel like you've described the law as a slightly inert, maybe even hapless bystander, as society and Parliament have stepped back and – and the law has, sort of, stepped up to do its job and I wonder if that's entirely fair? If you look at the House of Commons, for instance, about one in six or one in seven of its members are lawyers, which vastly outnumbers their proportion in society and certainly outnumbers their proportion of, let's say, social workers or doctors or scientists, and maybe part of the antidote to the phenomenon you're describing is lawyers, perhaps, backing off and then letting the rest of our diverse society have more of a say in how we're governed?

JONATHAN SUMPTION: Yes. I mean, lawyers have always been the largest professional constituency in the House of Commons, and they still are, but there is one big difference, which is that the number of practicing lawyers in the House of Commons is tiny. In fact, I think that Geoffrey Cox, before he became Attorney General, was probably the only one. There may be one or two others. They are all non-practitioners. Some of them have never practiced. I don't see any sign of a particular legal mentality surfacing from that area of the House of Commons. Maybe if it did we would have fewer conflicts of the kind which my next three lectures will be concerned with.

ANITA ANAND: Well, unless the real Imran Khan wants to step up and ask a question, we're going to have to leave it there. Next time we are going to be in Birmingham

where Jonathan will be addressing how best democracy can accommodate political difference, a theme currently dominating British national life, but for now, our thanks to our hosts here at Middle Temple, to our audience and, of course, to the Reith Lecturer for 2019, Jonathan Sumption.

(AUDIENCE APPLAUSE)

TRANSCRIPT ENDS

THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS
TX: 28.05.2019 0900-1000
Reith Lecturer: Jonathan Sumption
Lecture 2: In Praise of Politics

ANITA ANAND: Welcome to the second of the 2019 BBC Reith Lectures with the former Supreme Court Judge, Jonathan Sumption. We're in England's second city at the University of Birmingham's Bramall Music Hall, a beautiful modern addition to this famous old red brick campus.

Our speaker this year began his series by raising concerns about the law's growing influence over public life. He suggested that this expansion may not be good for democratic life. Now, he develops this idea further, turning his attention to some fundamental issues which underpin democracy, how the State acquires and builds legitimacy and, mindful of recent events, how democracy accommodates difference, difference of opinion and experience. This, he believes, is the job of politicians, not of judges.

Will you please welcome the 2019 BBC Lecturer Jonathan Sumption. The lecture is called In Praise of Politics.

(AUDIENCE APPLAUSE)

JONATHAN SUMPTION: The 18th century sage, Dr Samuel Johnson, thought that politicians were only in it out of vanity and ambition. Mark Twain believed that they were corrupt, as well as thick. George Orwell famously dismissed the world of politics as 'a mass of lies, evasions, folly, hatred and schizophrenia.' Statements like these are timeless clichés, faithfully reflecting the received opinion of every age, including our own.

So, the title of this lecture may sound provocative, at least I hope so, because I want to make the case for the political process with all its imperfections. I argued in my last lecture that the quest for protection from perceived threats to our values and wellbeing had

immeasurably expanded the role of the State in our lives. In a democracy the State, with its immense potential, for both good and ill, is ultimately in the hands of electoral majorities, hence comes the great dilemma of modern democracy, how do we control the potentially oppressive power of democratic majorities without undermining democracy itself?

Let us start with some basic questions. Why do people obey the State? Fear of punishment is only part of the answer and not even the main part. Fundamentally, we obey the State because we acknowledge its legitimacy. Legitimacy is a vital but elusive concept in human affairs and it is a large part of what these lectures are about. Legitimacy is less than law but it is more than opinion. It's a collective instinct that we owe it to each other to accept the authority of our institutions, even when we don't like what they are doing. It depends on an unspoken sense that we are in it together. It's the result of common historical attachments, of language, place and culture. In short, of collective identity. But even in an age when collective identities are under strain, legitimacy is still the basis of all consent for in spite of its immense power, the modern State depends, on a large measure, of tacit consent.

The sudden collapse of the communist governments of Eastern Europe at the end of the last century was a sobering lesson in the importance of legitimacy. Even in a totalitarian State, civil government breaks down at the point where tacit consent fails and ideology cannot fill the gap. If that was true of the party dictatorships of Eastern Europe with their intimidating apparatus of social control, then how much more is it true of a relatively free society such as ours?

The legitimacy of State action in a democracy depends on a general acceptance of its decision-making processes, not necessarily of the decisions themselves but of the method of making them. A free society comprises countless individuals and groups with conflicting opinions and interests. The first task of any political system is to accommodate these differences so that people can live together in a single community without the systematic application of force.

Democracies operate on the implicit basis that although the majority has authorised policies which a minority deplores, these differences are transcended by their common acceptance of the legitimacy of its decision-making processes. Self-evidently, majority rule is the basic principle of democracy but that only means that a majority is enough to authorise the State's acts. It isn't enough to make them legitimate. That is because majority rule is no more than a rule of decision. It does nothing to accommodate our differences, it simply restates them in numerical terms.

A democracy cannot operate on the basis that a bare majority takes a hundred percent of the political spoils. If it did, it would harbour large and permanently disaffected groups in their midst who had no common bonds to transcend their differences with the majority. A State based on that principle would quickly cease to be a political community at all. That is why all democracies have evolved methods of limiting or diluting the power of majorities. I'm going to talk about two of them. They are, really, the only two that matter. One of them is representative politics and the other is law.

This city has a good claim to be the birthplace of representative politics. In the lead up to the great Reform Bill of 1832, Thomas Atwood and the Birmingham Political Union were at the heart of the campaign for parliamentary representation across the whole of

Britain. Today, we could in theory abolish representative politics. In fact, we could abolish politics as we know it. For the first time since the whole citizenry of Ancient Athens gathered together in the Agora to transact public business, it would now be technically feasible for the electorate to vote directly on every measure. In fact, no democracy works like that. They act through elected legislatures. They do this not just for reasons of practicality but on principle.

In one of his contributions to the federalist papers James Madison, the chief draftsman of the US Constitution, gave what is still the classic justification for the representative principle. A chosen body of citizens was less likely to sacrifice the true interests of the country to short term considerations, unthinking impulses or sectional interests. 'Under such a regulation,' he wrote, 'it may well happen that the public voice pronounced by the representatives of the people will be more consonant to the public good than if pronounced by the people themselves.'

In England, Madison's contemporary, the politician and philosopher Edmund Burke, carried this idea further. 'Parliament,' he said, 'was not a congress of ambassadors. Its members were there to represent the national interest and not the opinions of their constituents.' Now, this might view might be called elitist, and so it is, but political elites have their uses. Professional politicians can fairly be expected to bring to their work a more reflective approach, a broader outlook and a lot more information than their electors, but there is also a more fundamental point. Nations have collective interests which extend over a longer time scale and a wider geographical range than are ever likely to be reflected in the public opinion of the moment.

Today, for example, we face issues such as climate change, on which the interests of future generations differ radically from those of the current electorate. There are other issues on which the opinions of England, which is electorally dominant, differ from those of Scotland, Wales or Northern Ireland. Brexit is an issue which raises both of these difficulties. It was the 18th century political philosopher David Hume who first pointed out what he called the 'incurable narrowness of soul that makes people prefer the immediate to the remote.' If we are to avoid the same narrowness of soul, we have to take a view of the national interest which transcends snapshots of the current state of electoral opinion.

Historically, representative politics has been by far the most effective way of doing this, while at the same time accommodating the differences among our people. This is mainly because of the pivotal role of those much maligned institutions, political parties. Political parties are the creatures of mass democracy. Writing at the end of the 19th century, when mass democracy was a new phenomenon, the great constitutional lawyer, AV Dicey, regarded them as conspiracies which sacrificed the public interest to sectional interests, and that is still a widely held view but experience has, I think, proved it to be wrong.

Political parties have not usually been monolithic groups, they have been coalitions of opinion, united by a loose consistency of outlook and the desire to win elections. Politics is a marketplace. To achieve a critical size and to command the parliamentary majority, parties have traditionally had to bid for support from a highly diverse body of MPs and an even more diverse electorate. They have had to adjust their appeal to changes in the public sentiments or priorities which seem likely to influence voting patterns. Their whole object is to produce a slate of policies which, perhaps, only a minority would have chosen as their preferred option but which the broadest possible range of people can live with. This has

traditionally made them powerful engines of national compromise and effective mediators between the State and the electorate.

In Britain it is impossible to think about these things without an eye to the tumults of the past three years. There are serious arguments for leaving the European Union and serious arguments for remaining. I'm not going to express a view about either because they are irrelevant to my theme. I want to focus on the implications for the way in which we govern ourselves. Brexit is an issue on which people feel strongly and on which Britain is divided, roughly, down the middle. These divisions are problematic, not just in themselves but because they roughly correspond to other divisions in our society, generational, social, economic, educational and regional. It's a classic case for the kind of accommodations which a representative legislature is best placed to achieve.

Europe has now become the defining issue which determines party allegiance for much of the electorate. As a result, we have seen both major national parties which previously supported membership of the European Union adjust their policy positions to the new reality. In a sense, that is what parties are for, it's what they have always done, but there remains a large body of opinion, in both major national parties, which are strongly opposed to Brexit. One would therefore ordinarily expect the political process to produce a compromise not entirely to the liking of either camp but just about acceptable to both. Now that may yet happen but it has proved exceptionally difficult. Why is that?

The fundamental reason is the referendum. A referendum is a device for bypassing the ordinary political process. It takes decision-making out of the hands of politicians, whose interest is generally to accommodate the widest possible range of opinion, and places it in the hands of individual electors who have no reason to consider any opinion but their own. The very object of a referendum is to inhibit an independent assessment of the national interest by professional politicians, which is why it might be thought rather absurd to criticise them for failing to do so. A referendum obstructs compromise by producing a result in which 52 per cent of voters feel entitled to speak for the whole nation and 48 per cent don't matter at all.

This is, after all, the tacit assumption of every minister who declares that the British people has approved this or that measure as if only the majority were part of the British people. It is the mentality which has created an unwarranted sense of entitlement among the sort of people who denounce those who disagree with them as enemies, traitors, saboteurs, even Nazis. This is the authentic language of totalitarianism. It is the lowest point to which a political community can sink, short of actual violence.

In the last six months we have seen politics, in some small degree, reasserting itself. Parliament has forced compromise on those who feel that the referendum entitles them to absolute outcomes. If that process has been late, slow and incomplete, it is because of another factor which has been at work for longer and may prove even more damaging. This is the steep decline in public engagement with active politics. The turnout at general elections has been on a declining trend for many years. At one point in 2001 it fell below 60 per cent, the lowest ever.

In the early 1950s political parties were the largest membership organisations in Britain. The Conservative Party had about 2.8 million members. The Labour Party had about a million members in addition to the notional membership of those who belonged to

its affiliated trade unions. Between them, they probably represented a rough cross-section of the voting public. Today, in spite of the recent rise in Labour Party membership, the Royal Society for the Protection of Birds has a larger membership than all three national political parties combined.

The Hansard Society's latest annual audit of political engagement records a marked rise in the number of people who say that they don't want to have any involvement in either national or local decision making. All of this has widened the gap between professional politicians and the public. It has meant that membership of political parties has been abandoned to small numbers of activists who are increasingly unrepresentative of those who vote for them. The effect has been to obstruct the ability of parties to function as instruments of compromise and to limit the range of options on offer to the electorate. This is a dangerous position to be in. The current disengagement of so many voters is, in the long run, likely to lead to a far more partisan and authoritarian style of political leadership.

There are some truths which are uncomfortable to admit. One of them is that an important object of modern democratic constitutions is to treat the people as a source of legitimacy while placing barriers between them and the direct operation of the levers of power. They do this in order to contain the fissiparous tendencies of democracy, to counter the inherent tendency of democracy, to destroy itself when majorities become a source of instability and oppression.

One of these barriers, as I have argued, is the concept of representation. The other is law, with its formidable bias in favour of individual rights and traditional social expectations and a core of professional judges to administer it who are not accountable to the electorate for their decisions. These two barriers are not mutually inconsistent. You can have both. To a greater or lesser extent, most countries do. But we need to understand the limits of what law can achieve in controlling majorities and the price to be paid if it tries too hard.

The attractions of law are obvious. Judges are intelligent, reflective and articulate people. They are intellectually honest, by and large. They are used to thinking seriously about problems which have no easy answer and contrary to familiar clichés, they know a great deal about the world. The whole judicial process is animated by a combination of abstract reasoning, social observation and ethical value judgment that seems, to many people, to introduce a higher morality into public decision-making. So as politics has lost its prestige, judges have been ready to fill the gap. The catchphrase that justifies this is the rule of law.

