Democracy's Defender: *The Challenges of Democracy and the Rule of Law* by Jonathan Sumption

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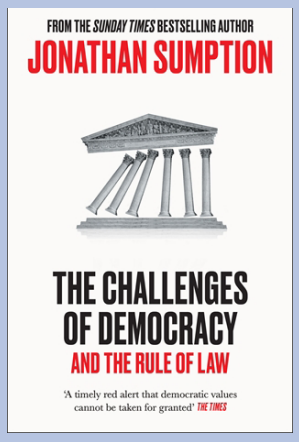

Jonathan Sumption (2025)
***The Challenges of Democracy and the Rule of Law*, published by Profile Books, London**
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In this collection of revised and published essays, distinguished historian and former United Kingdom (UK) Supreme Court justice Jonathan Sumption ponders on the threats to democracy and the rule of law presented by contemporary phenomena. These include the decline by the public in faith in politicians and organized politics, climate change and public hostility to unpopular measures to address its effects, intergenerational conflict in the allocation of resources and a growing faith in right-wing populist parties and opportunistic policies encouraged by autocratic and dictatorial regimes not only in Hungary, Turkey and India but the full monty, as seen in Russia, China and North Korea. Donald Trump's admiration for the dictators who strive to be masters of all in their spheres of influence has driven the United States (US) President's own ambition to imperialize the US under a strong-man militaristic ruler who brooks no interference from courts, congress, state governors or the Constitution—or from a free press and conventional media, which are labelled "fake news".

Even in those countries which are not presently under autocratic rule, a pandemic has facilitated extraordinary executive centripetalism and

extreme restrictions on those liberties associated with liberal society: in particular, freedom of speech, freedom of assembly, even freedom of movement. More damaging to freedom of speech has been the assault on "influencers" from the past and on historical tradition by forces of darkness, as Sumption would see them, who have sought to impose their *politique idéologique* on racial or sexual oppression or gender identity on the silent majority. At root, Sumption believes, is an assault on the foundations of democracy in the modern world and its virtues of cooperation and compromise, negotiated outcomes accepted by the majority, even though not liked by all, and personal liberty. Faced by these threats, if democracy is to survive, a "higher political morality may be required not just of politicians but of those who elect them" (xiii).

In his obvious regard and esteem for conservative philosophers and a traditional Conservative party—not the scions led by Boris Johnson and Liz Truss—and the individual's responsibility and courage to speak out, Sumption shows himself to be a contemporary Burkean. Burke idealized tradition, the knowledge of collective experience and traditional institutional sagacity built on the past and enshrined in the eighteenth-century English constitution and its protection of property and liberty. He opposed slavery, supported Catholic emancipation, believed in limited monarchy and supported the impeachment (unsuccessful) of Warren Hastings and his corrupt rule in India. Burke has often been described as a liberal conservative which is what Sumption also shows himself to be. Sumption's account of how fortunate we Brits are with our parliamentary sovereignty and monarchical unwritten constitution (37) when compared with the excesses of presidential forms of governance is straight out of Burke. His denunciation of Johnson's attempt to claim a mandate directly from the people, like a president, is keenly to the point.

The essays in this book, titled the *Challenges to Democracy*, are grouped around four themes: politics and the state; law in our lives; the international dimension of law; and freedom of speech.

The first group fastens on familiar themes in Sumption's previous work, namely the assault on our civil liberties and freedoms by global events such as the Covid pandemic and consequential disillusionment with democracy, especially, he notes, among the young, and a growing attraction to what is perceived as strong autocratic rule to fix the problems of modernity. Democracy, he believes, is threatened by economic insecurity, intolerance and fear. The protection of liberty, compromise and a greater prospect of efficiency, all of which come with democracy, are being undermined by the weakening of representative democracy, the

promotion of party caucuses and the refusal to accept negotiated outcomes with which we do not agree. There is a growing conviction in absolutism which sees former Tory and Labour supporters turn to erstwhile fringe parties pursuing populist and extreme policies. Tackling the climate crisis has produced unpopular policies and has increased the cost of living. Global indiscriminate lockdowns and their widespread acceptance by cowed populations revealed an aversion to the risks associated with normal processes of life, he writes. Such aversion to risk, he claims, is an open invitation to authoritarian government to put it "right". It has its analogues in the philosophy of Hobbes, Sumption believes, who advocated the all-powerful state in his *Leviathan*.

