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**THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS**

**TX: 21.05.2019 0900-1000**

**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 14<sup>th</sup> 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 5<sup>th</sup> 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 19<sup>th</sup> 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 18<sup>th</sup> century. It discriminated between different religious denominations until the 19<sup>th</sup> 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 17<sup>th</sup> 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 17<sup>th</sup> century may have abolished absolute monarchy but the 20<sup>th</sup> 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