Now, judges have always made law. In order to decide disputes between litigants, they have to fill gaps, supplying answers which are not to be found in existing legal sources. They have to be prepared to change existing judge-made rules if they are mistaken, redundant or outdated. The common law, which has grown up organically through the decisions of judges, remains a major source of our law. Judges have traditionally done this within an existing framework of legal principle and without trespassing on the functions of parliament and the executive.

In the last three decades, however, there has been a noticeable change of judicial mood. The Courts have developed a broader concept of the rule of law which greatly enlarges their own constitutional role. They have claimed a wider supervisory authority over

other organs of the State. They have inched their way towards a notion of fundamental law overriding the ordinary processes of political decision-making, and these things have inevitably carried them into the realms of legislative and ministerial policy. To adopt the famous dictum of the German military theorist Clausewitz about war, law is now the continuation of politics by other means.

The Courts operate on a principle, not always acknowledged but usually present, which lawyers call the principle of legality. It is probably better described as a principle of legitimacy. Some things are regarded as inherently illegitimate. For example, retrospective legislation, oppression of individuals, obstructing access to a Court, acts contrary to international law, and so on. Now, that doesn't mean that parliament can't do them but those who propose these things must squarely declare what they are doing and take the political heat, otherwise there is too great a risk that the unacceptable implications of some loosely worded proposal will pass unnoticed as a Bill goes through parliament.

The principle of legitimacy is a very valuable technique for ascertaining what parliament really intended, but it puts great power into the hands of judges. Judges decide what are the norms by which to identify particular actions as illegitimate. Judges decide what language is clear enough. These are elastic concepts. There are usually no clear legal principles to shape them. The answer depends on a subjective judgment in which a judge's personal opinion is always influential and often decisive. Yet the assertion by judges of a power to give legal effect to their own opinions and values, what is that if not a claim to political power?

Let me illustrate this with two recent decisions of the Supreme Court. Both of them concerned a matter on which the Courts have always been sensitive, namely attempts to curb their own authority. As it happens, I didn't sit on either of them. The first is about Court fees. Employment tribunals were created by Act of Parliament to provide a cheap and informal way in which employees could enforce their rights, the rights conferred upon them by statute. Until 2013, access to them was free but in that year the government introduced steep fees which people on low or middling incomes could not afford, at any rate without large sacrifices in other directions.

The government had a general statutory power to charge fees but in 2017 the Supreme Court held that the language of the Act was not clear enough to authorise fees so large that many employees would be unable to enforce their rights in Court. This decision has been criticised but I think it was perfectly orthodox. MPs looking at the words of the Bill as it went through parliament would not have suspected that the power to charge fees would be used to stifle people's employment rights.

Let's now move to the opposite end of the spectrum. The Freedom of Information Act entitles people to see certain categories of documents held by public bodies, unless there is an overriding interest in there being withheld. The Act also conferred on the Court a power to order disclosure but in addition to those, it gave ministers a veto if they felt that they could justify that in parliament. In other words, it empowered them to impose a political rather than a legal solution.

The Tribunal decided that letters written to ministers by the Prince of Wales should be disclosed to a journalist on The Guardian. Thereupon the Attorney General issued a certificate under the Act overriding that decision on the ground that disclosure was not in

the public interest. The Supreme Court, by a majority of five to two, quashed this decision. The majority's reason, however dressed up, was that they didn't approve of the power that parliament had, on the face of it, conferred on ministers. Three of the judges thought that it was such a bad idea that parliament could not possibly have meant what it plainly said. Two others accepted that parliament must have meant it but thought that the Attorney General had no right to disagree with the tribunal.

For my part, I think that there is no reason why a statute should not say that on an issue like this a minister answerable to parliament is a more appropriate judge of the public interest than a Court. As one of the two dissenting judges pointed out, the rule of law is not the same as the rule that the Courts must always prevail, whatever the statute says. No other modern case so clearly reveals the judge's expansive view of the rule of law. Whether the Prince of Wales's letters should be disclosed is not itself a very important issue but the same technique has been applied more discretely to sensitive issues of social policy about which the public feels much more strongly.

An example, say for the past half century, include education, subsidised fares on public transport, social security benefits, the use of overseas development funds, statutory defence system murder, the establishment of public inquiries and many, many others. On immigration and penal policy, the Courts have for many years applied values of their own which are at odds with the harsher policies adopted with strong public support by parliament and successive governments.

Now, most people's reaction to decisions like these depends on whether they agree with the result, but we ought to care about how decisions are made and not just about the outcome. We ought to ask whether litigation is the right way to resolve differences of opinion among citizens about what are really questions of policy. Many people applaud decisions of the Courts which wrong-foot public authorities. Sometimes they're right to applaud but there is a price to be paid for resolving debatable policy issues in that way.

It is the proper function of the Courts to stop governments exceeding or abusing their legal powers. But allowing judges to circumvent parliamentary legislation or review the merits of policy decisions for which ministers are answerable to parliament, raises quite different issues. It confers vast discretionary powers on a body of people who are not constitutionally accountable to anyone for what they do. It also undermines the single biggest advantage of the political process, which is to accommodate the divergent interests and opinions of citizens.

It is true, politics do not always perform that function very well but judges will never be able to perform it. Litigation can rarely mediate differences. It's a zero sum game. The winner carries off the prize, the loser pays. Litigation is not a consultative or participatory process, it is an appeal to law. Law is rational. Law is coherent. Law is analytically consistent and rigorous. But in public affairs these are not always virtues. Opacity, inconsistency and fudge maybe intellectually impure, which is why lawyers don't like them, but they are often inseparable from the kind of compromises that we have to make as a society if we are going to live together in peace.

In my next lecture I want to consider what has become the main battle ground between law and politics, namely international human rights. Thank you.

(AUDIENCE APPLAUSE)

ANITA ANAND: Thank you very much, Jonathan. We're going to open this up for questions from our audience here at the University of Birmingham in just a moment but before we do, can I just ask you, isn't there a fundamental problem here distinguishing where the political ends and the distinctly legal begins?

JONATHAN SUMPTION: In the great majority of cases I think it is pretty clear but there is a large grey area where many of the distinctions which I've sought to draw are very difficult to draw. I absolutely accept that.

ANITA ANAND: And so, therefore, is there not a fundamental problem with your – your theory then?

JONATHAN SUMPTION: All – all legal problems have – generate grey areas. It doesn't mean to say that the principle is misguided, it simply means that judges have to work harder to decide which side they're on.

ANITA ANAND: Let's turn to some of the questions from the audience. One of the questions which has been submitted to us anonymously this evening is from a member of the audience who's a bit shy, who wants to ask you, 'For 30 years politics has spectacularly failed to deliver effective collective action on society's biggest threat, climate breakdown. How do we change that?'

JONATHAN SUMPTION: I think the basic problem about climate breakdown – climate change, is that it is not in the immediate interest of the current generation to do anything about it which costs them in their pockets or in their way of life. Another part of the problem is that it's not a problem that can be tackled at national level, it's got to be tackled at international level, and people tend to feel that in the absence of international agreement they might as well do what they please rather than go out on a limb. It's roughly the equivalent of the feeling that if you're going to divide the restaurant bill by 10, at the end of the day you might as well order lobster.

Now these, I agree, are very serious problems. They are not going to be overcome in a way consistently with democracy until the problem becomes so dire that it threatens the current generation.

ANITA ANAND: Yes…

SARA NATHAN: Hi, I'm Sara Nathan, I'm co-founder of a charity that hosts refugees in people's houses, Refuges At Home. The hostile environment to refugees is government policy. Often the Court is the only defence for individuals facing removal. Should the Courts act?

JONATHAN SUMPTION: It depends on the ground of complaint. It's absolutely right that the Courts should act, first of all in cases, obviously, where the government has exceeded its powers; secondly, in cases where the government has abused its power, for example, by using a power for a purpose which it was not intended to serve. But there are different issues which arise when what is being reviewed is the underlying policy itself.

Now, I accept that the government's policy about refugees is harsh and if you feel that it's too harsh, I'm with you, I personally take that view as well, but I also think that immigration is a subject on which the public is entitled to its say.

ANITA ANAND: Yes..

ALEHA: I'm 16 and I study at Joseph Chamberlain College.

ANITA ANAND: And what's your name?

ALEHA: Aleha.

ANITA ANAND: And what did you want to ask?

ALEHA: I ask more than one question.

JONATHAN SUMPTION: Choose the best one.

ANITA ANAND: Do you – yes?

ALEHA: How can we encourage ethnic minorities, females and our youth to go into law and politics?

JONATHAN SUMPTION: Well, a certain amount of effort is already being made to do that. I'd be interested in your view about how successful it is but all the – the various legal professions, in addition to particular solicitors' firms, barristers' chambers and so on, have Outreach programmes which endeavour to do this. The problem, of course, about studying law at university is that to encourage ethnic minorities or any other group, to study law at university, you have to reach them while they're still at school and that is very much more difficult for professional bodies to do. But they are doing it to some extent.

ANITA ANAND: Would the judiciary not benefit though from some kind of positive discrimination? At the moment the judges are pretty much of a muchness. They go to the same universities, they are of the same social class and background. Is there not a great argument for people like Aleah to get involved in the law or people who then make the law more representative, to look a lot more like the people they are judging?

JONATHAN SUMPTION: Well, I think the first priority in the selection of judges is to choose people who are going to be good at the job and establishing preferred categories, first of all, means that you're not necessarily doing that. It also means that you discourage people who feel that the dice is loaded against them and that is, I think, very unfortunate and very damaging.

Now, I entirely agree that judges are not typical of those who they serve, of the communities that they serve, and I have to tell you that that applies as much to judges who come from ethnic minorities as to others. The problem is this, and actually the same applies to politicians, they may start by being from working-class backgrounds but they don't end up that way. But there is an additional issue, which is that the administration of justice is something that people need to feel confidence in and I would entirely accept that judges - that one needs to have a reasonably representative Bench in order to make people feel that

they have got a Bench that is sympathetic to their position.

ANITA ANAND: This is something that has been said for decades. And for decades the judiciary has looked pretty much the same…

JONATHAN SUMPTION: That's not true. I mean, you have to realise that judges, because under our - in our system they're appointed at the age of something like 50, the current makeup of the Bench represents entry into the legal profession a generation ago, so there is always a delay. There has been really quite significant change in the makeup of the Bench and there will be more, but if we were today to say, for example, that 50 per cent of every new appointment to the Bench had to be female, it would still take about 30 years to have an exact match on the Bench as it is. That's simply a matter of mathematics.

ANITA ANAND: Time for one last question?

EAMON ALAYWE: My name is Eamon Alaywe, I'm from Birmingham. My question is, in the light of the recent political controversy surrounding the Supreme Court's ruling over the 2017 Miller case, which of course you partook in, do you believe that the reforms that were made in the early 2000s in regards to, obviously, the creation of the Supreme Court, have been effective in enhancing judicial independence?

ANITA ANAND: Before – before you answer that, would you like to just summarise, for those people who don't know the case, you are speaking about what it is about.

JONATHAN SUMPTION: I can do that.

ANITA ANAND: Yeah. Actually, you probably could, couldn't you, Jonathan? Yes, why don't you do that?

JONATHAN SUMPTION: I mean, Miller was the case – Gina Miller contended, successfully, that the government was not entitled to give notice under Article 50 of the EU treaty so - to withdraw the United Kingdom from the European Union without the authority of a statute in parliament. The changes that were made to create the Supreme Court, in my view, had no impact on this at all. All that happened was that the law lords, the appellate committee of the House of Lords who had previously served as the ultimate Court of Appeal in the United Kingdom, moved over the road and became the Supreme Court. Pretty well nothing changed.

There were a number of voices suggesting that being a new Court would make them bolder, for example, in acting against the government. I don't think that that is so. I think that the Miller decision would have been arrived at under the old system, just as it was under the new.

ANITA ANAND: Can I ask a supplementary question to this? I mean, if representative democracy is so effective, as you argue that it is-----

JONATHAN SUMPTION: I accept that it's not always.

ANITA ANAND: But parliament decided on a referendum when it came to Brexit.

JONATHAN SUMPTION: Yes. Parliament can do many things that are unwise and that are – and that are – and that are inconsistent with the way that democracies ought to work. I am certainly not suggesting that the referendum was unlawful, I am simply suggesting that it was extremely unwise and that the last three years are an illustration of quite a lot of the reasons why.

