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**JONATHAN SUMPTION, *TRIALS OF THE STATE:  
LAW AND THE DECLINE OF POLITICS*\***

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Jonathan Sumption, who delivered the 2019 BBC Reith lectures, was a pre-eminently successful barrister who rose from the Bar to the highest perch of judicial appointment in the UK, the Supreme Court, without occupying any intervening full-time judicial positions. He is clearly possessed of considerable ability and, while he loved the academic life as a don, he turned to the Bar as a career because he did not like penury. He is a conservative neo-liberal and a libertarian although he has given judgments that would support government claims, and his own thesis, that judges allow the judicial process to be used as the pursuit of politics by other means.<sup>2</sup> His libertarian views were well illustrated when he very publicly criticized the police for over-zealously implementing the wishes of ministers (and not the law), themselves reacting to public pressure, in applying stringent lockdown measures in the COVID-19 crisis in March 2020. Britain risked becoming a ‘police state’, he warned. Was the severe police reaction justified he asked? (*The Spectator* 2020)

The subject of *Trials of the State: Law and the Decline of Politics*, the book under review, is the role of judicial law in public life and law’s expanding empire. Sumption’s thesis is that judicial law has undermined legislation and the political process in the UK today. The argument was unfolded in lectures delivered in May and June 2019 in London, Birmingham, Edinburgh, Washington DC and Cardiff. These were, with some editing, then published in the present monograph.

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\* Profile Books 2019 and 2020.

<sup>1</sup> Emeritus professor of public law at the University of Hull. I would like to record my thanks to Martin Gallagher for his very helpful comments and criticism of this review. The faults that remain are the author’s.

<sup>2</sup> See e.g. *Bank Mellat No 2* [2013] UKHL 39, *Miller No 1* and his comments on *Miller No 2* below. Compare Lord Sumption in *Lord Carlile* [2014] UKHL 60.

As a judge, Sumption was not predictable or one-dimensional. In *Kennedy v The Charity Commission* ([2014] UKHL 20), he remarked, in terms which seemed favourable, that ‘The Freedom of Information Act 2000 [FOIA] was a landmark enactment of great constitutional significance for the United Kingdom’ (paragraph 153). He also sided with the majority in *Miller No 1* ([2017] UKHL 5) concerning the unlawful invocation of Article 50 Treaty on European Union by the government to serve notice of exit from the EU under the prerogative and not by parliamentary legislative consent. Such notice could only be served in the only manner known to our constitution; by consent of Parliament. In his retirement he supported the unanimous judgment of 11 judges of the UK Supreme Court in *Miller No 2* ([2019] UKHL 41). In the latter, which declared the Prime Minister’s advice to prorogue Parliament at a crucial stage in the Brexit process to be unlawful and void for undermining common law constitutional principles, he described Boris Johnson’s action and advice as ‘constitutional vandalism’ hardening ‘conventions of political accountability into law’.<sup>3</sup> He changed his opinion from his initial thoughts which went in the opposite direction to the eventual judgment.

However, in *Evans v Attorney General* ([2015] UKHL 21), in which he did not sit, and which concerned an executive power given by Parliament in legislation to override the effect of a judicial decision over a veto on disclosure under section 53 FOIA, he wrote disapprovingly of the majority’s decision to outlaw an executive review of the judgment. This override, he argued, was clearly what Parliament, or in reality the executive, intended.

This theme was continued by Sumption in the *Privacy International* case ([2019] UKHL 22). He broke with orthodoxy established by the Law Lords in 1969 to argue in the minority that the secretary of state was entitled to succeed in arguing that Parliament had successfully locked out judicial review of the merits of the Investigatory Powers Tribunal’s decision, concerning what in effect are contemporary general warrants (thematic warrants) of mass surveillance, under the Regulation of Investigatory Powers Act 2000 (RIPA), section 67(8): this despite the long-standing 18th-century judgment of Lord Camden holding in *Entick v Carrington* ([1765] 19 St Trials 1029) that general warrants were unknown to the common law and therefore unlawful. The powers were now provided for by legislation but, if the lock-out was successful, a challenge under the Human Rights Act 1998 (HRA) was impossible if section 67(8) said what the government claimed it meant. The majority ruled that it is for