Hobbes was writing after the brutal and ravenous civil war that tore through all four countries of what was to become the union. Little surprise that he wanted a strong system of government and one to which a war-torn populace was willing to trade its freedom (Sumption says freedom but was it not trading "an old order") for security. The interregnum did not only produce the "strong state", but it saw numerous (short-lived) legal reforms in the public interest as Stephen Sedley has catalogued, including a written constitution that presaged essential features of the 1688-1689 Bill of Rights and the earliest Law Commissions promoting law reform (Sedley 2015: chapter 4); it also saw the Levellers and radical egalitarian claims. Such claims were bound to fail in any era and not simply in Hobbes' England.

Among the chapters on politics and the state is an interesting chapter on the transition to communism from British rule in Hong Kong in 1997. Hong Kong had existed as a Crown colony under paternalistic colonialism and a system of law built upon common law foundations. Attempts by the last British governor (Chris Patten) to set up a more democratic system of governance before the Chinese takeover—after 155 years of British rule—were swept away by Beijing and its national security priorities, leading to a harsh regime of repression and authoritarianism. Sumption's observations are not those of passing interest. He was a visiting justice on Hong Kong's Court of Final Appeal. The rule of law he says is not indivisible (79), and the harsh consequences of growing authoritarianism impelled him to resign from the court. A very eminent judge once told me that if capital punishment were reintroduced, he would impose it. But torture was a resigning issue.

The second theme offers discussions on the legitimacy of law, the rule of law and human rights, and a critique of the judgment of the US Supreme Court (USSC) on the criminal liability of the President (*Trump*

v United States 2024). The preoccupation of the first two essays is on the role of the judge, not as an interpreter of the law within accepted confines, but as a policy-maker subverting the role of elected assemblies. The European Court of Human Rights (CHR), he believes, empowers its justices to decide things in ways which are not in the "textes", as the French lawyer would describe it, not in the words of the treaty and not agreed to by the signatory states. The CHR is not a forum which is subject to electoral control. Societies, he claims, "evolve" through instinct and experience. This is ill at ease with law that has become dependent upon abstract thinking and more "idealistic"; should one go further and say ideological?

This dependency on idealism, Sumption continues, has seen a growth of public interest law, human rights and social rights law: in short, public law. Much of this has been made by judges, very often under the influence of the CHR. The problem, he believes, is that when law is not made by a democratic political process, it lacks legitimacy. The common law, including judicial review, has been made by judges. Does that lack legitimacy? Does *Donoghue v Stevenson* (1932) deserve any less adherence or respect than the Scotch Whisky Act? If a right is not given by legislation, what, he asks, gives the right its legitimacy? Judge-made law in tort, contract, property rights and what we term private law are acceptable, he argues. But in the sphere of public rights which are based ultimately on moral and political values, what right does a judge have to be an arbiter of morality? Some person's values at the end of the day, he believes, are simply deemed by that judge to be more valid than another's. Like private law, most of our public law, I would argue, is based on reasoned principle and is about doing justice on the basis of that principle. Our judicial review is not a catalogue of individual moral preferences but a body of articulated and consistent principle built up and developed over centuries.

The targets here are Ronald Dworkin and John Rawls and their theories based on rational justice and, in Dworkin's case, equal concern and respect. That is the keystone principle, argues Dworkin, to be applied in those cases if rights are to be taken seriously in adjudication. I have never subscribed to Dworkin's belief that in hard cases there is only one correct answer. But, like Dworkin, I expect an answer to be given after detailed, meticulous and unbiased reasoning by the judge supported by precedent. Where there is no constitution, and the US Constitution makes no reference to equal concern and respect, what are we to infer from a democratic society that takes human rights seriously? Sumption does in fact refer to "equal concern and respect" for his own purposes:

he hopes that a legislature will treat and determine our interests in that manner (105). For Dworkin, it is the lynchpin principle in adjudication, especially where basic rights are in contest. This is the point of divergence: for Dworkin, our basic rights are *rights*; for Sumption, they are political interests.

For Sumption, moral values and disputes thereon are best resolvable democratically; democracy is a representative collective endeavour. But entrenched majorities, rigged systems, inertia and sheer discrimination have often made the elected chamber far from truly representative. And a minority remains a minority to be outvoted. No judge-made rule, says Sumption, could not have been made by a legislature "had there been a sufficient appetite for it"! But this is the problem. There is no appetite because it would brook vested interests, or greed, or, to put it at its strongest, evil. Or it may touch upon matters on which there is no vote.

"If we dispense with collective consent in pursuit of a nobler morality [like Dworkin], we will end up with institutions that dispense with consent in pursuit of other ends that we may regard as utterly ignoble" (97). This seems to suggest that Solomon will lead to Hitler and that they are just the same, or equally dangerous.