ANITA ANAND: Okay, you're not a fan. I get that.

JONATHAN SUMPTION: I'm not a fan of referendums, full stop.

ANITA ANAND: Okay. So, well, okay, well that answers the second thing. To get us out of this mess, do we need a second referendum?

JONATHAN SUMPTION: Well, I don't think we should have had the first.

ANITA ANAND: No, but we've had it now so now how do-----

JONATHAN SUMPTION: I – I – let me finish my sentence.

ANITA ANAND: Okay.

JONATHAN SUMPTION: I don't think we should have had the first but having had the first, it may well be that the only way that we can get out of the mess created by the first, is to have another one but the moral is not to have as many referendums as possible, the moral is to have none at all.

ANITA ANAND: Well, we're going to have to leave it there. Next time we're going to be in the Scottish capital, Edinburgh, to hear why Jonathan thinks that judges are over extending the remit of the European Convention on Human Rights. That is the third lecture.

In the meantime, a huge thanks to the University of Birmingham for hosting us, to our audience and to our BBC Reith lecturer, Jonathan Sumption.

(AUDIENCE APPLAUSE)

TRANSCRIPT ENDS

THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS
TX: 04.06.2019 0900-1000
Reith Lecturer: Jonathan Sumption
Lecture 3: Human Rights and Wrongs

ANITA ANAND: Welcome to the third of this year's Reith Lectures with the former Supreme Court Justice Jonathan Sumption.

We are in Edinburgh's Parliament House, a building which dates back to the 16th century. This place has long been home to the Court of Sessions, the highest court in Scotland, and here in the great hall we are dominated by a stunning stained glass window depicting the moment King James V confirmed the Court of Sessions right here in 1532. This is a place, therefore, steeped in regal and legal history, an entirely suitable setting for Jonathan Sumption to continue his series of lectures on the role of the law in our public and private life.

So far Jonathan has questioned what he calls "law's expanding empire" and discussed how best democracy can accommodate political difference. Today he will be taking a look at human rights, in particular the role of the European Convention on Human Rights and the Strasbourg Court. The lecture is called Human Rights and Wrongs.

Please welcome the BBC 2019 Reith Lecturer, Jonathan Sumption.

(AUDIENCE APPLAUSE)

JONATHAN SUMPTION: Human rights are where law and politics meet. It can be an unfriendly meeting. A few years ago the then Prime Minister, speaking to the House of Commons, described a recent Supreme Court judgment about human rights as "appalling". The same Prime Minister, on a later occasion, said about another human rights decision that it made him "physically sick". These are strong words. What's the fuss about?

There is nothing new about human rights apart from the name. A quarter of a millennium ago Sir William Blackstone, the author of the earliest methodical survey of the common law, called them "natural rights". They were, he believed, recognised by the law because they belonged to human beings by the immutable laws of nature. The idea behind this is simple and undeniably attractive. It is that there are some inalienable rights which human beings enjoy, not by the largesse of the state, not by the forbearance of their fellow citizens, but because they are inherent in their humanity. This is the idea which underlies modern human rights theory.

There are, however, some problems about it which, if we are honest with ourselves, we must recognise. To say that rights are inherent in our humanity without law is really no more than rhetoric. It doesn't get us anywhere unless there is some way of identifying which rights are inherent in our humanity and why, and that is essentially a matter of opinion.

In a democracy differences of opinion on what rights ought to exist are resolved politically through legislation but advocates of human rights have always been suspicious of majorities, which ultimately control democratic legislatures. The idea behind modern international human rights law is that certain fundamental rights should have a higher status than ordinary laws so that they cannot readily be dislodged politically, even with the authority of a democratic legislature. In principle, democracies can enact whatever rights they like. The object of human rights law is to ensure that they get certain rights, whether they like them or not. To achieve that, however, it is necessary to identify some other source of legitimacy for these rights apart, that is, from the wishes of the population.

In a more religious age than ours this was perfectly straightforward. Rights were part of the moral law or deigned by God. In a totalitarian state it's equally straightforward. Rights, so far as they exist at all, are ordained by the ruling group in accordance with its ideology. But in a secular democracy, what is it that makes rights legitimate if not the decision of representative bodies? What is the source, independent of popular endorsement, which enables us to identify some rights as so fundamental that they must not be removed or limited by political decision?

This is the city of David Hume, the great philosopher of the 18th century Scottish Enlightenment. He rejected the whole concept of natural law. It is always dangerous to paraphrase Hume but, essentially, he rejected it because you cannot derive moral principles from abstract reasoning or empirical observation. They derive their legitimacy from collective moral sentiment.

Rights do not exist in a vacuum. They are the creation of law which is a product of social organisation and is therefore, necessarily, a matter of political choice. So, when we speak of some rights as being inherent in our humanity, we are not really saying anything about the nature of humanity. We are making a personal moral judgment that some rights ought to exist because they are so fundamental to our values, and so widely accepted, as to be above legitimate political debate.

Almost all of us believe that there are some rights in that category but the idea only works if the rights in question are truly fundamental and generally accepted. If there is room for reasonable people to disagree about them, then we need a political process to resolve that disagreement. In that case, they cannot be above legitimate political debate except in a

totalitarian state. There are probably only two categories of right that are truly fundamental and generally accepted.

First, there are rights which are fundamental because without them life is reduced to a crude contest in the deployment of force. So we have rights not to be arbitrarily detained, injured or killed. We have equality before the law and recourse to impartial and independent courts. Secondly, there are rights without which a community cannot function as a democracy, so there must at least be freedom of thought and expression, assembly and association, and the right to participate in fair and regular elections. Of course, democracies should confer many more rights than these but they should confer them by collective political choice and not because they are thought to be inherent in our humanity or derived from some higher law.

Today, the main source of human rights in Britain is an international treaty, the European Convention on Human Rights. It is a basic constitutional principle that international treaties have no effect on people's legal rights or duties without an Act of parliament. In theory, this means that parliament always has the last word on the contents of our law, even when it originates in a treaty. There is, however, one category of treaties which largely escapes parliamentary control. I will call them "dynamic treaties". A dynamic treaty is one which does not just say what our domestic law should be, it also provides a supranational mechanism for altering and developing it in future.

For those who believe that fundamental rights should exist independently of democratic choice, dynamic treaties have an obvious attraction. They create a source of law which is independent of democratic political choices. The European Convention on Human Rights is a classic dynamic treaty. The *Human Rights Act 1998* empowers the British Courts to strike down any rule of common law, regulation or government decision which is found to be incompatible with the Human Rights Convention. Even an Act of parliament can be declared incompatible with the convention, which is a signal to parliament to repeal or amend it.

Crucially, the *Human Rights Act* requires the British Courts to take account of rulings of the European Court of Human Rights, the International Court set up in Strasbourg to interpret the convention. In theory, the British Courts could reject decisions of the Strasbourg Court. In rare cases they do. Occasionally, Strasbourg modifies its position in response but defiance is really not an option if Strasbourg persists. That would put Britain in breach of international law, something which, by longstanding constitutional principle, the domestic courts should avoid if they possibly can.

The Human Rights Convention was not originally designed as a dynamic treaty. It was drafted in the aftermath of the terrible history of the Third Reich and it was conceived as a partial statement of rights universally regarded as fundamental. No torture, no arbitrary killing, no imprisonment, freedom of thought and expression, due process of law and so on. It is the Strasbourg Court which has transformed it into a dynamic treaty. The doctrine of the Strasbourg Court is that the convention is what it calls "a living instrument". The court develops it by a process of extrapolation or analogy so as to reflect its own view of what additional rights a modern democracy ought to have.

Now, of course, the court wouldn't need to do this if the additional rights were already there in the treaty. It only needs to resort to the living instrument doctrine in order to

declare rights which are not in the treaty. Now it's fair to say that some development of the text is unavoidable when applying an abstract statement of principle to concrete facts. In addition, some concepts in the convention, such as the notion of inhuman or degrading treatment, plainly do evolve over the time with changes in our collective values. But the Strasbourg Court has gone much further than that. Article 8 of the convention is probably the most striking example of this kind of mission creep.

Article 8 protects the human right to private and family life, the privacy of the home and personal correspondence. It was designed as a protection against the surveillance state in totalitarian regimes. But the Strasbourg Court has developed it into what it calls a principle of personal autonomy. Acting on this principle, it has extended Article 8 so that it potentially covers anything that intrudes upon a person's autonomy unless the Court considers it to be justified.

Now, it will be obvious that most laws seek, to some degree, to intrude on personal autonomy. They impose standards of behaviour which would not necessarily be accepted voluntarily. This may be illustrated by the vast range of issues which the Strasbourg Court has held to be covered by Article 8. They include the legal status of illegitimate children, immigration and deportation, extradition, criminal sentencing, the recording of crime, abortion, artificial insemination, homosexuality and same sex unions, child abduction, the policing of public demonstrations, employment and social security rights, environmental and planning law, noise abatement, eviction for non-payment of rent and a great deal else besides. All of these things have been held to be encompassed in the protection of private and family life.

None of them is to be found in the language of the convention. None of them is a natural implication from its terms. None of them has been agreed by the signatory states. They are all extensions of the text which rest on the sole authority of the Judges of the Strasbourg Court. This is, in reality, a form of non-consensual legislation.

Now, I'm not complacent about our human rights record in the United Kingdom. We have a strong libertarian tradition but we have done some things which are contrary to our own traditions and morally and politically indefensible. In my lifetime, parliament has twice responded to political violence by authorising internment without trial in peacetime. So I have no problem with the idea of an international court to act as an external check. But most of the rights which the Strasbourg Court has added to our law are quite unsuitable for inclusion in any human rights instrument. They are contentious and they are very far from fundamental.

This has transformed the convention from an expression of noble values, almost universally shared, into something meaner. It has become a template against which to assess most aspects of the ordinary domestic legal order, including some highly disputable ones, and the result has been to devalue the whole notion of universal human rights. Many people will feel that some, at least, of the additional rights invented by the Strasbourg Court ought to exist. I think so myself. But the real question is whether the decision to create them ought to be made by judges.

Judges exist to apply the law. It is the business of citizens and their representatives to decide what the law ought to be. Many of the issues thrown up by the convention are not even issues between the state and the individual. They are really issues between different

groups of citizens. This applies particularly to major social or moral issues, such as abortion, fetal tissue research or medically assisted suicide, about which opinion is often deeply divided.

In a democracy, the appropriate way of resolving such disagreements is through the political process. If I say that we should recognise a human right, in appropriate cases, not to be evicted from a council house for non-payment of rent and you say that somebody who hasn't performed his side of the bargain should have no such right, then the only alternative to a political resolution of our difference is to invite the judges to legislate. The main problem about human rights law is that it does this too readily. It transforms controversial political issues into questions of law for the Courts. In this way it takes critical decision-making powers out of the political process. Since that process is the only method by which the population at large is able to engage, however indirectly, in the shaping of law, this is, I think, a problem.

If we are going to deal with fundamental human rights in a way which has radical implications of this sort, then we need to have a very clear idea of what a fundamental human right really is. In particular, we have to distinguish a fundamental human right from something which is merely a good idea. It is often pointed out that parliament has authorised this way of making law by passing the *Human Rights Act* and, of course, so it has. What is more, in 1998 when it did this the expansive tendencies of the Strasbourg Court were already apparent but not everything that a democratic parliament does is consistent with a democratic constitution. Parliament could abolish elections. It could ban opposition parties. It could forbid criticism of official policy. It could transfer its powers to a dictator, as the German parliament did in 1933 and the French one in 1940.

Decisions of this kind would have the authority of a democratic parliament but they would hardly be democratic. So, the fact that parliament has incorporated the convention into our law does not relieve us from the need to look at its implications for the working of our democracy. The problem can be most clearly seen in decisions about qualified convention rights. Most convention rights are qualified. They are subject to exceptions for cases where an interference with the right in question is judged, as the phrase goes, to be necessary in a democratic society for some legitimate purpose.

According to the convention, legitimate purposes include the prevention of crime, the protection of public health or the economic wellbeing of society. If a national measure interferes with a protected right, the Courts ask whether the interference has a legitimate purpose and, if so, whether that purpose is important enough to justify the interference in question. Ultimately, as the Appellate Committee of the House of Lords held in 2007, the convention requires them to strike a fair balance between the rights of the individual and the interests of the community.