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<sup>3</sup> *The Times* 24 September 2019.

the courts to set limits on the *legal interpretation* of what the executive may do, not Parliament or the executive. Anything else would undermine the rule of law and violate the separation of powers. I agree with the majority. At paragraph 209 Sumption reasoned that the rule of law applies as much to the courts as it does to anyone else, and, under our constitution, effect must be given to parliamentary legislation. Presaging his 2019 lectures, he wrote:

In the absence of a written constitution capable of serving as a higher source of law, the status of Parliamentary legislation as the ultimate source of law is the foundation of democracy in the United Kingdom. The alternative would be to treat the courts as being entitled on their own initiative to create a higher source of law than statute, namely their own decisions.<sup>4</sup>

The executive override case law above is indicative of how judges have interpreted statutes in such a way that the courts have the final say on legality, not the executive. Although judgments may be reversed by legislation, the courts interpret what legislation means.

Judges, in reality judges in the Supreme Court, Court of Appeal and Administrative Court, have back-seated politics. Sumption's model of the ideal judicial process would encapsulate a minimal role for the rule of law emphasizing the formal attributes and not the substance. The vision of fundamental rights is one with a minimum content which, although the content might be arguable, the rights would be only those necessary for the protection of the democratic political process and communal (social) life. The more human rights are developed or are elaborated in adjudication, the more this assumes a role for the opinion of judges and non-consensual legislative action by judges. It objectifies what is inherently subjective judicial value preference and removes combative debate from the field of politics and representation of the citizens. Judicial supremacy, he argues, undermines active citizenship. It is power without accountability. It can also cut both ways, liberally and illiberally, as he shows in the *Lochner* line of cases in the United States.<sup>5</sup> One individual's freedom may be another individual's oppression.

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<sup>4</sup> Just one further case of Sumption's deference to the legislature can be illustrated: *P, G and W* [2019] UKHL 3 on disclosure of conviction records etc to a prospective employer and the margin of judgment properly allowed to the legislator or the Secretary of State on whom the legislator has laid the task of defining the exceptions to the rehabilitation regime requiring disclosure. Although he agreed two of the exceptions allowing disclosure were disproportionate, the scheme generally was in 'accordance with the law', although capable of producing what some would consider very disproportionate results. See Lord Kerr's dissent.

<sup>5</sup> *Lochner v New York* 198 US 45 (1905) and the 14th amendment protection of employers imposing unlimited working hours on employees under freedom of contract.

The message seems to have influenced Boris Johnson in his 2019 manifesto promise to appoint a commission to examine ‘broader aspects of our constitution and the relationship between government, Parliament and the courts’ and to restore ‘trust in our institutions’. The prerogative, so central in the *Miller* cases, will be examined by the commission. The HRA and judicial review will be ‘updated’, Johnson promises, in order to prevent the judicial process becoming an alternative means of doing politics.<sup>6</sup> Not only some of the ideas, though not all of them, viz. Sumption’s role and comments in the *Miller* prerogative cases above, but also some of the wording are taken from Sumption.

Judges’ subjective values, Sumption argues, are given legal effect. The process produces a more substantive rule of law ‘that penetrates legislative and ministerial policy’: a form of the rule of law that focuses on justice according to greater openness, transparency and accountability rather than a strict literal and technical interpretation of language. Interestingly, Sumption referred in his lecture to judges ‘creating’ the realm of administrative law since the 1960s—in the book a weaker word, ‘developing’, is used. The principles are not recent creations or developments. They travel way back into our common law constitution. It was in the 1960s that they took on a new dynamic/momentum in an age of increasingly interventionist government.

Not only in the judicial role have judges overreached themselves, argues Sumption. Judges should not be asked to chair inquiries whose subject-matter is really within the province of political overlords. The Leveson Inquiry into the culture, ethics and practices of the press following scandalous behaviour should have been conducted by those more adept at political judgement (Questions, Lecture 1). The conclusions of a judge are not likely to be very helpful, he believes, in such matters. The politicians decided that the second inquiry by Leveson should not sit. Was this not because Leveson’s recommendations on ‘more sensitive aspects’ of relations between the press, the police and the state might be too inimical to the interests of politicians, press barons and the police? The politicians have subsequently done nothing apart from create a voluntary regulator to which no significant newspaper has signed up.