These points are reprised in the following chapter on human rights and the rule of law. Sumption does accept that there are fundamental rights which he views as essentially of two types: the first category includes a right to physical integrity and a resort to impartial and independent courts (prohibition of slavery and torture are not expressly mentioned but could be inferred from his list). These rights are "implicit in the rule of law" (103). Without them social life is not possible.

He also identifies a second category of rights which are essential to democracy, such as freedom of speech and thought, assembly and participation in their broadest sense "and the right to participate on equal terms with everyone else in fair and regular elections". It follows that "people must have sufficient liberty to make use of these rights" (104). Although the second category of rights are "fundamental", they are not a part of the rule of law, he argues, but like the first group they do not depend upon political choice. As well as being valued, these rights must be defended; but he doesn't say how. There is a passing reference to entrenchment. No explanation is essayed on how this could be achieved in the UK's unwritten constitution built on the legislative sovereignty of the Crown in Parliament to change any law. And if they are not dependent upon political choice, what gives them special status if *not* a part of the rule of law? And like the first group, what happens if

our governors do not take them seriously? Why should governors take them seriously if they wish to remove or ignore them? All other rights, which would include many widely regarded as fundamental such as privacy, social security and race relations, are subject to the political process, he writes. The safeguard against abuse is a political one.

Abortion in the US is used as an example of the serious shortcomings of entrusting to courts the creation or removal of a right to abortion as a fundamental right. In the US it has turned "presidential elections into contests for the right to appoint suitably biased Supreme Court justices" (108) to vote on party lines. This says more about the shortcomings in appointing USSC justices in the US than it does about judicial protection of fundamental rights. If a woman is not allowed to terminate her pregnancy subject to reasonable conditions and time limitations, she is not being accorded her bodily autonomy and right to private life. To equiparate a woman's choice in this to legalizing the taking of narcotics or prostitution as the USSC majority did in *Dodds v Jackson* (2022) borders on perverse.

The following chapter on the President's crimes is a stinging rebuke to the inadequacies of the USSC majority judgment in *Trump v US* (2024). In *Trump*, the USSC ruled 6:3 (though Barret dissented on one evidentiary point) on party political lines that the President is immune from criminal prosecution for his official acts while in office and the immunity does not cease when he has demitted office. Trump had been indicted for conspiring to overturn the result of the 2020 presidential election. The case was sent back to the lower court to determine whether the alleged acts were within his official functions and immune, but the majority issued capacious guidelines bringing many criminal acts within his official functions. Where there was a "presumptive immunity" regarding his "outer perimeter" responsibilities, courts can neither examine the President's motives in acting the way he did nor the manner in which he acted. There is no place for irrationality or proportionality, let alone, it would seem, illegality. When exercising his "core" responsibilities under the Constitution the immunity was absolute. The President was given effectively *carte blanche* to act like a criminal.

Sumption relates the history of partisanship of allegiances within the USSC. It is a political court. But, to repeat, this does not undermine the argument for judicial protection of fundamental rights. It argues for reform of the USSC and its appointment processes and quality of appointments. "The United States has never stood in greater need of

impartial constitutional arbiters in its highest court, and has never been further from getting them" is his grim summation (123).

Trump v US centred on Trump's abuse of the law and the Constitution. Since Sumption wrote this book, Trump has returned to power as President in a clear victory and his assault on the federal courts, and where not successful his attempt to ignore them, is repeated almost daily. He has ruled by executive decree, or order as it is known, downplaying or by-passing Congress, and his Government's invasion of civil liberties is frightening. Top law firms and Ivy League universities have cowed before his excesses. Almost alone, Harvard has stood up to Trump, refusing to be intimidated although the college now has a co-protagonist, so it seems, though not a partner, in Elon Musk. Meanwhile the USSC has been sedulously reversing precedents going back almost a century, depriving the federal regulatory agencies of their independence and expertise and bringing them within Trump's empire. In *Trump v CASA* (2025) the USSC dramatically neutered the injunction as a federal remedy against *prima facie* unconstitutional action by the president. For so many years American public law was exemplary in offering numerous lessons and striking examples in the legal control of government. There is very little to look up to now. The advice of de Tocqueville offers little comfort at this juncture of history:

> Let us look to America, [he wrote] not in order to make a servile copy of the institutions that she has established but to gain a clearer view of the polity that will be best for us (de Tocqueville 1874: xviii).

And, attributed to the same scholar: "America is great because she is good. If America ceases to be good, America will cease to be great." The world is taking note.

