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Trial of the State: Law and the Decline of Politics
Jonathan Sumption. London: Profile Books Limited, 2019, 112pp (£8.99 Softback) ISBN 9781788163736

The United Kingdom is currently experiencing what can only be described as a political crisis. As faith in politics declines amongst citizens, there is an increasing trend to turn to the courts for answers: – this is the thesis of Jonathan Sumption's *Trial of the State: Law and the Decline of Politics*. Based on the 2019 Reith Lectures,[1] two recurring themes emerge throughout the book: – the decline of politics and the rise of law to compensate.

In the first chapter of the book, Sumption explores how the law has expanded to fill the voids created by an ever-growing decline in politics. For him, the judiciary, using the rule of law, has blurred the boundaries between the courts and the legislature. The rule of law, as articulated by Sumption, encompasses three principles: first, public authorities must adhere to the law; second, all citizens are entitled to basic rights; third, everyone should have access to an independent judiciary. However, for Sumption, the rule of law '… does not mean that every human problem and every moral dilemma calls for a legal solution.'[2] Herein lies the problem for Sumption – he argues that society turns too readily towards the courts for solutions to dilemmas that are ill-suited to judicial resolution.

Using *Great Ormond Street Hospital for Children NHS Foundation Trust v Yates*[3] as an example, Sumption attempts to demonstrate how the law has expanded into areas of public

* I am grateful to Dr Alan Greene, Dr Natasa Mavronicola and Adam Pendlebury for their insightful comments on earlier drafts.
[1] See website available at https://www.bbc.co.uk/programmes/m00057m8.
[2] J Sumption *Trials of the State* (London: Profile Books Limited, 2019) p 6.
[3] [2017] 4 WLUK 260.

and private life, that a decade ago, in his opinion, would not have made it before the courts.[4] For him, the decision of doctors to seek judicial authorisation before withdrawing treatment from a sick child, for fear of being sued, demonstrates how society has evolved to '… regard these terrible human dilemmas as the proper domain of the law.'[5] He goes on to illustrate how this case demonstrates the erosion of individual responsibility, in favour of collective moral judgments.

Sumption suggests that the outcome of *Yates* had been nationalised, i.e. the decision to withdraw treatment from the child was taken away from the parents and instead, placed in the hands of the state. However, if the medical team had withdrawn treatment without the parents' consent, the decision would have still been removed from the parents, though be it by medical practitioners rather than the courts'. Though Sumption does not directly address who should make these decisions, he uses *Yates* to illustrate the continued erosion of '… autonomous decision-making by individuals.'[6] Indeed, for Sumption, cases like *Yates* '… marks the expansion of the public space at the expense of the private space that was once thought sacrosanct.'[7] However, he fails to acknowledge the main issue in *Yates* – the medical team and the parents could not reach an agreement and needed an impartial arbiter to rectify the situation. Indeed, the main function of the court is dispute resolution, so it is difficult to understand how the decision of *Yates* illustrates Sumption's thesis.

Sumption is not just concerned with the rise in domestic law to fill political voids, he is also apprehensive about the expanding rights contained within the European Convention on Human Rights (ECHR). Sumption is critical of the approach undertaken by the European

[4] Sumption, above n 2, p 11.
[5] Ibid.
[6] Ibid.
[7] Sumption, above n 2, p 13.

Court of Human Rights (ECtHR) and its interpretation of the Convention and in turn, the case law application of these decisions by the judiciary here in the UK. The Convention has been interpreted as a living instrument and though Sumption maintains that it is inevitable that the ECHR will develop as democracies change over time, he is critical of the 'mission creep' nature of the Convention.[8] Sumption acknowledges that in some instances, interpretation is necessary, in fact, inevitable at points, yet he fails to clarify the boundary as to when the act of interpretation infringes upon politics. Here, he neglects to articulate a clear argument that there *is* a distinction between law and politics. Indeed, political constitutionalists argue that there is no distinction between law and politics.[9] Yet, at varies points within the book, Sumption seems to endorse a political constitutionalist approach.[10]

For Sumption, '[r]ights do not exist in a vacuum. They are the creation of law, which is a product of social organisation, and therefore necessarily a matter of political choice.'[11] Indeed, he goes on to suggest that some rights are '… inherent in our humanity'.[12] If some rights are inherent, how can law be separated from politics? Here, Sumption seems to acknowledge the evolution of the Convention, as democracies evolve, whilst at the same time, criticising the expansion of the ECHR. For example, Sumption argues that there are some instances where the ECtHR has expanded the Convention beyond what it originally entailed; essentially taking on the role of the legislature.