The resort to a written constitution is an extreme form of the tendency to judicialize politics, Sumption continues. But the UK system, he believes, makes politics supreme. The law did not create parliamentary sovereignty; politics did, he asserts. This reviewer’s belief is that it was

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<sup>6</sup> The Conservative and Unionist Party Manifesto 2019 page 48.

not politics that made Parliament supreme but the common law: not common law expressed in a judgment—judgments recognize Parliamentary supremacy—but common law as a system which ordained and ordains the English and UK matrix of governance; common law which develops and is subject to change (Birkinshaw and Varney 2017). The common law created parliamentary sovereignty. It was common law which brooked the power of the Crown and which established the Crown in Parliament. A written constitution would have no basis in our ‘historic experience’, Sumption argues. The UK’s unwritten constitution’s basis lies in habits, traditions and attitudes which are far more powerful than law. But those matters form the basis of our law. They were the basis of the claims in Magna Carta, the Petition of Right, the Bill of Rights and so on.

*Miller No 2* illustrates the way in which the common law works constitutionally. The prerogative, the realm of state politics and high political judgement, was not intended to be subject to judicial control. As Francis Bacon reasoned in Book II of *The Advancement of Learning* (1605), government is ‘obscure and invisible’. A judge in court determined in the early 17th century that the law in England only recognizes those prerogatives which are known to the law and not simply pronounced on the *ipse dixit* assertion of the king. Whether a prerogative exists, and what is its extent, are judicial questions.<sup>7</sup> By asking these questions courts helped set upon the route to establish the independent role of the judiciary from the monarch and the limits on prerogative legislation—rule by decree. The story of the development of the judicial review of the prerogative to protect individuals against arbitrary action, to stop unlawful expenditure and then to question mighty matters of state such as prorogation of Parliament, is well told (Sedley 2015). Had Sumption been writing 200 years ago, would he declare such matters as ‘political’ and outwith the courts? Yet after initial criticism of any successful review of prorogation in the courts, he gave full support to the decision in *Miller No 2*. When the Supreme Court was advised by Crown counsel it was treading on political territory in *Miller No 2*, Lady Hale correctly retorted that the history of our public law had *always* voyaged into the political, the realm of political decisions. Political decisions are not, and never have been, unconfined by law. Such decisions did not occupy an inviolable and preferential realm.

Sumption seems to wish that the role of our public law would be frozen in the past. It is, in reality, impossible to fathom where Sumption’s border between law and politics exists.

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<sup>7</sup> *Case of Proclamations* (1611) 12 Co Rep 74.

Sumption acknowledges as much in his belief that the unwritten constitution accommodates fundamental constitutional change through flexibility. Yesterday's political has become today's legal. The constitution comprises not only legislation, but judicial decisions, conventions and standing orders of Parliament setting out parliamentary procedure. A written constitution will produce rigidity and transfer power from an 'aristocracy of knowledge and power', namely ministers and MPs, who are at least removable, he reminds us, to an unelected and unremovable judiciary.

A focal point of Sumption's criticism of judicial activism is on the role of the European Court of Human Rights (CHR) and its interpretation of the European Convention on Human Rights (ECHR). Article 8 ECHR and CHR jurisprudence on private and family life and privacy are used to illustrate the problem as he sees it. Article 8 has been the armature around which all forms of controversial rights have been created, he claims. He lists these at pages 57-58 'and much else besides' where the CHR has given substance to a right to 'personal autonomy'. The Convention has also been given extra-European effect following invasion in middle-eastern states by UK and other forces. The ECHR was never meant to operate in these places in wartime conditions. The CHR has ruled to the contrary.<sup>8</sup>

If rights are controversial, they are not universally accepted, therefore the representative political process is the best means to resolve them through a process in which each vote counts equally, he writes. The process is more important than the outcome. Law is no substitute for politics. But what if politics, by which I mean here the legislature, denies the rights' existence? Sumption, like David Cameron, questions whether the 'international' ECHR has outlived its utility and, in the absence of a fundamental change in judicial attitude, whether it would be better to withdraw from the ECHR and replace it with a purely domestic measure leaving Parliament in ultimate control. What rights would Sumption remove from such a measure? Please be specific. It is a weak argument to suggest that the context in which the ECHR was framed has no relevance to novel manifestations of rights today and that its real target in its original conception and design were Nazi and Communist regimes and their abuses. The drafters of the ECHR, including the highly influential UK lawyers, also wanted a protection against social-democratic redistributive governments acting in a statist or authoritarian manner, a protection with which, one presumes, Sumption would concur.