In the Courts, most arguments about human rights are not about the existence of the rights but about the scope of these exceptions and qualifications. The Strasbourg Court tends to give a wide scope to the rights protected by the convention, as we have seen with Article 8. It does this precisely in order to enable more and more legislative and governmental measures to be justified in Court. This poses, in an acute form, the role of judges in a democracy. Who is to decide what is necessary in a democratic society, or what purposes are legitimate, or what the prevention of crime, or public health, or the economic wellbeing of society requires, or what is a fair balance between the individual and the

community? These are all intensely political questions. Yet, the convention reclassifies them as questions of law, thus reforming them from the realm of democratic decision making and referring them instead to national and international courts.

Our domestic courts have occasionally expressed surprise and dismay at decisions emanating from Strasbourg, but their own legislative instincts are at least as strong. Five years ago the Supreme Court had to deal with one of the most sensitive and controversial moral issues of our time, assisted suicide for terminally ill patients. Our society is divided about this. What is life worth when one's ability to enjoy it has gone? What do we say about human autonomy? Does it entitle an individual to assistance in killing himself always or only sometimes? Are these just questions for the patient or does society have an interest of its own?

The Strasbourg Court had previously held that the whole issue was culturally and politically too sensitive to permit of a single pan-European answer. Each convention state would therefore have to decide it in accordance with its own values. The essential question for the Supreme Court was who should give Britain's answer, parliament or the courts? Parliament had already given Britain's answer. The *Suicide Act 1961* says that assisting somebody to kill himself is a crime. Over the years, parliament has considered proposals to change the law but has always decided against it. Yet, five of the nine judges who sat on this appeal thought that the question was ultimately one for the courts. Two of the five would have declared the *Suicide Act* to be incompatible with the convention. The other three decided not to do that but only because it would be premature until after parliament had had an opportunity to consider the matter. One of the three even threatened that unless this was satisfactorily addressed, the courts would do it for them.

Now, if that threat meant anything, it meant that the courts should be prepared to exercise legislative powers in place of the legislature. I am not alone in questioning the constitutional proprietary of all of this. The meaning of the *Suicide Act* is a question of law. The question whether the *Suicide Act* is a good thing is not a question of law, it's a question of moral and political opinion. I was one of the minority who considered that this was entirely a matter for parliament. I thought that on such an issue as this, my own opinion had no greater weight, by virtue of my judicial office, than that of any other citizen. I still think that.

The implicit message of cases like this is that even in a democracy such issues are not in the last analysis to be left to the general body of citizens. Certainly the views of parliament are a factor but how much attention the courts should pay to them is a matter of judicial value judgment. From time to time the Strasbourg Court has said this out loud. It has twice held that the statutory rule in Britain that serving prisoners cannot vote is incompatible with the convention. What was interesting about these decisions was the way in which the Strasbourg Court dealt with the fact that parliament had approved this rule.

In its first decision in 2005 Strasbourg said that parliament cannot have thought properly about the human rights implications. In its second decision in 2008 it couldn't say that because the House of Commons had by then debated the 2005 decision and reaffirmed its original view. So Strasbourg simply said, "Well, it was a question of law and not one for parliament at all." There is an obvious irony in the Strasbourg Court's rejection of parliamentary authority in the name of democracy and yet, that irony brings us close to the heart of the present issue.

What we are seeing here are two rival conceptions of democracy. One is that democracy is a constitutional mechanism for arriving at collective decisions and accommodating dissent. The other is that it is a system of values. After the end of the Second World War the democratic label was claimed by the autocratic communist states more or less forcibly established by the Soviet Union in Eastern Europe, such as the German Democratic Republic. What they meant by democracy was a value-based system in which communism was treated as inherently democratic, although not chosen or necessarily supported by the people or even open to meaningful discussion among them.

The values of the Strasbourg Court are, of course, very different from those of the post-war dictatorships of Eastern Europe but they do have this much in common. They both employ the concept of democracy as a generalised term of approval for a set of political values. The choice of elected representatives are, on that view, only legitimate within the limits allowed by these values. Democracy is a word with strong emotional resonance. Everyone wants to appropriate it as a label for their own preferred positions. So we distort the language, not in order to deceive, but to avoid confronting awkward dilemmas. This is not just a question of vocabulary.

Democracy, in its traditional sense, is a fragile construct. It is extremely vulnerable to the idea that one's own values are so obviously urgent and right that the means by which one gets them adopted don't matter. That is one reason why it exists in only a minority of states. Even in those states it is of relatively recent origin and its basic premises are under challenge by the advocates of various value-based systems. One of these is a system of law-based decision making which would entrench a broad range of liberal principles as the constitutional basis of the state. Democratic choice would be impotent to remove or limit them without the authority of courts of law.

Now, this is a model in which many lawyers ardently believe. The essential objection to it is that it is conceptually no different from the claim of communism, fascism, monarchism, Catholicism, Islamism and all the other great isms that have historically claimed a monopoly of legitimate political discourse on the ground that its advocates considered themselves to be obviously right. But other models are possible. One can believe in rights without wanting to remove them from the democratic arena by placing them under the exclusive jurisdiction of a priestly caste of judges. One can believe that one's fellow citizens ought to choose liberal values without wanting to impose them.

In the next lecture in this series I want to turn to the experience of the country which has confronted these dilemmas for longer than any other democracy, namely the United States of America. Thank you.

(AUDIENCE APPLAUSE)

ANITA ANAND: Jonathan, thank you very much. Clearly there are failings in the ECHR in your mind. Would you go as far as say, "Right, we should leave. Pack our bags, we're off."

JONATHAN SUMPTION: I think a much better solution would be a change of heart among both the domestic judiciary and the Strasbourg judiciary about how far it is legitimate to go in differing from democratic institutions. So, that is the solution that I

would like to see, and there are some signs that this may be beginning but, ultimately, if there is no significant change, yes, I would withdraw from the Human Rights Convention. I hope that won't be necessary.

ANITA ANAND: Okay, but what – what is the thing that would push you over the line?

JONATHAN SUMPTION: I can't say what would happen in future that might persuade me that we should leave, I've given a general description, but it isn't true that there are established positions. Judges, whether in Strasbourg or here, do not usually dig trenches around their positions. They are sensitive to mood, they are sensitive to values. I think that there has been a noticeable change of approach in some Strasbourg decisions in the last five or six years. I also think that there are indications that a younger generation of judges is less enthusiastic about the new toy placed in their hands by the *Human Rights Act* than some of those who were already judges when it was enacted.

ANITA ANAND: So – so even with the backdrop of Brexit, as we are seeing it unfurl around us and some of the intransigencies that that has – has laid bare, you are still helpful that there will be, at least, give in this monumental decision about human rights?

JONATHAN SUMPTION: The intransigencies that you refer to about Brexit have not come from judges.

ANITA ANAND: Let's take some questions from the floor. Can we get… one over here?

CATHERINE SMITH: Thank you. Catherine Smith, Chair of the John Smith Centre which promotes trust in politics and public service. You suggest we need a political process rather than the courts to resolve human rights issues that are not truly fundamental. If that were to happen, would we not need a different type of discourse from and between our politicians to allow the very real tensions that you describe between individuals' rights and those of society to be properly weighed in the way that the courts currently do? And separately from that kind of capability question, I wondered who you thought the public would trust more to make these careful judgments, politicians or judges?

JONATHAN SUMPTION: Well, do we need a different kind of political forum to address them? I don't think so. What is quite striking is that some of the most impressive and informative debates that have happened within our lifetimes in the House of Commons have been directed to just such an issue. For example, the abortion debates surrounding the 1967 *Abortion Act* were very remarkable in the extent to which MPs debated in an informed and enlightened way the issues involved, and I think that that was one reason why in this country, as in most of Europe, abortion has now become relatively uncontroversial, whereas in the United States, where it was a matter of judicial decision, it remains extremely controversial. Partly, I think, because the decision there was made in a way which marginalised the contribution of the electorate at large.

As to which the public would trust? There's no doubt that the public generally, at the moment, are saying in all the polls that politicians are somewhere down the bottom of their trust list and judges somewhere up the top. I think the problem about this is that when presented with a judicial decision, the great majority of people tend to ask themselves, "Do I

like the result?" rather than, "Is this a way that we ought to be making decisions?" and the reason that that's a problem is that if you have a method of making decisions which consigns to irrelevance the views of the public at large, you may get a result next time round where you don't like the result and don't like the method either.

ALAN PATERSON: My name is Alan Paterson. I'm a Professor of Law, Strathclyde University. The standard answer to judicial accountability over human rights is, well, parliament enacted the *Human Rights Act* but you've kind of taken the ground from under their feet by saying, "Yes, but a democratic parliament can behave in an undemocratic way"…

JONATHAN SUMPTION: The *Human Rights Act* is a sufficient explanation of why the courts review governmental and legislative decisions in the way they do and the jurisdiction of the Strasbourg Court, which the *Human Rights Act* requires them to have regard to, is a sufficient explanation of most of the decisions which I would criticise as going too far. But it is one thing to say that these decisions of the courts are in accordance with the law. It's another thing to say that they are legitimate. A large part of the theme of all of these lectures has been to examine the concept of what makes law legitimate and my complaint is not that there is a breach of the statute, my complaint is that this is not legitimate.

ANITA ANAND: So you are saying categorically these are not legitimate?

JONATHAN SUMPTION: I think that some decisions go beyond what is legitimate in a democracy.

FIONA GARWOOD: I'm Fiona Garwood, I'm not a lawyer but I'm interested to know what you think about – you mentioned the rights of access to the courts and how that's reconciled with the restrictions and limitations now in legal aid for people to use that right to access the courts?

JONATHAN SUMPTION: The Strasbourg Court has never held that there is, as part of the right of access to the courts, a right to legal aid. But, if you ask me from my own view about that, in criminal cases a more generous attitude to legal aid is absolutely indispensable. If the state, with its great armoury of lawyers and money, has set itself against the citizen who is accused of a crime, I think that the citizen is entitled to legal aid and I think that the recent changes in the legal aid regime under which if you are acquitted you cannot recover more than a very modest part of your costs are, frankly, disgraceful.

As to civil legal aid, I would take a rather different view. There are some areas in which litigation is a wholly involuntary process. A lot of matrimonial breakup, for example, where I would apply a similar principle to the one which I think should apply in criminal law, but in many others I would say that the state does not have a moral, and should not have a legal obligation to fund litigation.

DREW WALDY: Hello. My name's Drew Waldy. I'm just your basic man in the street. The young girl who went to Syria, who's been on the news, do you think that her basic human rights have changed during this episode, should they have changed during this episode and, if so, at which point did they change?

JONATHAN SUMPTION: Well, when you say "changed during this episode," do I think that her human rights have changed as a result of her being deprived of British citizenship?

ANITA ANAND: You're talking about Shamima Begum here?

DREW WALDY: It's just the media would portray her as having no rights whatsoever-----

JONATHAN SUMPTION: Well, I doubt that that's right.

DREW WALDY: -----based on the decision that she's making so I'm not sure-----

JONATHAN SUMPTION: I don't think that human rights is actually – has any direct bearing on her situation, either before or after she was deprived of her citizenship. Essentially, the deprivation of her citizenship, the legality of that is going to depend on whether she had Bangladeshi citizenship because if she didn't, then the government was not entitled to deprive her of British citizenship, thereby rendering her stateless. If she was lawfully deprived of her British citizenship, then she has no right to come here. The *Human Rights Act* would not help her. It might have helped her if she was resident in this country because the right to deport her would have engaged her Article 8 rights but she's not in this country and it's very difficult to see that Article 8 is going to help her where she is. I'm frankly surprised at the suggestion that she could be regarded as the citizen of a country with which she has never had anything to do but that's the government's position and I have no doubt that it will be tested in the courts in due course.

ANITA ANAND: Can – but just on – on the, sort of, the kernel of the question there, if somebody chooses to go to a state that is waging war against your country, do they, should they, ought they to lose their standing when it comes to human rights?

JONATHAN SUMPTION: Well, what they lose is their citizenship. That doesn't necessarily deprive them of their standing when it comes to human rights. I have no problem about the notion of depriving people of their citizenship who have gone abroad to fight in foreign wars save this: it is an established principle of international law that you cannot deprive somebody of his – his or her citizenship if the result would be to render them stateless, and whatever they may have done, in Syria or anywhere else, that rule has always been applied and I have no doubt will be applied in this case.

ANITA ANAND: And should be.

JONATHAN SUMPTION: And should be, yeah, absolutely.

