
THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS
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Reith Lecturer: Jonathan Sumption
Lecture 4: Rights and the Ideal Constitution

ANITA ANAND: Welcome to Washington DC and the fourth BBC Reith Lecture with the former UK Supreme Court Judge, Jonathan Sumption.

We're at George Washington University, home to 26,000 students. Former alumni include Jacqueline Kennedy Onassis and the former director of the FBI, J Edgar Hoover.

In his series, Jonathan has been interrogating the complex relationship between politics and the law, suggesting that the Courts have become too powerful. Now he compares the constitutional models of the US and the UK. This lecture is called Rights and the Ideal Constitution.

Please welcome the BBC 2019 Reith Lecturer, Jonathan Sumption.

(AUDIENCE APPLAUSE)

JONATHAN SUMPTION: When the French political writer Alexis de Tocqueville visited the United States in the 1830s, one of the things that struck him most forcibly was the dominant place occupied by lawyers in the public life of the nation. In his classic account of early American democracy, de Tocqueville suggested that lawyers, as a class, had succeeded to the beliefs and influence of the old landed aristocracy. They shared its habits, its tastes and, above all, they shared its contempt for popular opinion.

"The more we reflect upon all that occurs in the United States," he wrote, "the more we shall find that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element in the Constitution." There is scarcely any political question in the United States that does not ultimately resolve itself into a judicial question.

There was only one other country that de Tocqueville could think of where the legal elite enjoyed a comparable influence over public affairs and that country was Britain.

A new edition of de Tocqueville written for today would probably make the same point. The twin themes of these lectures have been the decline of politics and the rise of law to fill the void. I have argued that democracies depend for their survival on their ability to mitigate the power and impulses of electoral majorities. Historically, they've done this in two ways. One is by a system of fundamental law standing above the elected legislature and enforced by judges. The other is representative politics, which creates a class of professional politicians with an interest in softening extremes in order to broaden their electoral appeal.

Representative politics is a very imperfect mechanism for achieving this but in the long run, political constraints on the part of majorities are likely to be a great deal more effective than legal ones. Why do we believe in democracy, or think we do? What are the proper limits of democratic choice? What rights ought a democratic constitution to protect, even against the will of the people?

When the British argue about these questions, as they often do, they generally look to the United States. Sometimes as an inspiration, sometimes as a warning. Yet, in spite of a close similarity of political outlook, the American constitutional tradition is the polar opposite of the British one. At its most basic level, the difference is between two models of the state, a legal model and a political one. The Constitution of the United States is the archetypal legal constitution. Britain, by comparison, has historically been the archetypal political state.

In Britain, as in many other countries, including the United States, we have witnessed a mounting tide of hostility to representative politics over the past three or four decades. This has naturally been accompanied by a growing interest in the legal constitutional model, especially among the judiciary. This is therefore a good time to be assessing its attractions, and Washington is a good place in which to do it, for the legal model raises dilemmas in a democracy of which the United States has a longer and more varied experience than any other country in the world.

The prime purpose of any constitution is to provide a framework of political rules for making collective decisions. In its original form of 1787, the Constitution of the United States did almost nothing else. The Protection of Rights came later with the 10 amendments of 1791 which together constitute the Bill of Rights. Twelve years later, in 1803, came the decision of the Supreme Court in Marbury and Madison which established the power of the Supreme Court to quash acts of Congress held to be unconstitutional.

So, by the beginning of the 19th century the US Constitution had already acquired the three basic features which have come to be regarded as the hallmarks of every legal constitution. First, there is a recent code of rights which prevails over all other law. Secondly, it is proof against political amendment, except by some extraordinary procedure such as a super majority in the legislature or a popular referendum. Third, it confers on judges the power to enforce constitutional rights, to strike down any act of the state, including its legislation, which they find to be inconsistent with them.

By comparison in Britain, at any rate in orthodox constitutional theory, there are no constitutional limits on the power of the British parliament. There is no fundamental law

which parliament cannot alter or abrogate at will. Even the treaties of the European Union, which have prevailed over domestic legislation for the past 46 years, do so only by virtue of an act of parliament which can be repealed at will, as we have seen. We are almost the only country in the world of which this is true.

Of course, the difference between the legal and the political models of the state has never been absolute. Almost all constitutions have some elements of both. The United States has a sophisticated doctrine of the separation of powers which reserves a large space to political judgments by the executive and the legislature. In Britain, law has always had a place in its basically political constitution. Nonetheless, the conceptual difference between the legal and the political model remains a real one which exposes two very different views about democracy.

The attraction of the legal model is that it is based on a body of principle applied by judges whose perceptions are less likely to be swayed by passion, prejudice, self-interest or [realpolitik] than those of politicians or voters but it's patronising overtones are perfectly obvious. The legal model seeks to create a body of constitutional rights which is beyond the reach of popular choice. Its advocates do not trust elective institutions to form opinions about them with the necessary restraint, intelligence or moral sensibility. They therefore favour an accretion of power to the sort of people, namely judges, whose superior qualities and independence of public opinion are thought to produce more enlightened judgments.