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<sup>8</sup> *Al-Skeini v UK* [2011] 53 EHRR 18; *Al-Jedda v UK* [2011] 53 EHRR 23; *Hassan v UK* [2014] App No, 29750/09 Grand Chamber (16 September). The *Hassan* case has been interpreted by the UKSC as a qualification on *Al-Skeini and Al-Jedda: Abd Ali Hameed Al-Waheed v Ministry of Defence* [2017] UKSC 2.

Oppression and evil take many forms. If one expects the devil to be possessed of cloven hooves, goat's horns and a forked tail one will never see the devil (Miller 2010). The concept of autocratic abuse of power is not framed in a time capsule.

Central to the book's thesis is that modern society wants more legal and judicial regulation so that decisions are not a matter of individual choice but collective will. Modern society (interest groups) seeks to enforce conformity. Moral relativism has given way to moral absolutism as the collective welfare seeks greater security and reduction of risk. Society has become more censorious and increasingly seeks judicial enforcement of a particular point of view. Makers of controversial decisions increasingly seek judicial endorsement to protect their position. The end result is an overall loss of liberty and a reduction of the realm of private choice. Diversity is removed, he continues. For those whose vision of the good life is not endorsed through the courts, the outcome may smack of oppression. This is done under the guise of 'absolute democracy'.

An outcome through referendum presents a similar problem. But if a bare majority asserts its right to take 100 per cent of the spoils, the basis of political community is eviscerated. A majority may win, but their victory is not legitimated by the outcome of a winner-takes-all contest. Brexit and its referendum and narrow outcome illustrate this point. The referendum undermined the representative political process. Its narrow margin of victory has wrought seemingly irreconcilable societal division. I add that only the advent of the worst global viral crisis since 1918 has removed the subject of Brexit from the headlines. There will be precious little time left within the deadline set by Johnston, and presuming the pandemic is abated before that deadline, to forge a sensible way forward.

Why is it that judges have assumed such prominence in the UK? Is it, one asks, because they are seen to be independent of the political machine and party politics? Sumption addresses the virtues of the *representative* political process and the reasons why, despite those strengths, it has fallen into low public esteem. The representative democratic political process is one that has a mediating and healing role. MPs as representatives should seek to remove fissiparous tendencies. A blurring and obfuscation of differences in the legislative process help assuage divisive societal issues—on abortion, for instance—and help to achieve compromise as in the UK. This is not the case where the outcome on abortion was determined by judicial fiat as in the USA.<sup>9</sup> Political parties

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<sup>9</sup> *Roe v Wade* 410 US 113 (1973). See also *Griswold v Connecticut* 381 US 479 (1965) forbidding contraception and *Obergefell v Hodges* 135 S Ct 2584 (2015) on same sex marriage.

are comprised of diverse members and diverse electorates. But the political process has weakened its representative basis—there has been a fall in party membership, growing resort to referendums, and a huge gap between professional politicians and the public. A more partisan, populist and authoritarian style of political leadership has emerged. Democracy brings high expectations of change. It results in disenchantment and disappointment with the ‘self-interested’ hustlers (my expression) who have come to dominate in politics when those expectations are thwarted. Despite this, he claims that younger generations are more inclined to prefer autocratic leaders. Whether true or not, autocratic leaders are certainly on the rise.