ANITA ANAND: I mean, the thing – the wonderful thing about – should be. Okay, I just wanted to know where you were coming from.

JONATHAN SUMPTION: Yes, absolutely.

ANITA ANAND: Okay. Seems like an excellent place to leave it. Thank you all very much indeed. We're going to have to end it there.

Next time we're going to be in Washington DC where Jonathan will be defending Britain's unwritten constitution but for now, a big thanks to our hosts here at Parliament House in Edinburgh, to our audience and to Jonathan Sumption, the BBC's Reith Lecturer.

(AUDIENCE APPLAUSE)

THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS
TX: 11.06.2019 0900-1000
Reith Lecturer: Jonathan Sumption
Lecture 4: Rights and the Ideal Constitution

ANITA ANAND: Welcome to Washington DC and the fourth BBC Reith Lecture with the former UK Supreme Court Judge, Jonathan Sumption.

We're at George Washington University, home to 26,000 students. Former alumni include Jacqueline Kennedy Onassis and the former director of the FBI, J Edgar Hoover.

In his series, Jonathan has been interrogating the complex relationship between politics and the law, suggesting that the Courts have become too powerful. Now he compares the constitutional models of the US and the UK. This lecture is called Rights and the Ideal Constitution.

Please welcome the BBC 2019 Reith Lecturer, Jonathan Sumption.

(AUDIENCE APPLAUSE)

JONATHAN SUMPTION: When the French political writer Alexis de Tocqueville visited the United States in the 1830s, one of the things that struck him most forcibly was the dominant place occupied by lawyers in the public life of the nation. In his classic account of early American democracy, de Tocqueville suggested that lawyers, as a class, had succeeded to the beliefs and influence of the old landed aristocracy. They shared its habits, its tastes and, above all, they shared its contempt for popular opinion.

"The more we reflect upon all that occurs in the United States," he wrote, "the more we shall find that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element in the Constitution." There is scarcely any political question in the United States that does not ultimately resolve itself into a judicial question.

There was only one other country that de Tocqueville could think of where the legal elite enjoyed a comparable influence over public affairs and that country was Britain.

A new edition of de Tocqueville written for today would probably make the same point. The twin themes of these lectures have been the decline of politics and the rise of law to fill the void. I have argued that democracies depend for their survival on their ability to mitigate the power and impulses of electoral majorities. Historically, they've done this in two ways. One is by a system of fundamental law standing above the elected legislature and enforced by judges. The other is representative politics, which creates a class of professional politicians with an interest in softening extremes in order to broaden their electoral appeal.

Representative politics is a very imperfect mechanism for achieving this but in the long run, political constraints on the part of majorities are likely to be a great deal more effective than legal ones. Why do we believe in democracy, or think we do? What are the proper limits of democratic choice? What rights ought a democratic constitution to protect, even against the will of the people?

When the British argue about these questions, as they often do, they generally look to the United States. Sometimes as an inspiration, sometimes as a warning. Yet, in spite of a close similarity of political outlook, the American constitutional tradition is the polar opposite of the British one. At its most basic level, the difference is between two models of the state, a legal model and a political one. The Constitution of the United States is the archetypal legal constitution. Britain, by comparison, has historically been the archetypal political state.

In Britain, as in many other countries, including the United States, we have witnessed a mounting tide of hostility to representative politics over the past three or four decades. This has naturally been accompanied by a growing interest in the legal constitutional model, especially among the judiciary. This is therefore a good time to be assessing its attractions, and Washington is a good place in which to do it, for the legal model raises dilemmas in a democracy of which the United States has a longer and more varied experience than any other country in the world.

The prime purpose of any constitution is to provide a framework of political rules for making collective decisions. In its original form of 1787, the Constitution of the United States did almost nothing else. The Protection of Rights came later with the 10 amendments of 1791 which together constitute the Bill of Rights. Twelve years later, in 1803, came the decision of the Supreme Court in Marbury and Madison which established the power of the Supreme Court to quash acts of Congress held to be unconstitutional.

So, by the beginning of the 19th century the US Constitution had already acquired the three basic features which have come to be regarded as the hallmarks of every legal constitution. First, there is a recent code of rights which prevails over all other law. Secondly, it is proof against political amendment, except by some extraordinary procedure such as a super majority in the legislature or a popular referendum. Third, it confers on judges the power to enforce constitutional rights, to strike down any act of the state, including its legislation, which they find to be inconsistent with them.

By comparison in Britain, at any rate in orthodox constitutional theory, there are no constitutional limits on the power of the British parliament. There is no fundamental law

which parliament cannot alter or abrogate at will. Even the treaties of the European Union, which have prevailed over domestic legislation for the past 46 years, do so only by virtue of an act of parliament which can be repealed at will, as we have seen. We are almost the only country in the world of which this is true.

Of course, the difference between the legal and the political models of the state has never been absolute. Almost all constitutions have some elements of both. The United States has a sophisticated doctrine of the separation of powers which reserves a large space to political judgments by the executive and the legislature. In Britain, law has always had a place in its basically political constitution. Nonetheless, the conceptual difference between the legal and the political model remains a real one which exposes two very different views about democracy.

The attraction of the legal model is that it is based on a body of principle applied by judges whose perceptions are less likely to be swayed by passion, prejudice, self-interest or [realpolitik] than those of politicians or voters but it's patronising overtones are perfectly obvious. The legal model seeks to create a body of constitutional rights which is beyond the reach of popular choice. Its advocates do not trust elective institutions to form opinions about them with the necessary restraint, intelligence or moral sensibility. They therefore favour an accretion of power to the sort of people, namely judges, whose superior qualities and independence of public opinion are thought to produce more enlightened judgments.

"We, the people," are the opening words of the US Constitution but as James Madison's contributions to the federal papers show, the founding fathers regarded the people as a bigger threat to liberty than their governments. Madison looked for a solution to the representative principle. He expected lawmakers to be wiser and more circumspect than their electors. For later generations, however, the representative principle has not been enough. Distrust of elected majorities and fear of majoritarian tyranny has always been the driving force behind the idea of entrenched constitutional rights.

Now, it is probably true that the decisions of voters and their representatives are not morally pure. They are based on a variable mixture of wisdom and folly, prejudice and understanding, of idealism, pragmatism and self-interest. The real question is whether this impurity of motive is a good enough reason for constraining their choices by law. To answer that question, I think that we have to ask ourselves why we believe in counting votes at all. There are, surely, two main reasons.

In the first place, all governmental authority which is not based simply on force requires some source of legitimacy. If a political community is to have any long-term stability then people have to have a reason for obeying laws that they do not like, other than the threat of coercion. "We, the people," is the emotional foundation of democracy in Britain as well as in the United States, even if the British do not have a document that says so.

The second reason why we believe in counting votes is that it reflects our sense of social and political equality. Thomas Jefferson wrote in one of his letters to the German scientist Alexander von Humboldt that the lex majoris, the law of the majority, is the fundamental law of every society of individuals of equal rights. The critical words in that sentence are the last ones "of equal rights." The interests and the opinions of citizens conflict. We cannot all have our own way. What we can expect is that the decision-making

process will treat our various interests and opinions with equal consideration and respect. That is achieved by giving all of us an equal share in decision making, even if as individual voters our influence on the outcome is minimal.

A constitution which was not based on democratic choice but on some embedded scheme of values, such as liberalism, human rights, Islamic political theology or the dictatorship of the proletariat, would not achieve this. It would privilege those citizens who happened to agree with these values. That might not matter if the values in question were universally or almost universally accepted. But you do not need to entrench values in the constitution if they are already universally accepted. You only need to entrench them if they are controversial and therefore liable to be discarded if people are allowed a free choice in the matter.

That suggests that the essence of democracy is not moral rectitude but participation, that the proper function of a constitution is to determine how we participate in the decision-making processes of the state and not to determine what the outcome should be. Whether voters act from good or bad motives is really not the point. We cannot make the constitution for some imaginary world in which people are without prejudices or indifferent to their own interests. All that a political system can really aspire to do is to provide a method of decision making which has the best chance of accommodating disagreements between citizens as they actually are. That calls for a political process in which every citizen can engage whose results, however imperfect, are likely to be acceptable to the widest possible range of interests and opinions.

This is arguably a more important priority for a political community than finding the right answers to its moral dilemmas, even assuming that there are right answers or that we can finally hit on them. The problem about the legal model is that it marginalises the political process. When a judge identifies something as a constitutional, or a human, or a fundamental right, he is saying that it derives from a higher law than the ordinary decision-making processes of the state. He is declaring that its existence and extent are not to be determined by political choice. Yet, very many judicial decisions about fundamental rights are themselves political choices only made by a smaller and unrepresentative body of people.

In an American context, perhaps the most interesting example is the due process clause of the Fourteenth Amendment. It provides, among other things, that no state shall deprive any person of liberty without due process of law. Successive decisions of the US Supreme Court have made this the functional equivalent of Article 8 of the European Convention on Human Rights and Fundamental Freedoms which protects private life. Both provisions have been interpreted as potentially embracing any interference with the personal autonomy of individuals within limits. But within what limits?

All mandatory rules of law interfere with the personal autonomy of individuals, that is what they are there for. If the limits to the right of liberty are to be fixed as a matter of principle by judges, then the answer must necessarily depend upon a judgment about which interferences with personal autonomy are acceptable and which are not.

Half a century ago this problem was energetically debated in the US Supreme Court in a celebrated case about a Connecticut statute forbidding contraception. The Court held, by a majority, that there was a constitutional right of privacy which the Connecticut statute

violated. But this right was nowhere mentioned in the constitution and confusion about its exact basis is obvious from the diversity of opinion among the justices. Some of them thought that a right of privacy existed because it was analogous to other rights specifically mentioned in the constitution. Some thought that the right was to be derived from the collective values of the people as the Court perceived them to be. One thought that it was enough to say that a right of privacy was implicit in the whole concept of liberty. The dissenters said that there was no such right because the only basis on which it could be said to exist was that enough justices thought that it was a good idea.

I think that the dissenters had a point. When a judge is asked to decide a question as broad as this, the issue is not really whether the right exists but whether it ought to exist. Yet, that is surely a question for lawmakers and not judges. Over the century and a-half since it was added to the constitution, the due process clause has been the basis of some of the most illiberal, as well as some of the most progressive, decisions of the federal Courts, according to the changing outlook of judges of the day.

As is well known, during the so-called Lochner era between the 1890s and the 1930s, the US Federal Courts struck down as unconstitutional some 150 pieces of employee protection legislation under the due process clause. They did this on the grounds that liberty required absolute freedom of contract subject only to limited considerations of public policy. Among the laws which they struck down were state laws limiting hours of work in the interests of health, guaranteeing a right to join unions and outlawing child labour.

Moving to the opposite extreme, the due process clause was also the basis of the decision in Roe and Wade in 1973. The US Supreme Court derived a right to abortion from the newly discovered constitutional right of privacy and autonomy. The same reasoning, in a sense, lay behind the Court's decision more recently about same sex marriage in 2015. In both cases the Supreme Court's decisions were necessarily based on the perception of the justices that this was what liberty now required. Yet it seems likely that if the same issues had come for the first time before the Court as it is now constituted, the result would have been different, although nothing would have been changed apart from the outlook of individual justices.

Now, one can draw two lessons from the broad range of outcomes which at different times in American history have been justified under the due process clause. One is that on politically controversial issues, the decisions of judges almost always involve a large element of political value judgment. The case for or against labour regulation is a question of economic and social policy. The case for or against abortion is a question of social and moral values. What liberty requires in either context and how far it should go are fundamentally political questions.

The other lesson is that judicial decisions on issues like these are not necessarily wiser or morally superior to the judgments of the legislature. Much of the employee protection legislation struck down by the federal courts in the Lochner era had been on the statute book in Britain since the middle of the 19th century. It had got there by ordinary legislation and by political action. The justification commonly put forward for treating such matters as constitutional issues is that it protects minorities against majoritarian tyranny. But what constitutes majoritarian tyranny very much depends on how you define your majority and what you regard as tyranny. Expect, perhaps, in classic discrimination cases where the animating principle is to treat like cases alike, there are no legal standards by which these

questions can be answered. The only available standards are political ones.

There is also, although I perhaps hesitate to make the point here, a wider issue, namely whether it is wise to make law in this way. I recognise that partisan divisions and institutional blockages in Congress have made controversial legislative change difficult to achieve in the United States. I recognise that that encourages those who look for a judicial resolution of major social issues, but the chief function of any political system is to accommodate differences of interest and opinion among citizens. Resolving these differences by judicial decision contributes nothing to that end. On the contrary, characterising something as a constitutional right removes the issue from the arena of political debate and transfers it to judges.