"We, the people," are the opening words of the US Constitution but as James Madison's contributions to the federal papers show, the founding fathers regarded the people as a bigger threat to liberty than their governments. Madison looked for a solution to the representative principle. He expected lawmakers to be wiser and more circumspect than their electors. For later generations, however, the representative principle has not been enough. Distrust of elected majorities and fear of majoritarian tyranny has always been the driving force behind the idea of entrenched constitutional rights.

Now, it is probably true that the decisions of voters and their representatives are not morally pure. They are based on a variable mixture of wisdom and folly, prejudice and understanding, of idealism, pragmatism and self-interest. The real question is whether this impurity of motive is a good enough reason for constraining their choices by law. To answer that question, I think that we have to ask ourselves why we believe in counting votes at all. There are, surely, two main reasons.

In the first place, all governmental authority which is not based simply on force requires some source of legitimacy. If a political community is to have any long-term stability then people have to have a reason for obeying laws that they do not like, other than the threat of coercion. "We, the people," is the emotional foundation of democracy in Britain as well as in the United States, even if the British do not have a document that says so.

The second reason why we believe in counting votes is that it reflects our sense of social and political equality. Thomas Jefferson wrote in one of his letters to the German scientist Alexander von Humboldt that the lex majoris, the law of the majority, is the fundamental law of every society of individuals of equal rights. The critical words in that sentence are the last ones "of equal rights." The interests and the opinions of citizens conflict. We cannot all have our own way. What we can expect is that the decision-making

process will treat our various interests and opinions with equal consideration and respect. That is achieved by giving all of us an equal share in decision making, even if as individual voters our influence on the outcome is minimal.

A constitution which was not based on democratic choice but on some embedded scheme of values, such as liberalism, human rights, Islamic political theology or the dictatorship of the proletariat, would not achieve this. It would privilege those citizens who happened to agree with these values. That might not matter if the values in question were universally or almost universally accepted. But you do not need to entrench values in the constitution if they are already universally accepted. You only need to entrench them if they are controversial and therefore liable to be discarded if people are allowed a free choice in the matter.

That suggests that the essence of democracy is not moral rectitude but participation, that the proper function of a constitution is to determine how we participate in the decision-making processes of the state and not to determine what the outcome should be. Whether voters act from good or bad motives is really not the point. We cannot make the constitution for some imaginary world in which people are without prejudices or indifferent to their own interests. All that a political system can really aspire to do is to provide a method of decision making which has the best chance of accommodating disagreements between citizens as they actually are. That calls for a political process in which every citizen can engage whose results, however imperfect, are likely to be acceptable to the widest possible range of interests and opinions.

This is arguably a more important priority for a political community than finding the right answers to its moral dilemmas, even assuming that there are right answers or that we can finally hit on them. The problem about the legal model is that it marginalises the political process. When a judge identifies something as a constitutional, or a human, or a fundamental right, he is saying that it derives from a higher law than the ordinary decision-making processes of the state. He is declaring that its existence and extent are not to be determined by political choice. Yet, very many judicial decisions about fundamental rights are themselves political choices only made by a smaller and unrepresentative body of people.

In an American context, perhaps the most interesting example is the due process clause of the Fourteenth Amendment. It provides, among other things, that no state shall deprive any person of liberty without due process of law. Successive decisions of the US Supreme Court have made this the functional equivalent of Article 8 of the European Convention on Human Rights and Fundamental Freedoms which protects private life. Both provisions have been interpreted as potentially embracing any interference with the personal autonomy of individuals within limits. But within what limits?

All mandatory rules of law interfere with the personal autonomy of individuals, that is what they are there for. If the limits to the right of liberty are to be fixed as a matter of principle by judges, then the answer must necessarily depend upon a judgment about which interferences with personal autonomy are acceptable and which are not.

Half a century ago this problem was energetically debated in the US Supreme Court in a celebrated case about a Connecticut statute forbidding contraception. The Court held, by a majority, that there was a constitutional right of privacy which the Connecticut statute

violated. But this right was nowhere mentioned in the constitution and confusion about its exact basis is obvious from the diversity of opinion among the justices. Some of them thought that a right of privacy existed because it was analogous to other rights specifically mentioned in the constitution. Some thought that the right was to be derived from the collective values of the people as the Court perceived them to be. One thought that it was enough to say that a right of privacy was implicit in the whole concept of liberty. The dissenters said that there was no such right because the only basis on which it could be said to exist was that enough justices thought that it was a good idea.

I think that the dissenters had a point. When a judge is asked to decide a question as broad as this, the issue is not really whether the right exists but whether it ought to exist. Yet, that is surely a question for lawmakers and not judges. Over the century and a-half since it was added to the constitution, the due process clause has been the basis of some of the most illiberal, as well as some of the most progressive, decisions of the federal Courts, according to the changing outlook of judges of the day.

As is well known, during the so-called Lochner era between the 1890s and the 1930s, the US Federal Courts struck down as unconstitutional some 150 pieces of employee protection legislation under the due process clause. They did this on the grounds that liberty required absolute freedom of contract subject only to limited considerations of public policy. Among the laws which they struck down were state laws limiting hours of work in the interests of health, guaranteeing a right to join unions and outlawing child labour.