The prognoses offered by Sumption for improvement of the political process and its current malaise and to provide an antidote to public disenchantment with institutions and disempowerment and disengagement are not without merit. But they are not original. By themselves they appear simplistic. These include the removal of the first-past-the-post UK election system. The removal may encourage greater public participation and reduce the role of a ‘tiny number of activists’ who dominate local political machines. It could end the duopoly that has dominated British politics—surely the Scottish Nationals would have something to say about that? Open primaries for selection of MPs could further reduce the influence of the activists, he believes. Strong leadership may be reduced, but reforms may encourage compromise not only within political parties but between parties. Political compromise could be encouraged, he suggests.

But is this the way to increase citizen engagement? Most individuals simply do not engage with the political process. Politicians are careerist. Their aids and active supporters are party obsessives. It may be that the outcome of the COVID-19 crisis will have far more effect in bringing communities, local, regional, national and global together. This may help establish a common bond of humanity and cooperation in our relationships that over 40 years of neo-liberal Thatcherite politics have done so much to undermine. And maybe not.

In offering an analysis of political decline and possible antidotes, Sumption has drifted far from the moorings of where politics ends and where law begins. But that is not a question he has adequately answered in this monograph. One has to have a tolerable sense of the distinction and the boundaries to know when trespass is being committed. At heart, he does not seem to believe that law (I mean adjudication) should operate on anything other than a conservative, narrow base. Even assuming that

a judge believes his role is *ius dicere* and not *ius facere*, and the judge supports this philosophy by giving judgments that support a proprietorial bias towards the possessors of wealth, that judge is acting politically. His or her decisions favour one group, the haves, over the have-nots. Most of us will accept this because it gives us security in our property and possessions. But this does not remove the proprietorial bias and its impact in forging social division and hierarchical advantage.

Or, if we take the example of tort liability, which is judicially developed case law, judicial decisions have in the past favoured one group of haves (farmers) over another (manufacturers) or vice versa. Or their decisions favour the collective rights of employers over the collective rights of employees (trade unions). No doubt those judges have in the past believed they were upholding a political status quo and simply and neutrally applying ‘the law’. Their decisions are nonetheless suffused with systemic bias.

In terms of fundamental rights, his vision again is a very conservative one. Upholding human rights in novel areas may have redistributive effects. A right of access to justice is not self-realizing but invariably depends upon resources.<sup>10</sup> The rule of law should entail access to justice and not its displacement by executive or legislative fiat. Sumption accepts that the *Unison* judgment (*UNISON* [2017] UKHL 51), where the government increased employment tribunal fees to such an extent that the tribunals were effectively placed out of the reach of individual employees, was correctly decided. The government had acted unlawfully in increasing the fees. I have problems with Sumption’s criticisms levelled against the publication of the letters of Prince Charles in *Evans* for the reasons set out above. The government action effectively denied access to justice. The case was an attempt to allow the executive to stand in judgement of the judiciary. The reasons put forward by the Attorney General did not justify this action.<sup>11</sup> In *Privacy International*, the applicant had received a decision from a tribunal, but it was not a judgment the applicant liked. Unlike virtually every other occasion in which a litigant loses at first instance, there would be a right of appeal or a review. That was not the case here. At issue is a fundamental point of liberal-democratic governance and an independent judiciary. Who decides what the law is?<sup>12</sup>

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<sup>10</sup> JUSTICE, ‘Legal aid and human rights’.

<sup>11</sup> Lords Neuberger and Mance gave majority judgments which differed in their own reasoning and intensity for deciding against the Attorney General.

<sup>12</sup> The Investigatory Powers Act 2016, section 242, introduced an appeal from the tribunal to the Court of Appeal.

As we have also seen above, Sumption is particularly troubled by the CHR judgments prescribing a catalogue of ‘novel’ rights under Article 8 ECHR. What was intended by the Convention’s drafters as a protection for private and family life, privacy and correspondence against totalitarian states has become a part of ‘mission creep’ and protection of wide-ranging novel rights (pages 57-58). None of this was intended by the drafters or expressed in the language of the ECHR, he asserts, although he writes in the same breath that some of the ‘additional rights’ ought to exist (page 60). Well, again, which? His problem is not with the rights (or some of them) but the manner in which they were made, namely by courts. The CHR has determined many of these ‘additional’ rights when deciding what qualifications to rights are necessary in a democratic society. In so doing, the CHR undermines decisions of democratic assemblies. My response is that ‘in a democracy’ surely must entail a society with equal rights and equal concern and respect for every individual. This focuses on the individual not the collective, although the outcome is for the collective good. It has come to focus on proportionate use of political power. What is undemocratic about that?