In the United States it does this irreversibly unless the Supreme Court changes its mind or the constitution is amended. Personally, I'm in favour of a regulated right of abortion but I question whether it can properly be treated as a fundamental right displacing legislative or political intervention. Abortion was once highly controversial in Britain too. After extensive parliamentary debate it was introduced by ordinary legislation in 1967 within carefully defined limits and subject to a framework of clinical regulation. The same pattern has been followed in Europe where all but one state, and Northern Ireland, have now legislated for a regulated right of abortion. As a result, abortion is much less controversial in Europe than it is in the United States. I suspect, although I cannot prove it, that one reason why abortion remains so controversial in the United States is that it was introduced judicially, i.e. by a method which relegated the wider political debate among Americans to irrelevance. Instead, the debate is concentrated on candidacies for the Supreme Court with results that were apparent in the undignified and partisan procedures in the most recent [consummation] hearings.

In his first inaugural address in 1861 Abraham Lincoln drew attention to the implications of filling gaps in the constitution by judicial decision. His words are very well known. "The candid citizen," he said, "must confess that if the policy of the government on vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." Lincoln had in mind the notorious Supreme Court decision in Dred Scott, which had held that African-Americans were not to be treated as citizens, but he was also making a broader point which was about active citizenship. A nation cannot hope to accommodate divisions among its people unless its citizens actively participate in the process of finding political solutions to common problems.

Law has its own competing claim to legitimacy but it is really no substitute for politics. Now, I'm certainly not saying that there are no rights which should be constitutionally protected in a democracy but I think that one lesson which Britain can learn from the US experience is that one must be very careful about which rights one regards as so fundamental as to be beyond democratic choice.

I suggested in a previous lecture in this series that in a democracy there are only two kinds of right that are truly fundamental in that sense. There are rights to a basic measure of security for life, liberty and property, without which life is reduced to a crude contest in the exercise of force. And there are rights such as freedom of expression, assembly and association, without which a community cannot function as a democracy at all. These rights

will certainly not be enough to prevent majoritarian tyranny, but no code of rights will do that.

The law simply has no solution to the problem of majoritarian tyranny, even in a system of perfectly entrenched constitutional rights like that of the United States. Law can insist that public authorities have a proper legal basis for everything that they do. Law can supply the basic level of security on which civilised existence depends. Law can protect minorities identified by some personal characteristics, such as gender, race or sexual orientation, from discrimination. But the Courts cannot parry the broader threat that legislative majorities may act oppressively unless they assume legislative powers for themselves.

The only effective constraints on the abuse of democratic power are political. They depend on active citizenship, on a culture of political sensitivity and on the capacity of representative institutions to perform their traditional role of accommodating division and mediating dissent. If that no longer happens in the United States, or on some issues in Britain, it is because our political culture has lost the capacity to identify common premises, common bonds and common priorities which stand above our differences. This is a serious problem in any democracy but there is nothing that the law can do about it.

In an essay written in 1942, the great American Judge Learned Hand confessed that he could not predict whether the spirit of equity and fairness which emanated the constitution would survive without judges to enforce them. But he added these words, "This much," he said, "I think I do know, that a society so riven that the spirit of moderation is gone no Court can save, that a society where that spirit flourishes, no Court need save. That a society which evades its responsibilities by thrusting upon the Courts the nurture of that spirit, that spirit will in the end perish."

The ultimate expression of claims of law to set limits on political action is a written constitution. In the next, and final, lecture in this series, I shall look at calls to introduce one in the United Kingdom and at what such a constitution might say. Thank you.

(AUDIENCE APPLAUSE)

ANITA ANAND: Thank you very much, Jonathan. We're going to open this up for questions from our audience in just a moment but before we do, is it not a case of old world arrogance that you will come over here and tell these good people, when the majority of countries in the world right now have written constitutions, that we do it better because we haven't written it down?

JONATHAN SUMPTION: I haven't said that we did it better. We obviously start from completely different points of view. In the United States a written constitution on the legal model has nearly a quarter of a millennium of history, so that is where you start and I am not for one moment suggesting that that is something that you should dispose of or modify, it's 240 years too late for that. But, in the United Kingdom we start from a tradition in which our constitution is essentially political. It differs from almost every other country in the world in that respect. We are where we are and it is relevant when you try to answer the question: Ought the United Kingdom to move closer to a legal model? Then it seems sensible to me that one should look at the experience, pre-eminently that of the United States, of managing such a model.

The United States Constitution experience has demonstrated that there are dilemmas when you try to have both a democratic model and a legal one. That is something from which the United Kingdom ought to learn.

ANITA ANAND: But you do believe in – in your country and my country that we are slightly more fleet of foot, we have more flexibility because we have an unwritten – is that true or not true, that you believe that we have more flexibility because we have an unwritten constitution?

JONATHAN SUMPTION: I believe that we have a great deal of flexibility. I don't wish to suggest that the United States lacks that degree of flexibility.

ANITA ANAND: Question over there?

MARK MEDISH: Thank you. Mark Medish, a lawyer in Washington DC. I wanted to probe further on your view of the role of judges. You had made the observation in reference to due process and privacy cases decided by the Supreme Court that American judges, justices, sometimes appear to arrogate power, that they almost act as legislators through their practice of interpretation of legislation and of the constitution. And I was just wondering if you think that judges in your country as somehow less powerful? Don't they have the same powers of interpretation that can have hugely consequential impact on the outcome of cases and controversies and in that case, what really is the difference between a written and an unwritten constitution if judges, who must be the arbiters, still have this awesome power of interpretation?

JONATHAN SUMPTION: Judges in the United Kingdom have the same power of interpreting written instruments as they do in the United States, although they carry that power less far than at any rate the Supreme Court has done but their – the basic theoretical framework is the same. Moreover, judges in the United Kingdom have the same appetite for developing rights, as many judges do in the United States. That is something which I think is relatively recent. It's not recent in the States, it is recent in the United Kingdom, and is, I think, undesirable. The difference between our systems is that what the Supreme Court decides to be a right, a constitutional right, is thereafter written in stone unless the Supreme Court itself modifies its view subsequently or, unusually, there is a constitutional amendment. Whereas in the United Kingdom there are no entrenched rights that cannot be modified by parliamentary legislation, if necessary, by a single vote. That's the difference.

ANITA ANAND: Thank you very much. The gentleman over there?

REVEREND GRAYLAN HAGLER: I'm Reverend Graylan Scott Hagler, I'm the pastor of Plymouth Congregation of the United Church of Christ here in Washington DC and what I'm intrigued by is the total absence of any kind of racial analysis when it comes to the interpretation and the use of the constitution and law in the United States because it is basically the constitution and the language that was put in there, embedded in there, that gave our black folks the opportunity to hope that those words would be interpreted in a way that would lead towards their emancipation. And that eventually happened as attitudes got changed but the reality, if we waited for attitudes to change, it would never, ever happen, which was our process of almost 400 years of slavery in this country. And so, in a sense, you know, it was the words in the constitution, it was the battleground in order for people to get Brown v. Board of Education, even the Dred Scott decision failed or Plessy v. Ferguson,

but they kept coming up because that constitution was in place that guaranteed some rights. So what is your perspective on that analysis?

JONATHAN SUMPTION: Well, emancipation wasn't achieved by the original constitution and, indeed, wasn't achieved, in a real sense, by the constitution at any stage. It was achieved by a bloody seven year civil war. The results of that civil war were subsequently embodied in the amendments to the constitution which immediately followed it. It is clearly right that the original constitution – effectively it did not deal with slavery, it was ambiguous on the subject and that was because it was a subject on which the founding fathers would probably never have been able to agree, and that was a missed opportunity at a time when slaves were beginning to be emancipated in much of the rest of the civilised world.

REVEREND GRAYLAN HAGLER: In a sense, the emancipation was a battleground that was fought out in the civil war but also was fought out in the legislature. But the real issue is what follows, after reconstruction, is Jim Crow, what we know as Jim Crow in this country, the bricks of Jim Crow get taken down by basically the challenge of the law that forced legislative bodies to have to deal with things like desegregation and had to deal with things like public accommodations, that basically was the battleground on which we fought, as well as in the street.

JONATHAN SUMPTION: That battle was won politically. I agree that the Supreme Court contributed something to it, rather late, in Brown and Board of Education in particular, but essentially, as I read the situation historically, I mean, correct me if I'm wrong, the legislation of the 1960s and subsequently was what really produced that change. That seems to me to be the way that it ought to work, except in one sense, it ought to have been achieved very much earlier.

BRIAN CHUNG : Hi. My name is Brian Chung, I'm a graduate of both this university, the George Washington University, and the Queen's College Oxford. Both here in the US and in the UK we've seen that leaders have come to power promising to restrict the rights of minorities such as asylum seekers, terrorist suspects and particular religious groups, and Congress and parliament have gone along or generally failed to protect these rights. So my question is, how would your ideal system of constitutional law or politics protect the rights of these persistently unpopular minorities?

JONATHAN SUMPTION: As I understand it, the United States Constitution does not permit the executive to operate a system for admitting migrants which is biased on racial or religious grounds. Certainly that is the principle in the United Kingdom and, so far as I'm aware, of pretty well all European countries. All countries have an immigration policy and it seems to me likely that in any democratic country there will be laws which restrict the right to migrate into that country. I don't regard that as inherently objectionable. I would certainly regard it has inherently objectionable if these laws operated by discriminating between some races or religions and others but I'm not sure that I would accept that migrants can be regarded as a minority in the sense which you mean.

ANITA ANAND: Which system looks after minorities better, a written constitution or an unwritten constitution?

JONATHAN SUMPTION: I don't really think that there's any difference in that

respect. It would be possible for the United Kingdom to have laws which did discriminate against migrants from some races. In fact, we don't do that. It would not be possible in the United States. So to that extent, clearly, the American system has a more durable-----

ANITA ANAND: Sounds more robust?

JONATHAN SUMPTION: More durable protection. At the same time, there are many things in any constitutional polity which one would wish to prevent but which are already effectively prevented politically, and I think that our system does politically protect minorities from ethnic or religious discrimination.

VERA GOGOKHIA: I'm Vera Gogokhia here, and I come from Georgia, the other Georgia across the ocean. My question is what does – what do you think Brexit's [stance here]? Is it because of the very specific political system model that UK has-----

ANITA ANAND: Wow, there we go.

VERA GOGOKHIA which might be different from other countries, from other EU countries, or do you think it is the reaction to the decline of politics?

JONATHAN SUMPTION: I'm not sure I think either is true. I think that Brexit is the result, partly, of economic frustration, which is not peculiar to the United Kingdom but is very strongly felt there. It is partly the result of a romantic view of the British past, which in some important respects is very different from the past of other European countries. After the Second World War every European country had been invaded and had had its existing political system effectively destroyed, either in the course of the war itself or in the course of the Nazi conquests which preceded it. The fact that this didn't happen in Britain has given very many British people a feeling that they can operate independently from social and economic movements which exist across Europe and, indeed, in some cases, across the world. I personally think that this is an illusion but historically I think that that is the explanation.

I do not think that it has anything to do with our constitution except in one respect, which is that we adopted a mode of decision making, namely a referendum, on a particular issue which, I think, was constitutionally completely misguided. If you believe, as I do, that the prime function of any constitution is to provide a method of decision making which has the best prospect of accommodating dissent and disagreement within the citizen body, that's a state of affairs that you are likely to regard, as I do, as completely unacceptable.

ANITA ANAND: That is all that we have time for. My thanks to all of you here at George Washington University, to you who are listening at home and, most especially, to Jonathan Sumption. Thank you very much indeed.

(AUDIENCE APPLAUSE)

THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS
TX: 18.06.2019 0900-1000
Reith Lecturer: Jonathan Sumption
Lecture 5: Shifting the Foundations

ANITA ANAND: Welcome to the fifth and final BBC Reith Lecture of 2019 with the former Supreme Court Judge, Jonathan Sumption.

We're at Cardiff University's School of Journalism, Media and Culture, housed in a shiny new building which opened only last September, for the last of this series examining the relationship between the law and politics.

So far, Jonathan has questioned what he calls law's expanding empire and the mission creep of the European Convention of Human Rights. He has discussed how best democracy can accommodate political difference and has warned the UK against going down the American constitutional road. Now, he is going to offer some suggestions to try and re-energise political participation, both in our institutions and political processes. The lecture is called "Shifting the Foundations".