The third of Sumption's themes addresses the international dimension of law. The specific points addressed are the proper place for international law, the tendency of the CHR to engage in "mission creep", specifically examined in relation to Article 6 of the European Convention on Human Rights (ECHR), and the European Union (EU) and the place of national law, especially constitutional law. The basic premise is that international law is best suited to interstate disputes and grievances in the form of treaties and tribunals established by those treaties. Since the Second World War, however, and commencing at Nuremburg, there has been a proliferation of international bodies/courts established by treaty that have adjudicated on the behaviour of states towards individuals, either their citizens or aliens, and allegations and holdings of breaches of their rights under fundamental rights treaties. These courts stand in judgment

over the domestic law of the state complained against. Such courts—he focuses on the CHR—have a common practice of expanding their power, influence and in effect jurisdiction. Their status is approved by treaty. But the CHR goes beyond the words of the treaty agreed to by the signatory states, describing the treaty as a "living charter" to be interpreted according to contextual and developing circumstances. In doing so the CHR undermines national political norms and democracies. The CHR has become an "ideological court", he claims (143). There is nothing, he argues, that is contained in international human rights treaties that cannot be achieved domestically "if there is sufficient democratic support for it" (137).

In the cases of Russia (which is no longer a member of the Council of Europe following ejection), Hungary, Turkey and various other states, this may not be a surprise that their state practices are in need of international oversight. Their respect for democracy and human rights is non-existent or marginal to put it mildly. But for a democratic state such as the UK, Sumption sees this as a usurpation of its representative democracy. It is fair to say he dismisses this as arrogance writ large by the CHR; to such an extent that he advocates Britain (UK) withdrawing from the Convention (148).

This, I believe, would be a tragedy. There is no doubt the CHR has made mistakes; even its grand chamber and especially decisions of the lower chambers occasionally can be suspect. It has qualified or reversed its decisions in the light of critical UK judgments. What court doesn't make mistakes? But in asserting that Blackstone in the eighteenth century included "the most important human rights" in his *Commentaries* and that judicial decision and legislation had embraced them before the Human Rights Act 1998 (HRA) is a serious overstatement. It waxes into lyricism what was often a lamentable position. Too often, the courts in England shrank in the face of executive excesses. Nothing in English law could stop phone-tapping (interceptions)—except a judgment of the CHR. Nothing opened up British prisons to legal scrutiny—except judgments of the CHR. Discrimination against homosexuals in the armed services for simply being homosexual, not for practising sexual relations in the forces it must be emphasized, was stopped not by national law, it was powerless, but a judgment of the CHR. Left to ourselves, change would have been a long time coming. And so on, and so on. The comment also undermines the fact that the ECHR makes the human *right* protected a right subject to qualifications that have to be established on grounds of necessity, proportionality or in the public interest. Our domestic law

treated them as *liberties* subject to legislation or executive discretion and fiat. Once the contrary fiat was exercised, that was the end of it.

Sumption focuses on case law surrounding Article 6 ECHR which gives a right to a fair trial. Dramatic footage from early 1940s Germany of Roland Freisler, who as judge prosecutor presided over some of the most harrowing of trials of those who stood up to Nazism, gives an idea of what was in the minds of the drafters of the Convention. His starting point is *Golder v UK* (1975) in which an English prisoner was prevented from contacting his solicitor to commence legal proceedings against the Home Office. Under prison rules he had to submit the application to the authorities first. He petitioned the then Commission of Human Rights and eventually the court ruled there had been a breach of Article 6. Sumption's umbrage, shared by the Home Office, was that a right to a "fair trial" had morphed into a right to a trial and therefore access to a court (one of Sumption's human rights above!) which implied a right to a lawyer. This, the CHR reasoned, was a requirement of the rule of law, one of the general principles of law agreed by civilized nations and supported by Article 31 of the Vienna Convention on treaties. But the words of Article 6 did not actually specify this, the UK and dissenting judge (a UK judge) ruled.

It seems to suggest that an international court that reasons by analogy, context and principle is straying off-piste. This, of course, is the method of the common law. But that is a domestic method—no matter that common law claims norms of customary international law to be a part of the common law. Put simply, the argument is the narrowest of originalist positions—what the words said and meant in 1950 is what they mean now. Is it really an abuse of language to say that a right to a fair trial also includes a right to a trial, and for a right to a trial one must have access to a court, and to be deprived of access to a lawyer preventing access to a court breaches Article 6? The courts would have taken up Golder's case if submitted to them asserts Sumption, but how would Golder have penetrated the barrier that the Home Office placed in his way? Sumption is on stronger ground in criticizing judgments of the CHR on Article 6 where the court has misunderstood the true position of domestic law (*Osman* 1998), failed to appreciate a limitation in domestic courts' jurisdiction (*Cudak v Lithuania* 2010) or simply acted as an appeal court from a domestic court's interpretation of its own law (*Al-Adsani* 2001 and *VKSS* 2024).