Despite these criticisms, Sumption acknowledges the positive aspects of the HRA which brought much of the ECHR, as well as the corpus of CHR case law, into domestic UK law.<sup>13</sup> It has supported weak and vulnerable groups with no media or political support, he claims. It has forced more humane values on ministers and civil servants (although *Windrush* shows us how far there is to go). The HRA has promoted coherent and more detailed responses when official action has been challenged. But all of these, he argues, are achievable without international law! The HRA has prevented the UK being one of the most frequent defendants in the CHR as it was in the 1970s and 1980s. But over the years that court has repeatedly pointed out serious abuses of power which domestic courts left unremedied. *Sunday Times* highlighted the draconian nature of the common law of contempt of court and its unjustified denial of freedom of speech.<sup>14</sup> *Golder* and *Silver* showed how effectively lawless our prisons were.<sup>15</sup> *Malone* highlighted the lawless world of covert surveillance in England, to which one may add the recent RIPA

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<sup>13</sup> The use of CHR case law is governed by section 2 and interpretation of UK legislation by section 3 HRA.

<sup>14</sup> *Sunday Times v UK* (1979-80) 2 EHRR 245.

<sup>15</sup> *Golder v UK* [1975] 1 EHRR 524; *Silver v UK* [1983] 5 EHRR 347.

2000 case on inadequately regulated bulk surveillance.<sup>16</sup> The war against terrorism encouraged executive excesses and a compliant House of Commons. The reputation of the Lords was better, but the House of Lords is one of the subjects to be examined by the Commission on the Constitution (above). UK courts have occasionally refused to follow the CHR which, in turn, has been clearly influenced by UK courts (Young 2017).<sup>17</sup> The influence has been mutual and two-way. Even in the case of prisoner voting rights, on which Sumption is particularly exercised, adjustment has been made by the UK. The CHR never said that all prisoners had the right to vote. It ruled a total ban was disproportionate.<sup>18</sup> The UK made some (minimal) concessions. The same mutual and two-way influence is also true of the engagement of UK and EU judges in the UK's membership of the EU. As I develop elsewhere, our membership of the EU prompted UK judges to put questions to sovereignty, not only in relation to the EU, but also in relation to Parliament (Birkinshaw 2020). Domestic judges have matured immeasurably under this experience. They began to think constitutionally. I doubt that *Miller No 2* would have been decided the way it was without our European experience since 1973. *Miller No 1* was about our departure from the EU and removal of a source of law from our constitution. This could only be achieved by legislation, the court insisted. The court had to remind Parliament of its sovereignty! There has been a judicial learning process on both sides. Sumption addresses the ECHR issue as a question of *foreign* interference. There is an emphatic message that *we* know best. He is far from a populist, but many populists and nationalists would take comfort from these sentiments.

How is the judge to respond to illegitimate power? Sumption's constitution places judges under Parliament, and Parliament is supreme. That in theory is orthodoxy. As a consequence, judges cannot rule legislation null and void. He acknowledges that Parliament's actions may be undemocratic—would, one might ask, they lack legitimacy? If so with what consequence? What is the judge's response to be where parliamentary sovereignty is abused? What should the individual do—

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<sup>16</sup> *Malone v UK* [1985] 7 EHRR 14; *Big Brother Watch v UK* [2019] ECHR 258 (Grand Chamber). For bulk surveillance and its legality under the Investigatory Powers Act 2016, see *R (Liberty) v Secretary of State for Home Affairs et al* [2019] EWHC 2057 (Admin).

<sup>17</sup> In *AM v Secretary of State for the Home Department* [2020] UKSC 17 the court said: 'Our refusal to follow a decision of the CHR, particularly that of the Grand Chamber, is no longer regarded as ... always inappropriate. But it remains, for well-rehearsed reasons, inappropriate save in highly unusual circumstances ...' (paragraph 34).