Please will you welcome the 2019 BBC Reith Lecturer, Jonathan Sumption.

(AUDIENCE APPLAUSE)

JONATHAN SUMPTION: I shall begin with a quotation: "For 150 years, power has been deposited in Parliament, and for the last 60 and 70 years, Parliament has been becoming more and more unpopular." Sounds familiar? The author of these words was not a leader writer in a daily paper or an angry demonstrator in Parliament Square, it was Benjamin Disraeli, perhaps the only true genius ever to rise to the top of British politics. He put them into the mouth of his hero, Sidonia, in his novel *Coningsby*.

Coningsby was published in 1844 at a time of great constitutional ferment in Britain,

and on the eve of a political crisis, in some ways uncannily like the one that we are going through at the moment. Of course, Sidonia was Disraeli himself, and his diagnosis was bleak. "The peril of England," he said, "Lay not in laws or institutions, but in what he called the decline of its character as a community. Without a powerful sense of community, even the best laws and institutions were a dead letter."

Now, I begin with these lugubrious words in order to make a number of points. First, there is nothing new about our current political predicaments. Secondly, in any political crisis, there will always be calls for changes to our institutions. Third, the suggested changes are usually irrelevant to the problem which has provoked them. Even so, Disraeli's warning has never discouraged people from calling for institutional reform when the real problem was in ourselves.

For quite a few years now, these calls have taken the form of proposals for a written constitution. I have been concerned in these lectures with our persistent habit of looking for legal solutions to what are really political problems. Calls for a written constitution mark the extreme point of that tendency. Theoretically, we could have a written constitution without expanding the constitutional role of the judiciary. The constitution of the French fifth republic, in its original form of 1958, came pretty close to that, but, in practise, every scheme of constitutional reform suggested for Britain in recent years has sought to limit the powers of Parliament and government and to increase those of judges.

This is not an accident. A written constitution is, by definition, a supreme source of law. It prevails over Parliamentary legislation. Any supreme law which sets out to regulate relations between the citizen and the state must necessarily put some rights beyond the reach of the elected legislature. But the power which the legislature loses under such schemes does not simply disappear, it passes to judges. Judges recognise, interpret and sometimes create constitutional rights. Judges decide when these rights may be trumped by other interests.

Now, it will be apparent from earlier lectures in this series that I am sceptical about claims that our system of government can be improved by injecting a larger legal element into it. The main problem about such claims is that they attribute our current political malaise to the defects of our institutions when they are actually due to other causes which no amount of institutional reform will cure.

As it stands, the British constitution has four features which distinguish it from nearly every other constitution in the world. First, it is unwritten. There is no fundamental document against which the constitutionality of acts of the government or the legislature can be measured. Second, there is only one truly fundamental constitutional rule, which is that Parliament is sovereign. There is no legal limit to what it can do, the limits are political. Since the House of Commons, as the dominant element in Parliament, is an assembly of elected representatives, the sovereignty of Parliament really is the foundation of our democracy.

Third, the limits on what Parliament can do depend on political conventions. Conventions are not law, they are rules of practice. They derive their force from shared political sentiment which would make it politically costly to disregard them. Some of them are fundamental. For example, the convention that the monarch must act on the advice of her ministers, that the House of Lords does not obstruct legislation for which the

government has an electoral mandate, or that Parliament will not normally exercise its undoubted right to legislate for Scotland or Wales on matters which have been devolved to their own legislatures. It has been said that while the United States' constitution is a matter of law, the British constitution is a matter of opinion. Now, that is too glib, but there is some truth in it.

Fourth, and last, the government is part of Parliament and dominates it without ever being entirely in control of it. Its dominant position is due partly to tight party discipline and partly to the size of the ministerial vote. But the main reason for it is the long political tradition reflected in the procedural rules of both Houses that Parliament is not just a legislative or deliberative body, but an instrument of government. It is there to support the executive, or change it for another one that it can support.

The first three of these features were reaffirmed in the Supreme Court's decision of 2016 which ruled that the government needed Parliamentary authority to withdraw from the European Union. The fourth has been tested by the crisis over Brexit, but it remains a critical feature of our system. The objections to this system are that it is obscure, old-fashioned, out of step with international practice and gives far too much power to Parliament. There is some justice in all of these criticisms. But before we look for alternative arrangements we need to understand how we ended up with the present ones.

The British constitution is unique, but uniqueness is not necessarily a vice. It is the result of our history, which is itself unique. The godparents of written constitutions have been revolution, invasion, civil war and decolonisation. Constitutions have almost always been adopted by states upon the foundation of the state, or on the destruction of some previous order. As a result, there was always a blank sheet of paper to write on. But Britain is an ancient state which cannot be reduced to a blank sheet of paper.

For more than three centuries it has been fortunate, or perhaps unfortunate, in having experienced none of the catastrophes which have called for new beginnings elsewhere. Nothing has ever happened to create a new source of law to stand above Parliament. You do not have to believe, like Charles Dickens' Mr Podsnap, that our constitution was bestowed upon us by a benign providence in order to be wary about projects to demolish and rebuild it. All nations are prisoners of their past. They can discard it, but only at the cost of immense disruption and unpredictable outcomes.

I do not doubt that a written constitution would be an artefact of perfect rationality, a thing of great intellectual beauty, but it would have no basis in our historical experience, and experience counts for a great deal in human affairs; more than rationality, more even than beauty. Ultimately, the habits, traditions and attitudes of human communities are more powerful than law. Indeed, they are the foundation of law.

If our existing constitution was intolerable, we might have to put up with the disruption and instability involved in jettisoning it. But, in fact, it has brought us real advantages. Because it remains essentially a political and not a legal constitution, it is capable of significant incremental development without any formal process of amendment. This has enabled the British state to adapt to major changes in our national life which would have overwhelmed much more formal arrangements, the onset of industrialisation and mass democracy, the existential crises of two world wars, the creation and then loss of a worldwide empire, the rise of powerful nationalisms in Ireland, Scotland and Wales.

All of this has been accommodated politically without changing the basic constitutional framework. Take devolution, not just because we are gathered here in the capital of a politically reborn Wales, but because it is probably the outstanding modern example of the advantages of constitutional flexibility. Devolution has radically altered the internal workings of the United Kingdom, but it was achieved politically by ordinary legislation after a general election in which it was part of the successful party's manifesto.

Compare, for a moment, Britain's accommodation of Scottish and Welsh nationalism with Spain's apparent inability to accommodate the nationalism of the Catalans. One reason why the issue has been so much more confrontational in Spain is that relations between the state and its constituent regions are fixed by Article 2 of the Spanish constitution. The Spanish constitution is independently enforceable by the judges and, like all constitutions, it is hard to amend. A political solution is therefore difficult to achieve.

The fact that Britain has recently been through a period of radical change and is entering another is not, therefore, a reason for ditching our current constitutional arrangements. On the contrary, it is a reason for retaining them. Crises of political legitimacy are not unusual, either here or elsewhere. Other democracies have handled them no better, and often worse than we have, in spite of having elaborate formal constitutions with all the features recommended by those who would like to see one here.

This suggests, as Disraeli argued in *Coningsby*, that we ought to be looking at more fundamental causes of the current diseases of our body politic than the peculiarities of our constitution. In an earlier lecture in this series I suggested that a stable democracy requires a minimum level of public engagement with the political process. This is where the real problem lies. Successive annual surveys published by the Hansard Society and British Social Attitudes show us to be a country with a strong sense of political and public obligation and a real interest in public affairs.

Yet, this has been accompanied by the progressive disengagement of our people from the actual political process. The symptoms of this are all around us. The long term decline in the membership roles of all the major national political parties, falling turnout at elections, widespread contempt for professional politicians, the rise of powerful regional nationalisms offering a more immediate source of legitimacy. These things are not quirks of our political system. Other countries with very different systems have experienced them too.

Membership of political parties has declined across most of Europe. The decline has, in fact, been steepest in countries like the United Kingdom, France and Sweden with the longest democratic traditions. Regional nationalisms have challenged established states in Belgium, Spain and elsewhere. Turnout rates at presidential elections in the United States hit a post-war peak in the 1950s and '60s, but have fallen ever since. They are currently among the lowest in the world. France has recently experienced an even sharper falloff.

These are symptoms of a wholesale rejection, not just of politicians, but of the political process itself. Why has this happened in a country as politically aware as ours? Of course there have been spectacular incidents, like the scandal which erupted in Britain in 2009 over Parliamentary expenses. But there are, I think, more fundamental factors at work which are inherent in the democratic process itself.

Democracy generates unrealistically high expectations. They spring partly from the eternal optimism of mankind, partly from a misunderstanding of the role of politicians, and partly from an exaggerated view of their power to effect major change. The problem is aggravated by the auction of promises at every general election. When these expectations are disappointed, as they inevitably are, a sense of impotent frustration undermines public confidence in the whole political process. Either the prospectus was false, or the execution was incompetent.

This doesn't necessarily matter when everything is going well, but it matters extremely when other things are going badly. Functioning democracies have always been heavily dependent on economic good fortune. Western democracy has had plenty of good fortune. It was born in the 19th century in an age of creative optimism, economic expansion and European supremacy. The shattering of optimism is a dangerous moment in the life of any community. Disillusionment, with the promise of progress, was a major factor in the 30-year crisis which began in 1914 and ended in 1945. That crisis was characterised by a resort to autocracy in much of Europe.

Three-quarters of a century have now passed since 1945, years marked by rapid economic growth and exponential improvements in standards of living. But today, most western democracies face problems of faltering growth and relative economic decline, of redundant skills and capricious patterns of inequality, most of them the legacy of past successes. These things generate feelings of disempowerment which discredit democratic institutions. The polling data collected by the authoritative World Values Survey suggests that, although most of Europe still regards democracy as fundamental, in Britain, France and the United States, only the older generation agree. Most people under 30 no longer do.

Recent polls conducted by the Hansard Society suggest that a clear majority of our fellow citizens would welcome government by a strongman willing to break the rules. A high proportion of them think that this strongman should not have to worry too much about representative institutions like Parliament. Some climate change activists have openly proposed a suspension of democracy on the grounds that their programmes for limiting carbon emissions and species extinction at the expense of current standards of living would never be endorsed by electorates.

All of this has been aggravated in the public mind by the perceived remoteness of politicians. Representative democracy necessarily produces a political class separated by lifestyle and outlook from those who vote for them. This is inherent in the nature of democratic government. Few politicians will ever be like the generality of their electors, even if they began that way. Getting elected calls for exceptional levels of ambition and commitment. Government calls for high levels of information, experience and skill. These qualities are unlikely to be shared by most of the electorate.

The uncomfortable truth is that all political systems are aristocracies of knowledge. Democracy is only different in that the aristocracies are installed and removable by popular vote. This radically affects the way that they behave and think, generally for the better, but it does not bring them any closer to their electors. All of this is hard to reconcile with current notions about representation which have undergone a subtle but important change in our lifetimes.

People expect their representatives, not just to act for them, but to be like them. This

is an old idea. John Adams, one of the founding fathers of the United States, thought that the legislature should be an exact portrait in miniature of the population. The French revolutionary leader, Mirabeau, declared that it should represent the people as exactly as a map represents a landscape. But this was the top-down rhetoric of a political elite. The idea has acquired a much wider resonance in our own age which rejects deference and abhors hierarchy in a way that neither Adams nor Mirabeau would have understood.

Resentment of political elites played a large part in the British referendum campaign of 2016. The same resentments were decisive in the American presidential campaign later that year, as well as in the French presidential campaign of 2017 and the Italian legislative elections of 2018. In all of these contests, lack of political experience was a central part of the successful candidates' electoral pitch. The consequences of this rejection of political elites are, however, much more serious in Britain than in other countries. This is because of the critical role of political parties in Parliament and the intimate relationship between the government and the House of Commons.

Party membership may have dwindled to low levels, but party members still choose Parliamentary candidates and have a major voice in the choice of party leaders. Declining membership rolls have allowed both of the big national parties to be colonised by relatively small numbers of hard-edged zealots and entryists with a very limited vision of the public interest and no interest at all in accommodating anyone else. Even among the wider public, people are less willing to accept the horse trading that is a necessary part of building any kind of public consensus. This absolutist approach to controversial issues is the hallmark of fanatics, but it isn't confined to them.