Our domestic courts have come a long way and have been reinforced by the HRA which incorporates the ECHR into UK law. Our record before the

CHR is generally good in terms of victories. UK compliance is also good—though I would query whether remedying a shortcoming in domestic law established in CHR jurisprudence is simply a matter of political prerogative, as Sumption suggests (89), but rather an obligation on the executive under international law (Article 46 ECHR: *Ilgar Mammadov v Azerbaijan [GC]* 2019, paragraph 147). More fundamentally, Sumption believes there is no real place for international law in the protection of human rights. I am saddened by this statement from a very able and learned judge. Error can creep in to the courts at any level domestically. A fairly long period of right-wing populist government can, or may, make judges think differently and diffidently even after fairly prolonged HRA contact. Such a populist occurrence would doubtless hasten our departure from the Convention in any event. UK judges may not always be so robustly independent and apolitical as Sumption claims they are now, and I would accept his assessment at present as to their independence. But fundamentally, and hoping that we avoid a populist catastrophe, even our law and judges can learn from other systems and their judges. Nobody is above learning.

The criticism of the European Court of Justice (ECJ) in the following chapter is not as outspoken as that of the CHR. Indeed, Sumption expresses his regret at the UK decision to leave the EU (192) following the 2016 referendum. The core of his interest in this chapter is the clash between the primacy of EU law, as promoted by the ECJ, and a contretemps between that primacy and the sovereignty of national constitutional law. He examines the case law of constitutional courts in Poland, Hungary and Romania where those courts have criticized the ECJ in terms which reject the overriding "sovereignty" of EU law. Basically, such ultimate sovereignty was not "conferred" under the EU treaties, national courts argued. Following on from its jurisprudence on EU legal sovereignty, the ECJ has long held that constitutional provisions in national law must give way to EU law (*Frontini* 1973). Otherwise, there could be 27 versions of EU law.

The most celebrated clash between a national court and the ECJ is that involving the German constitutional court, the Bundesverfassungsgericht (BVG). In case law stretching back over many years the BVG has ruled that German ministers and its Parliament cannot transfer German constitutional identity and constitutional rights to the EU in a manner which breaches the German Constitution. It has listed the "core" national constitutional features of Germany—a very long list—which cannot be so transferred. Nor can EU institutions act in a manner that allows them to determine the scope of the powers they have: they can only operate

within the powers conferred in the treaties and the member states are the authors of the treaties.

In a remarkable case in 2020 involving the purchase of state debt and assets by the European Central Bank (quantitative easing), and therefore fiscal and monetary policy, and which the ECJ had approved, the Court of Justice of the European Union was ruled by the BVG to have exceeded its judicial mandate, as determined by the functions conferred upon it in the second sentence of Article 19(1) of the Treaty on European Union, where it renders an interpretation of the Treaties which "is not comprehensible and must thus be considered arbitrary from an objective perspective". The ECJ decision was on a preliminary reference from the German court in its earlier hearing on the case. Basically, were the powers being exercised by the European Central Bank (ECB) within EU monetary union or were they under the rubric of economic management and outside the ECB's competence? The BVG ruled that, if the Court of Justice of the European Union acts unlawfully, its decisions are no longer covered by Article 19(1) above in conjunction with the domestic German Act of Approval; at least in relation to Germany, these decisions lack the minimum of democratic legitimation necessary under Article 23(1) (second sentence) in conjunction with Article 20(1) and (2) and Article 79(3) of the German Basic Law (*Weiss* paragraph 112).[1] The BVG's orders were against the German Government and the German Parliament (Bundestag) in relation to the conduct of the ECB and its review of the debt-purchasing programme. It did not rule against the ECJ itself but it declared that German national authorities which pursue unlawful EU orders are behaving unconstitutionally.

The following year, the BVG did not find fault with the review of the measures under challenge by the German Bundestag and refused further relief.[2] The German Government gave "suitable assurances" to the Commission when the latter commenced legal enforcement proceedings against Germany for breaching EU law, thereby settling the action. It was not an assurance from the court, as Sumption rightly observes. The *Weiss* 2020 judgment of the BVG still stands.