<sup>18</sup> *Hirst v UK No 2* [2005] 42 EHRR 849; *Scoppola v Italy (No 3)* 56 EHRR 663. See Johnson (2020).

simply break the law as he suggests in the case of assisted suicide?<sup>19</sup> '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,' he says, in response to a question at the end of the first lecture. But, he says in the same breath, the law criminalizing assisted suicide should be in place. So, one cannot complain if one is prosecuted. If the Director of Public Prosecutions (DPP) decides charitably not to prosecute, is he or she not suspending or dispensing with the law? As Stephen Sedley has pointed out, the Bill of Rights has something to say on that (Sedley 2019).<sup>20</sup> If the DPP does prosecute, presumably Sumption as judge would approve conviction?

What is the judge to do if Parliamentary sovereignty is abused by the government? What if legislation authorizes the abuse of human rights, denies courts jurisdiction in controversial or inconvenient subject areas and deliberately and inhumanely undermines the rule of law? Is there not room where sovereignty is abused by Parliament to refuse to enforce the law, even to issue a declaration of unconstitutionality? Is a judge not entitled to exercise his or her conscience, after a reasoned judgment, where such abuses occur? (Young et al 2019: 137)<sup>21</sup> A judge's duty is not only to uphold the law, but the rule of law on which law is built. It is the rule of law, not the law of rules. Under the judicial oath, the judge 'will do right to all manner of people after the laws and *usages* [my emphasis] of this realm, without fear or favour, affection or ill will'.

The ideal judge would seem to be a conservative paragon of sense, reservation and reflection; neither a Hercules, as per Dworkin's intrepid adjudicator (1977: chapter 4), nor an Ocnus. There are nonetheless serious problems with Sumption's model of adjudication. There are not ideal separate worlds of politics, law and government. We know that there are adjudicative functions, legislative functions and executive or governmental functions. Initially, distinctions are easy to draw. However, these functions seep into each other. In the common law, judges develop and thereby make the law and create binding precedent. In public law

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<sup>19</sup> *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38 concerning assisted suicide under section 2 of the Suicide Act 1961. Five of the nine justices held that the court has a constitutional authority to rule on a blanket ban for assisted suicide. Three of those would not issue a declaration of incompatibility at this stage; let Parliament attempt resolution. Four of the nine judges, including Sumption, ruled that, while the court had jurisdiction under the HRA, the question was pre-eminently one for Parliament. Sumption stated at paragraph 207: 'English judges tend to avoid addressing the moral foundations of law.'

<sup>20</sup> See also Lady Hale's '[Law and Politics: A Reply to Reith](#)'. See Sumption in *Nicklinson* at paragraph 241.

<sup>21</sup> A more detailed account on this is in Birkinshaw and Varney (2016).

they have done this incrementally under common law techniques to achieve more developed and effective forms of accountability. Whether it was Denning's 'Let the little man have his say,' or more developed and refined subsequent theories of opening up decision-making processes of government and public power to more effective scrutiny, accountability, openness, justification and now transparency—what we see developed, and developing, are principles for the advancement of justice and responsiveness. It is impossible to grasp the handle of where law ends and politics begins in Sumption's analysis. They co-mingle: patently, as in public law; latently, as in private law. So, would he be critical of judgments that have ruled overseas aid illegal where it has been given for an uneconomic project taking it outside the statutory remit which amounts to an improper purpose?<sup>22</sup> He is quick to assert the right of free-born Englishmen to roam miles from their homes when the nation faces a highly contagious pandemic disaster (above). I am not concerned about the application of the precautionary principle in such a case in favour of public safety. I would be concerned if lockdown continued for a disproportionate period after the emergency. We will all have to be concerned about the longer-term impact and consequences of the strong state fight against the contagion and enhanced methods of digital surveillance and digital licensing, algorithms, facial recognition and omnipresent sensors. The balance between national security and personal autonomy will have to be drawn proportionately, in accordance with the law and as necessary in a democratic society. Would Sumption really want to argue that the judges were not up to this challenge where the legislative framework left lacunae or where there was legislative or executive overreach?