Few things were more revealing than the electoral catastrophe that befell the Liberal Democrats in 2015. They lost out because of the compromises that they had had to make to create a viable coalition government in 2010 when no party had a majority in the House of Commons. To many of their erstwhile supporters, compromise was inherently unprincipled. Unbending attachment to one's principles is often morally attractive, but it is just as often politically sterile. This isn't just our problem. The United States has, for the moment, ceased to be a political community because neither side of the major political divide respects the legitimacy of policy positions that they disagree with. In Britain, we have reached the same position on Brexit.

In the last French presidential election, the successful candidate, Emmanuel Macron, was preferred by less than a quarter of the electorate in the first round. A shift of just 3% of the votes would have resulted in a runoff between the intransigent right of Marine Le Pen and the intransigent left of Jean-Luc Málenchon. Two and a half millennia ago, Aristotle regarded democracy as an inherently unstable form of government, precisely because it was vulnerable to demagogues like these. The genius of western democracy has been to defy that prediction for some two centuries - but for how much longer?

If this is a plausible assessment of our current problems of political legitimacy, then it must, I suggest, be obvious that adopting a written constitution to serve as our supreme law will not make any difference. It will simply produce a partial shift of power from an elective and removable aristocracy of knowledge to a core of professional judges which is just as remote, less representative and neither elective nor removable.

None of this means that there should be no constitutional change. There has been a

great deal, and there will be more. But it has been gradual and piecemeal and has not undermined the sovereignty of the elected Parliament and that, as it seems to me, is as it should be.

The one significant change which might be thought to be pressing now harks back to the points that I made earlier about public engagement with politics. It concerns the electoral system. The first-past-the-post system which applies to Parliamentary elections in the United Kingdom has advantages which are often overlooked. It enables governments to come to power with absolute majorities in the House of Commons, even when they have no absolute majority among the electorate at large. They may not even have the largest share of the vote. This is a much criticised feature of our system, but it has contributed greatly to the stability of the English state and to the ability of governments to take decisive action when it was needed.

It has, of course, achieved this by squeezing out minor parties unless they have a strong regional base. The result has been to confer an alternating monopoly on the two biggest national parties. This was probably acceptable at a time when the two major national parties had very large membership rolls and a high proportion of British voters strongly identified with one or other of them. But it is difficult to justify now. The duopoly of the major parties is as powerful as ever, but their membership base is smaller and less representative than it has ever been. A move to proportional representation at Parliamentary elections, combined with open primaries for choosing Parliamentary candidates would weaken the duopoly. It would encourage more and smaller parties, it would give the established national parties a stronger incentive to broaden their appeal beyond their base, it would force them to negotiate coalitions. Above all, it would break the power of the tiny activist minorities who control local party associations.

The change would mean that the process of policy adjustment and compromise which currently operates within political parties would, instead, operate between political parties. That would probably mean weaker and less stable governments which would be a real loss, but it might still be a price worth paying if it boosted public engagement with politics and enabled them, once more, to accommodate differences of interest and opinion across our population.

There is already plenty of gloomy speculation about how long democracy can last against an adverse economic background without my adding to it. Prophets are usually wrong, but one thing I will prophesy; we will not recognise the end of democracy when it comes, if it does. Advanced democracies are not overthrown, there are no tanks on the street, no sudden catastrophes, no brash dictators or braying mobs, instead, their institutions are imperceptibly drained of everything that once made them democratic. The labels will still be there, but they will no longer describe the contents, the facade will still stand, but there will be nothing behind it, the rhetoric of democracy will be unchanged, but it will be meaningless - and the fault will be ours. Thank you.

(AUDIENCE APPLAUSE)

ANITA ANAND: We are going to take questions from the floor. Before we take one of these, I have a question for you. You've spent the majority of these lectures talking about the threat to democracy, this sense of impotence that people feel that their vote doesn't make any difference, but isn't there a bigger threat? It isn't so much impotence as *rage* that

there is actually structural economic inequality that gives this sense that this system isn't working well enough and that is the real threat to democracy?

JONATHAN SUMPTION: I don't agree that inequality is itself a threat to democracy. I do agree that it is a problem. If we want to change the economic system, we can do that politically. The institutions exist to enable us to do it. So far, there has been very little appetite for that. That may change.

ANITA ANAND: Do you think we're just being ungrateful then that the politics is delivering, but we're just not being grateful enough for what it does deliver?

JONATHAN SUMPTION: Well, politics - politics is not delivering at the moment because we only have one issue in our public life, namely Brexit. The reason why politics is not delivering on Brexit is that we have adopted a system of decision-making, namely a referendum, which is deliberately designed to circumvent the political process. It's, therefore, a little absurd for us to blame the political process for not responding appropriately.

(AUDIENCE APPLAUSE)

ANITA ANAND: Let's take our first question over here?

RO LYNTON: My name is Ro Lynton. I was wondering what's your opinion on having compulsory voting?

JONATHAN SUMPTION: I would not like to see compulsory voting. It is the right of every citizen not to vote if he doesn't want to. I know that in Australia you can vote, so to speak, not to vote. You can spoil a ballot or you can simply say, "I don't wish to express an opinion," but it seems to me that interfering with peoples' liberty to vote or not to vote is unjustifiable. There is another reason why I take the same view, which is that forcing people to vote when they don't really want to do so is an invitation for them to do so carelessly and without serious thought, then I'm not sure that their vote would contribute a great deal to our affairs.

ALUN MICHAEL: Alun Michael, I'm Police and Crime Commissioner for South Wales, before that 25 years in Parliament and in the Welsh Assembly. If we agree not to meddle with institutions, but to make the most of what we've got, including devolution and, in my view, our membership for the European Union, what should we change? Should we not be better at legislation, given that laws rarely prevent what they forbid? Isn't the challenge to find way of designing legislation to be evidence-based and preventative, rather than populist?

JONATHAN SUMPTION: Yes, is my short answer to that. I do not accept that the legislative process is not based on the serious study of problems. The great majority of legislation is very seriously thought through. The committee system in Parliament is quite exacting, and I think that by the standards of other legislatures, which is a fair standard to apply, I think that the Parliamentary record on legislation is pretty good. I entirely accept that Brexit is not a good advertisement for any political system, but I have sought to explain the major reason for that in answer to the last question.

ANITA ANAND: We have spent a great deal of time in these lectures talking about the problems that Brexit has shown up in - in the system. Just for one moment let's think about what might actual heal those rifts and divisions and cracks. What do you think should happen, in your opinion? Not what could happen, but what should happen if you had all power to change everything?

JONATHAN SUMPTION: Are you asking me what should happen about - about Brexit?

ANITA ANAND: I'm giving you a magic wand, Jonathan, is what I'm giving you. Yeah.

JONATHAN SUMPTION: With a view to doing what?

ANITA ANAND: Well, healing the divisions that you have identified and talked about.

JONATHAN SUMPTION: I do not think that our divisions on Brexit are going to heal except over a long period of time, and I do not think that there is any institutional way of making them heal quicker. The irony of Brexit is that until the referendum, membership of the EU, although people had views about it, was very low down most peoples' agenda, and what has happened is that the referendum has raised it to the top of the agenda and made the - the way in which we decide whether to leave the Union or not and, if so, on what terms an extremely abrasive process. Whatever the solution, whether there is a no deal leaving, or a Customs Union, or whether we remain there will be a very large body of vocal and extremely angry people.

ANITA ANAND: I think it's a very good moment to talk to somebody who is at the start of all of this. Mark Reckless, do you mind if we come to you?

MARK RECKLESS: I have campaigned to leave the European Union all my adult life. I held a by-election in Rochester where I was previously a member of Parliament and I'm now a member of the Welsh Assembly, and I think with the rise of the Brexit Party, I think we are seeing that…I think …we've had a lecture, I think, of some of the symptoms that if you give powers to judges and to regulators and to the European Union and people don't feel they can make a difference to their lives, they become disengaged, and Parliament decided to solve this by asking the people to decide, the government told them all it would implement what they decided, yet then we see the judges say that's not allowed, it has to go back to Parliament.

ANITA ANAND: Do you not at some point sit back and think how are we going to get out of this together?

MARK RECKLESS: Well, we get out of it by implementing the decision, that's why we had the referendum. The problem is the refusal of the politicians, and I'm afraid the Supreme Court by giving it back to them when they decided to give it to the people and the government had said the people would decide, that has caused our problems.

ANITA ANAND: So when - what-----

MARK RECKLESS: We should implement the result.

ANITA ANAND: So just - so when you-----

JONATHAN SUMPTION: Can I comment on this?

ANITA ANAND: Yes, of course. Just what you - I don't know whether you - where you - where you heard, but just in case people didn't hear, there were lots of murmurs of ridiculous and - and - and rubbish coming from the front few rows, Jonathan.

JONATHAN SUMPTION: Well, I'm not going to use either word.

ANITA ANAND: Uh-huh.

JONATHAN SUMPTION: But, first of all, I think that your history of this is not sound. First of all, the Miller decision which you characterise as the judges handing the matter back to Parliament-----

ANITA ANAND: And that's the Gina Miller decision that you're talking about.

JONATHAN SUMPTION: That decision simply reflected the fact that the referendum statute did not specify what the law was to be if the referendum result resulted in a - in a leave vote. Now, you say the government said that they would implement it. I have to tell you that in this country, the government does not make the law, only Parliament does. Nothing in the referendum bill authorised the government to make law. We, therefore, had to work out what the constitutional position was as regards the revocation of treaties which really significantly alter the contents of English law. And, not to put too fine a point of it, we decided that Mrs May did not have the power to alter the whole constitution of the United Kingdom by writing a diplomatic letter to the President of the European Union. That seems to us not to be what the British constitution was about.

I would also like to take you up on another point which is that the Miller decision is not the reason why we are dependent on Parliament. The Miller decision was simply that Parliament had to approve the giving of the original notice under Article 50 to leave the European Union. Parliament approved the giving of that notice by an enormous majority. The reason why we are currently in a position where Parliament is vital, and has failed to agree, is that in course of the withdrawal bill's passage through the House of Commons the Prime Minister gave an undertaking, which she was politically forced to give, not by the judges but by parliamentarians, that any deal which she made with the EU would require Parliamentary approval. The whole of what has happened since has been attributable to that, and the judges had nothing to do with it.

ANITA ANAND: A very brief right to reply.

MARK RECKLESS: On - on the treaty on the functioning of the European Union to implement the Lisbon treaty, Parliament specifically and expressly constrained the prerogative power on the use of other articles of that treaty. It did not constrain the prerogative on Article 50, it was the Supreme Court who did that and did not allow the peoples' decision to stand without going back to Parliament.

JONATHAN SUMPTION: Well, I'm not going to argue with this position now because you will find my views very fully expressed in the judgment to which I was party. But I disagree.

(AUDIENCE APPLAUSE)

ANITA ANAND: A question over here. .

ROGER AWAN-SCULLY: Roger Awan-Scully, Head of Politics here at Cardiff University. Recent experience in the United States has not suggested that the use of open public primaries leads to political parties moderating and broadening their appeal. You appear to be more optimistic about their use in this country and what might follow from that, so why?

JONATHAN SUMPTION: It's not always going to work, I quite agree. But, on the whole, the larger the degree of participation in the choice of an MP, the more likely it is that one will have somebody in whom the population thereafter can feel confidence. The American experience is very different in one particular respect, which is that the choice of the president is an exercise of direct democracy, as it is in France, whereas in most countries, and certainly in this country, the head of government is only indirectly selected by people. They are basically selected by MPs or by, in some cases, with a confirmatory vote by party members. You have to look at the situation that we are currently in. In the average Parliamentary constituency party, a candidate for that party is selected by, on average, rather less than 200 people. Now, I do not hold out open primaries as a panacea for all ills, but it's got to be better than that.

ANITA ANAND: This has been a fascinating series of lectures and has really drilled deep into that relationship between law and politics. And you've done the law, are you going to do politics?

JONATHAN SUMPTION: Personally?

ANITA ANAND: Mmm.

JONATHAN SUMPTION: Not on your life.

(AUDIENCE LAUGHTER)

ANITA ANAN: Okay. So supplementary question, why not? Why not?

JONATHAN SUMPTION: Well, one reason is that I'm 70.

ANITA ANAND: That doesn't rule many people out.

JONATHAN SUMPTION: I've got a lot of things to do before I expire.

ANITA ANAND: Okay. All right. Fair enough. That is all that we have time for. My thanks to the University of Cardiff and the School of Journalism for hosting us, this wonderful audience here in Cardiff, to you listening at home, but most of all to our Reith lecturer of 2019, Jonathan Sumption.

(AUDIENCE APPLAUSE)