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THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS

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Reith Lecturer: Jonathan Sumption

Lecture 2: In Praise of Politics

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

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

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

(AUDIENCE APPLAUSE)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(AUDIENCE APPLAUSE)

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

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

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

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

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

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

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

ANITA ANAND: Yes...

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

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

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

ANITA ANAND: Yes..

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

ANITA ANAND: And what's your name?

ALEHA: Aleha.

ANITA ANAND: And what did you want to ask?

ALEHA: I ask more than one question.

JONATHAN SUMPTION: Choose the best one.

ANITA ANAND: Do you – yes?

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

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

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

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

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

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

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

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

ANITA ANAND: Time for one last question?

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

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

JONATHAN SUMPTION: I can do that.

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

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

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

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

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

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

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

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

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

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

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

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

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

ANITA ANAND: Okay.

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

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

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

(AUDIENCE APPLAUSE)

TRANSCRIPT ENDS