Using Article 8 of the ECHR as an example, Sumption attempts to demonstrate how the ECtHR has overstepped its role from arbitrator to legislature. Here, the principle of personal autonomy has been read into Article 8 by the ECtHR to include things such as

[8] Ibid., p 58.
[9] For example, J A G Griffith, *The Political Constitution* (1979) 42(1) The Modern Law Review 1
[10] I would like to thank Dr Alan Greene (Birmingham Law School) for his initial comments on this point.
[11] Sumption, above n 2, p 49.
[12] Ibid.

homosexuality, immigration and the policing of demonstrations; none of which can '… be found in the language of the Convention.'[13] Once again, we see a flaw in Sumption's thesis. On the one hand, Sumption seems to accept that it is inevitable that personal autonomy will be read into the law, whilst on the other hand, criticising the 'mission creep[ing]' nature of the law.[14] Here, he fails to justify when, for him, it is acceptable for the ECtHR to expand the scope of the Convention, and when it will be considered as encroaching on the role of the legislature. In theory, Sumption does not have an issue per se with an external court acting as a check in respect of a state's compliance with human rights. Instead, his concern focuses on the ECtHR acting as law-maker. For Sumption, this is further proof of the creeping nature of the law as we witness a decline in politics.

The book's second chapter acts as a provocative discussion in which Sumption's overarching argument is politics in favour of law. For Sumption, political problems should be solved by politics alone, not law. Acknowledging the decline in trust and involvement amongst citizens in the world of politics, he argues that individuals have turned too readily to the courts to fill political voids.[15] But for Sumption, this does not mean that judges should make the ultimate decision in all cases. There are some matters, which are wholly political and therefore outside the realm of judicial intervention.[16]

With a decline in individuals becoming involved in politics and in turn politics losing '… its prestige',[17] Sumption suggests that judges have been more than willing to fill this gap under the cover of the rule of law. For Sumption, though judges have always made law, their

[13] Ibid., p 58- 59.
[14] Ibid.
[15] Indeed, in recent surveys, judges are considered more trustworthy than politicians. See website available at https://www.ipsos.com/ipsos-mori/en-uk/its-fact-scientists-are-most-trusted-people-world.
[16] For instance, the legalisation of euthanasia as discussed by Sumption, above n 2, p 63-66.
[17] Ibid., p 34.

current understanding and conception of the rule of law, has allowed them to take on the role of the legislature. According to Sumption, the courts' approach to what constitutes the rule of law has expanded to allow the judiciary to make judgments on matters which can be considered as 'wholly political.'[18] Here, by utilising the principle of legality, or as Sumption terms it legitimacy, judges inch their way into the political domain, by deciding on the norms or the clarity of language within a legal provision. To make this point, Sumption utilises *R (on the application of Evans) v Attorney-General*[19] as an example.

In *Evans*, the Supreme Court overruled the Attorney General (AG) who had declared it was not in the public interest for letters between the Prince of Wales and Ministers to be published, despite an Act of Parliament conferring this power upon the AG.[20] For the majority of the Court, Parliament could not have intended for the AG to have such power – ultimately, for Sumption, impinging on parliamentary sovereignty.[21] This is one of several examples given by Sumption as further evidence of law supplanting politics. However, Sumption fails to give due acknowledgement to the fact that statutory interpretation is not a new phenomenon. Like that of dispute resolution, discussed above, a further function of the court is to interpret legislation. Perhaps in *Evans* the court went too far in interpreting the Freedom of Information Act 2000, as suggested by Sumption, but Parliament could have overridden the judgment, by implementing new legislation, as was done in *Burma Oil Company v Lord Advocate*.[22] Consequently, Sumption's argument that the court overstepped its constitutional boundaries in *Evans*, is undermined.