In terms of the UK, almost a quarter of a century ago Sir John Laws ruled, *obiter*, that the fundamental legal basis of the UK's relationship with the EU rests with domestic, not European, legal powers. The relationship is governed by national law:

> In the event, which no doubt would never happen in the real world, that a European measure was seen to be repugnant to a fundamental

1 See the Judgment of 5 May 2020.

2 See Order of 29 April 2021.

> or constitutional right guaranteed by the law of England [sic], a question would arise whether the general words of the European Community Act were sufficient to incorporate the measure and give it overriding effect in domestic law (*Thoburn* 2002, paragraph 69).

This *obiter* has been confirmed subsequently by the UK Supreme Court (UKSC) (*Miller No 1* 2017; *HS2* 2014). This seems to be the accepted position *within* member states; the sovereignty of EU law cannot override constitutional fundamentals whether in a written or unwritten constitution. The ECJ steadfastly adheres to the sovereignty, though primacy is often the chosen epithet, of EU law. The warning to EU institutions is: don't do anything that is repugnant to, or contravenes, national fundamental or constitutional rights. If a member state has to accommodate constitutional amendment to comply with EU law, amend the constitution or negotiate an opt-out to avoid an impasse.

Sumption believes the Brits had their constitutional moment in 2016 just as the German BVG has experienced its own in the *Weiss* and earlier case law! The BVG's constitutional moment came when it criticized the ECJ's application of EU law (it was a preliminary reference), the very thing Sumption criticized when the CHR ruled that national courts had erred in applying national law.

He sees a sharing of "constitutional identity" in the example of the constitutional case law of European national courts and the vote to leave the EU in 2016 by the UK in a tight majority (51.9%:48.1%). Unravelling why people vote a particular way is always a matter of conjecture. Some may well have been motivated by constitutional considerations, if that is not over gracing the epithet in this context, and a fear of being subordinated by a "distant European polity" (226). Having pointed out so clearly that there was a strong consensus in the national jurisprudence of many courts that there was a limit to what the treaties authorized, and in the British case the overriding sovereignty of Parliament had not been displaced by EU law, dramatically emphasized by *Miller No 1* where Sumption joined in with the majority, he then makes this highly questionable conjecture. Furthermore, the BVG's judgment seems to be an act of constitutional creativity, which he denies to other courts in most of the essays where he sides with democracy against "judicial rights".

Sovereignty or primacy of EU law applies where EU law has competence. Much of our law remained untouched by EU law. And in *Miller No 1*, the constitutional importance of the UK leaving the EU impelled the majority to make a striking departure from our law of foreign relations to rule that our constitutional law required parliamentary review and legislation

authorizing notice of withdrawal from the EU and not just an act of Crown prerogative.

Many "leavers", I conjecture, were influenced by repeated and invariably false claims disparaging the EU in much of the English press. Many, I conjecture, were moved by xenophobic and chauvinistic considerations, to which they were entitled. Many, I conjecture, were motivated by populist policies fanning fear by persuasive demagogue(s). Many, I conjecture, were inspired by a desire to spike David Cameron/George Osborne and their six-year-long imposition of austerity which hit working-class areas severely and which still does. The pair had constantly rubbished the EU and then sought to defend it prior to the referendum. Their case for staying in the EU was pathetic. All of these putative motives are "Nonsense", says Sumption. The Brits knew what they were doing. They knew the consequences. The decision to leave is made and that belongs to the past. The UK has suffered economically because of Brexit; stagnating by degrees is not an exaggeration. Our international influence is diminishing. Our immigration has actually increased since 2020. And we face the prospect of greater alignment with EU law to strengthen our trading relations with the EU, increased EU/UK youth mobility and increased defence, security and policing cooperation. All the while having to deal with the wild card of Trump's unpredictability and caprice.

At the end of the day, Sumption seems to be saying that the ECJ was an international court that had gone too far. As he himself argues, international relations are unavoidable and treaty commitments bring plusses and minuses. It is a bargaining process, and we can only hope our leaders fully protect our interests. My fear is that those who decry international law will take comfort from Sumption's critique. As Richard Hermer has recently argued (2025), "progressive realism", which believes national interests are best protected by strength abroad, not armed force but influence and persuasion, combines both a pragmatic approach to the UK's national interests with a principled commitment to a rules-based international order. This at a time when our "soft power" presence in the world through the British Council, the BBC World Service and foreign aid is being ravaged. The removal by Cameron and his successors as Tory prime ministers of international law from the "overarching duty on ministers to comply with the law *including international law and treaty obligations*" in the 2015 Ministerial Code comes to mind. Keir Starmer restored "international law and treaty obligations" in his 2024 Code (paragraph 1.6, emphasis added).[3]

[3] See Ministerial Code. HM Government, November 2024.