UK judges do not say I am condemning a law preventing abortion. They say laws preventing abortion are incompatible with the ECHR if they remove an individual's right to private and family life where the legislature has not adequately protected that right and is unlikely to. There are putative rights which the political system may not like, may despise and which it hasn't provided for.<sup>23</sup> A judge's role is to ask whether the rights are protected by a catalogue of principles which the legislature has

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<sup>22</sup> *R v Secretary of State for Foreign Affairs ex p WDM* [1995] 1 All ER 611. There were suspicions that the aid was linked to military procurement by the Malaysian government. See also *R (Campaign against Arms Trade)* [2019] EWCA Civ 1020; and *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 on ruling the government's policy for the third runway at Heathrow airport was produced unlawfully. That was a question of law unlike a political decision on the merits of expansion the court ruled, paragraph 2.

<sup>23</sup> *Re NIHRC Application for Judicial Review* [2018] UKHL 27. The law in Northern Ireland prohibited abortion in cases of rape, incest and fatal foetal abnormality.

provided (HRA) or which it has not (the common law of human rights respecting human autonomy and integrity). A judge has to reason according to received legal doctrine. What makes the judgment convincing is its coherence in articulating and comprehending underlying principle. If it lacks conviction and coherence it will persuade no one. It will not persuade the unpersuadable, just as the *Miller* judgments will persuade Brexiteers of nothing but their own choices/prejudices. The judges would be seen as part of a Brexit conspiracy to prevent leave. Read the judgments carefully. They are not the product of anti-Brexit conspiracy. They are not fabrications.

Sumption represents an elitist view of the role of the judge and the political process. Here is a man who has been privileged, powerful and influential. At the end of Lecture 5 he says in response to a question—‘Inequality is not a threat to democracy. I do agree that it is a problem!’ To which I would add, inequality in political power based on wealth and oligarchic influence, inequality brought about by rapacious greed, lack of opportunity, social exclusion are serious toxic threats to a just society. They will become a threat to democracy through gerrymandering, exclusion from ballots, setting identity tests for voting that hit poorer sections of society harder, and so on. The greatest threat to democracy today comes from manipulation of consent by ubiquitous digital exploitation and those who have the finance to pay for and utilize it. Is this inequality not a threat to democracy?

What Sumption offers to remedy the democratic political process is not without virtue—e.g. proportional representation and open primaries for selection of MPs—and I would support these reforms. It is, however, thin gruel to revitalize representative democracy. Rejection by referendum of the Liberal Democrats’ arguments for an alternative to first-past-the-post voting outcomes in general elections was followed by rejection of the Liberal Democrats in 2015 and 2019! The vista of the 2017 Parliament, a Parliament that could not make decisions, was replaced by a Parliament with a government majority of 80 empowered to make sweeping changes accepted by a minority of the popular vote in 2019, backed by a narrow victory in the 2016 referendum (above). In the early sessions, the MPs of the victorious government party were treated by its leader like a bunch of sycophantic parrots repeating their leader’s election mantras. An alternative electoral outcome may have produced similar behaviour. Heaven forbid a world in which there is not a forum to protect human rights except on a basis that was understood or believed in 1950, to protect the integrity of the individual and anything other than a very formal, narrow expression of the rule of law. Sumption has written that

the ‘only effective constraints upon the abuse of democratic power are political’. The HRA shows the weakness of this bold statement. It enacts that the courts, Parliament and the government must work *together* to protect human rights—together but independently. Democracy will be undermined if the courts are not afforded the duty to make their full contribution to the protection of individual rights and collective welfare, not in the promotion of formal equal treatment but in treating all with equal concern and respect.<sup>24</sup> Parliamentary democracy will be undermined if there is no option but to accept serious abuses of parliamentary sovereignty.

Sumption has written an eloquent and limpid short monograph on themes that will be of interest to politicians, judges and lawyers and individuals who care about justice, and, possibly, those who wish to be rid of European legal influence in the UK. Although I disagree with many of the author’s tenets and the assumptions on which they rest, he states his case clearly and fluently. What judges have done in the UK in recent years has been to plug holes left by deficiencies in the political process. The politicians are too frequently the last to recognize such deficiencies. I doubt that that will change.

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<sup>24</sup> The phrase comes from Dworkin (1977) chapter 6.

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