To answer why we should favour politics over law, Sumption turns, in his fourth chapter, to

[18] Ibid., p 35.
[19] [2015] AC 1787.
[20] Freedom of Information Act 2000 s 53(2).
[21] Sumption, above n 2, p 40.
[22] [1965] AC 75.

look at the lessons we can learn from the United States of America. Referring to the Due Process Clause of the fourteenth amendment as an example, he attempts to demonstrate how the Supreme Court of the US has overstepped its position to make political judgments. As acknowledged by Sumption, the interpretive expansion of the Due Process Clause is *akin* to the development of Article 8 by the ECtHR as discussed above. Here, the US Supreme Court has read the right to privacy and bodily autonomy into the American Constitution. In turn, the Supreme Court has come to decisions which, for Sumption, should have been left to legislative bodies. He takes particular issue with the use of the Due Process Clause in *Roe v Wade*,[23] which was interpreted in a way to legalise abortion in the US, a matter which he considers to be wholly political.[24]

Sumption takes the stance that a constitution like the US is based on the principle of not being able to trust the executive branches of government, and instead, resting that faith in judges.[25] Yet, he remains sceptical of giving judges such power. For him, judges do not always make enlightened decisions. By entrusting judges with such matters, like the right to abortion, prevents the issue from being publicly debated. He goes on to suggest that in his opinion, though he cannot prove it, one reason abortion is considered such a controversial topic in America, is because it was legalised through the courts under the Due Process Clause, as opposed to the democratic process.[26] However, Sumption seems to underestimate the complexities of abortion in the US and consequently, he fails to discuss, or even acknowledge, the wider religious, political, racial and social issues of abortion.[27]

[23] 410 US 113 (1973).
[24] Sumption, above n 2, p 86.
[25] Ibid., p 81.
[26] Ibid., p 89.
[27] N F Russo & J E Denious 'Why is abortion such a controversial issue the United States?' in L J Beckman & S M Harvey (eds) *The new civil war: The psychology, culture, and politics of abortion* (Massachusetts: American Psychological Association, 1998) pp 25-59.

In his final chapter, Sumption turns to examine whether a written constitution is the answer to the rise in law and the decline of politics. Put simply, the answer for Sumption is no. For him, this encompasses the problem he unpacks throughout his book: – looking for legal solutions for political problems. Throughout the concluding chapter, Sumption argues in favour of the unwritten constitution of Britain.[28] Indeed, for Sumption, the four elements of the British Constitution (being unwritten,[29] parliamentary sovereignty, constitutional conventions and the executive being part of the legislature) makes it unique, alongside its '… unbroken constitutional history',[30] in comparison to other constitutions across the world. By using an inflexible constitution as an example, Sumption argues that the flexibility contained in the British Constitution is its biggest advantage and despite Britain recently going through a radical change, for instance, leaving the European Union, this is no reason to impose a written constitution. The law is rational, politics is not.[31]

There is no doubt that we are at a fragile point within our political system but for Sumption, the cause of this cannot be fixed with institutional reform. The real problem lies in the decline of politics. In recent years, we have witnessed a disengagement between the public and politics, not just here in the UK but worldwide. For Sumption, we have reached the point in which we need to revert back to respecting the political process. But how do we do this? Well, one solution put forward by Sumption is to remove the 'first past the post' system and instead move towards proportional representation.[32] In turn, this would allow for smaller political parties to form part of the political system. Though this might create a less stable

[28] Throughout the book, Sumption refers to the Constitution of the United Kingdom as the British Constitution.
[29] A better term here would be 'uncodified constitution'. The use of the phrase 'unwritten' implies that the Constitution of the United Kingdom is not physically contained within legal provisions. However, the Constitution of the United Kingdom is located in a variety of legal provisions but unlike that of the United States of America, it is not contained in one coherent document.
[30] Sumption, above n 2, p 99-100.
[31] Ibid., p 41.
[32] Ibid., p 111.

government, for Sumption, this is 'a price worth paying if it boosted public engagement and enabled politics once more to accommodate differences of interest and opinion across our population.'[33] This may well be a solution in attempting to get more individuals involved in the political process, but the issue of political apathy runs deeper than how elections work.

This book has three main strengths. First, it is an easy read and no prior legal knowledge is needed to understand Sumption's central thesis. Second, Sumption attempts to use examples throughout the book to illustrate his arguments, though more depth is needed. Last, and most importantly, it allows for a critical analysis of the law and its role within a democracy. Throughout, Sumption makes several interesting points, though as discussed above, some of these points are contradictory. He seems to focus on cases he wholly disagrees with, without unpacking and exploring why he thinks, with evidence, that law and politics can indeed be separated.

[33] Ibid., p 112.