The concluding subject is freedom of speech. The problem as set out is the assault on the UK's historical integrity built on custom and culture by ideological and tendentious critiques. Influencers from the past have been criticized on the basis of sexist, racist and ableist criteria labelling them as, in one way or another, benefiting from slavery, imperialism or class domination. There were, critics allege, societal biases revealing a white patriarchal hegemony that was in command. The attack on the past has been widespread, Sumption writes. Leading universities have embraced "decolonization" statements for their curricula to jettison the colonial heritage. Race becomes the absolute phenomenon masking all other complexities of culture. In common parlance, the chapter is an attack on "wokeness". America is tearing itself apart in the war on woke and the expurgation of liberal values.

Underlying these developments, Sumption claims, are attempts to purify epistemology—knowledge claims—of received science and learning and to acknowledge collective guilt for the wrongs of the past and the "heroes" who perpetrated them. What this amounts to, he believes, is little more than taking some obvious wrongs of the past and treating them as if they were the sole contribution of forgone ages and prominent individuals. His opponents would willingly align Sumption with Trump's attacks on universities and museums in the US and the wholesale assault on DEI (diversity, equity and inclusion) in public and corporate institutions. They will see an echo of Truss's claim that British institutions were captured by a leftist doctrine that hates western civilization, claims repeated by other Conservative former ministers and behind Reform's desire to root out DEI units in the local authorities that they won in the May 2025 elections; apparently there weren't any!

Sumption is above that. The attacks on western culture, he claims, are based on the assumption that there is no such thing as "objective truth", at least not as transmitted by the past. He makes a bold statement at page 224: truth is an existential reality existing "somewhere out there whether we like it or not". I share some of Karl Popper's scepticism about seeking absolute truth in preference to reducing ignorance and advancing knowledge. Popper called it a process of falsification. I would agree with Sumption that we have got closest to the truth by objective study of the available material, by abandoning fixed conceptions, "by logical reasoning and by a willingness to engage with dissenting opinion" (208). Amen to that. There are no alternative routes to truth dependent upon "different racial identities or different hierarchies of power" (208). But different experiences may expose one to different interpretations.

The problem is intensified by social media and algorithms which are able, as expressed in popular tropes, to intensify epistemic capsules, reverberate communal echo chambers and propel populist tribalism generated by a handful of fanatics. With these tools, the new influencers are powerfully assisted in their social construction of a new reality and the deconstruction of an old one.

It would be wrong to place Sumption alongside the drum-beaters of anti-wokeism. He is too subtle a thinker for that. He may well be overstating his case, and there is more than a touch of the advocate pressing his cause in the style of delivery, but he sees a growing problem, especially among today's youth. And there is a problem. But the problem is not new. Academia has always been susceptible to cliques who indoctrinate, like the Taliban. If they prevail, he writes, it will lead to the fragmentation of society and an intolerance built on conformity. This doesn't seem to be that far from what Trump is trying to achieve in the US or other autocrats elsewhere. It is also of interest to note again that, in criticizing the intolerant and structural influencers as "new roundheads", the interregnum in which the Roundheads prevailed led to many notable and liberal legal reforms which were done away with on the restoration of Charles II. It wasn't all about banning Christmas.

The concluding chapter continues the theme of enforced conformity in contemporary society and the danger this poses for freedom of speech. Freedom of speech was formulated in struggles against the state and religious bodies. But, following J S Mill, Sumption argues that public opinion to which individuals feel compelled to conform ropes them in, octopus-like. To which I imagine the new influencers would say they are simply trying to disabuse society of the prevalent false consciousness dominating traditional patriarchal, racist or whatever structures. All around we see an attack on those things which Sumption holds most dear: pluralism and diversity of opinion. The attack, he believes, is destructive of tolerance. The attack is facilitated by criticism of individualism, that characteristic so precious to Mill. The underlying objective is conformity by "systematic coercion" (216).

Sumption offers examples that come from the methods and campaigns of transgender groups and the promotion and invocation of hate speech crimes based on subjective identification of a feeling of harm rather than an objective standard of appraisal. Similar approaches are found in sexual, racial and political grievances to such an extent that hate speech operates like censorship, he argues. It has led to disciplinary proceedings for academic staff, course modifications, cancelled speeches and

publications described by Sumption. Professor Kathleen Stock resigned from Sussex university after hostile student and union reaction to her gender critical views. For Sumption, this amounted to "hounding out" (223), he somewhat emotively writes. The university was fined £585,000 by the university regulator for breaches of freedom of speech regulations. The fine was criticized by the vice-chancellor at Sussex for being unfair and disproportionate (Roseneil 2025). And in *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16 the UKSC ruled that "sex", "man" and "woman" for the purposes of the Equality Act 2010 meant "biological sex" "as any other interpretation would render the EA 2010 incoherent and impracticable to operate". It did not include sex defined by gender reassignment certificates.[4] Sounds like Sumption's empire is fighting back. Nonetheless, Sumption will be accused of oversimplifying complex arguments and developments which belittle the feelings and position of individuals who see themselves victimized.

He ends by delivering a clarion call for free debate, freedom of speech and advancement of knowledge through discussion of conflicting views and opinions. "We cannot have truth without accommodating error" (226). I cannot disagree. But the opinion that no one should be entitled to "intellectual safety" (225) would, I believe, be better expressed as intellectual inviolability. We should be physically safe in expressing the views of our intellect even though they are not beyond criticism.

But I would also add, as I hope Sumption would, that it is not just the left or the woke who need censure. Right-wing ideologues and evangelical conservatives need correction too. They are certainly as great a danger to democracy and the rule of law as the crusaders he criticizes. At the moment Trump and his acolytes are in the ascendant. Their promotion of social media techs, freedom of speech without restraint (for some), economic blacklisting and power of the federal purse and military are, if anything, more insidious than the subjects of Sumption's scorn.

CONCLUSION

This is a very readable collection of essays by a formidable intellect. It may not be obvious from the preceding review that it has made me think about the many issues with which it grapples. The author's delivery is always clear and well expressed, often forthright. This is not the worm's eye view of the law, but the eagle's. Sumption is from the upper echelons

[4] *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC 16, paragraph 264. See feminists@law 14(2) (2025) and critical gender comments. feministsatlaw/›

of society, privileged, well educated in prestigious institutions which have bestowed a confidence lacking in many of those who advocate anti-racism and who stand up for minorities and who feel the injustice of centuries of oppression, sometimes with bitter personal experience. Nearly 30 years before George Floyd's murder, Rodney King was subjected to a horrific beating by the Los Angeles police, the video of which caused worldwide uproar. Such racist violent abuse of power was not a novel event. One may not necessarily agree with tearing down statues of bygone slave-traders and imperialists, but one can sense the deep offence such statutes cause in a totally different society. I would favour balanced discussion about whether they should remain. I am sure the suffragettes met with similar antipathy from society's male elites in protests advancing their cause of equality. Gender recognition has fomented some of the most divisive disputes, and Sumption's account of how opposing views to those seeking transgender recognition were in essence censored is worrying. But it is his account. For their part, advocates of gender rights will argue that Sumption's views are overstated and they face hostile and overwhelming barriers in promoting their views. Social media may open up communication but it cannot stop physical exclusion.

In advocating that we take up the cudgels for free speech and combat the new ascendancy and assert our individualism, I can see that those on the left will need to be inspired by his arguments. Make no mistake, Trump and his acolytes are out to get them. Courage will be required, as Sumption demonstrates, to maintain democratic decency and integrity. Democracy is Trump's justification for his outrageous behaviour. Democracy will survive although metaphorically Cromwell's advice to "Keep your powder dry", intellectually that is, should not be forgotten.

I hope Sumption's wishes on the UK leaving the CHR do not come to fruition. He doesn't mention leaving the Council of Europe. A condition of membership of the Council of Europe is that the member state ratifies the ECHR. He would like to see the ECHR without the CHR incorporated into our law and additional safeguards introduced. This has been doing the rounds since Cameron was prime minister. A preoccupation at present is getting clarification on Articles 3 and 8 because too loose an interpretation affords convicted foreign criminals and asylum seekers unnecessary protection, Starmer's Government claims. What one asks is unworkable with the HRA? The internationalizing of domestic policy, Sumption argues, will simply fan the flames of populist politicians and lead to a world without any international law dominated by combatting autocracies (150). What if domestic policy included sending deportees to countries

where they face death or torture? Or reintroducing the death penalty; one way to resolve the problem of over-populated prisons. One can only say "stick" with what we have and not "twist". We would end up with Hobbes' pre-*Leviathan* nightmare in the international sphere. It may be well on the way.

About the author

Professor Patrick Birkinshaw *was Emeritus Professor of Public Law, University of Hull, until he passed away on 23 November 2025. He was a regular contributor to* Amicus Curiae*, and we are honoured to publish his final piece for the journal. His colleague Yseult Marique has written a tribute to Patrick's academic life and work which is published on page 830 of this issue.*

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