Moving to the opposite extreme, the due process clause was also the basis of the decision in Roe and Wade in 1973. The US Supreme Court derived a right to abortion from the newly discovered constitutional right of privacy and autonomy. The same reasoning, in a sense, lay behind the Court's decision more recently about same sex marriage in 2015. In both cases the Supreme Court's decisions were necessarily based on the perception of the justices that this was what liberty now required. Yet it seems likely that if the same issues had come for the first time before the Court as it is now constituted, the result would have been different, although nothing would have been changed apart from the outlook of individual justices.

Now, one can draw two lessons from the broad range of outcomes which at different times in American history have been justified under the due process clause. One is that on politically controversial issues, the decisions of judges almost always involve a large element of political value judgment. The case for or against labour regulation is a question of economic and social policy. The case for or against abortion is a question of social and moral values. What liberty requires in either context and how far it should go are fundamentally political questions.

The other lesson is that judicial decisions on issues like these are not necessarily wiser or morally superior to the judgments of the legislature. Much of the employee protection legislation struck down by the federal courts in the Lochner era had been on the statute book in Britain since the middle of the 19th century. It had got there by ordinary legislation and by political action. The justification commonly put forward for treating such matters as constitutional issues is that it protects minorities against majoritarian tyranny. But what constitutes majoritarian tyranny very much depends on how you define your majority and what you regard as tyranny. Expect, perhaps, in classic discrimination cases where the animating principle is to treat like cases alike, there are no legal standards by which these

questions can be answered. The only available standards are political ones.

There is also, although I perhaps hesitate to make the point here, a wider issue, namely whether it is wise to make law in this way. I recognise that partisan divisions and institutional blockages in Congress have made controversial legislative change difficult to achieve in the United States. I recognise that that encourages those who look for a judicial resolution of major social issues, but the chief function of any political system is to accommodate differences of interest and opinion among citizens. Resolving these differences by judicial decision contributes nothing to that end. On the contrary, characterising something as a constitutional right removes the issue from the arena of political debate and transfers it to judges.

In the United States it does this irreversibly unless the Supreme Court changes its mind or the constitution is amended. Personally, I'm in favour of a regulated right of abortion but I question whether it can properly be treated as a fundamental right displacing legislative or political intervention. Abortion was once highly controversial in Britain too. After extensive parliamentary debate it was introduced by ordinary legislation in 1967 within carefully defined limits and subject to a framework of clinical regulation. The same pattern has been followed in Europe where all but one state, and Northern Ireland, have now legislated for a regulated right of abortion. As a result, abortion is much less controversial in Europe than it is in the United States. I suspect, although I cannot prove it, that one reason why abortion remains so controversial in the United States is that it was introduced judicially, i.e. by a method which relegated the wider political debate among Americans to irrelevance. Instead, the debate is concentrated on candidacies for the Supreme Court with results that were apparent in the undignified and partisan procedures in the most recent [consummation] hearings.

In his first inaugural address in 1861 Abraham Lincoln drew attention to the implications of filling gaps in the constitution by judicial decision. His words are very well known. "The candid citizen," he said, "must confess that if the policy of the government on vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." Lincoln had in mind the notorious Supreme Court decision in Dred Scott, which had held that African-Americans were not to be treated as citizens, but he was also making a broader point which was about active citizenship. A nation cannot hope to accommodate divisions among its people unless its citizens actively participate in the process of finding political solutions to common problems.

Law has its own competing claim to legitimacy but it is really no substitute for politics. Now, I'm certainly not saying that there are no rights which should be constitutionally protected in a democracy but I think that one lesson which Britain can learn from the US experience is that one must be very careful about which rights one regards as so fundamental as to be beyond democratic choice.

I suggested in a previous lecture in this series that in a democracy there are only two kinds of right that are truly fundamental in that sense. There are rights to a basic measure of security for life, liberty and property, without which life is reduced to a crude contest in the exercise of force. And there are rights such as freedom of expression, assembly and association, without which a community cannot function as a democracy at all. These rights

will certainly not be enough to prevent majoritarian tyranny, but no code of rights will do that.

The law simply has no solution to the problem of majoritarian tyranny, even in a system of perfectly entrenched constitutional rights like that of the United States. Law can insist that public authorities have a proper legal basis for everything that they do. Law can supply the basic level of security on which civilised existence depends. Law can protect minorities identified by some personal characteristics, such as gender, race or sexual orientation, from discrimination. But the Courts cannot parry the broader threat that legislative majorities may act oppressively unless they assume legislative powers for themselves.

The only effective constraints on the abuse of democratic power are political. They depend on active citizenship, on a culture of political sensitivity and on the capacity of representative institutions to perform their traditional role of accommodating division and mediating dissent. If that no longer happens in the United States, or on some issues in Britain, it is because our political culture has lost the capacity to identify common premises, common bonds and common priorities which stand above our differences. This is a serious problem in any democracy but there is nothing that the law can do about it.

In an essay written in 1942, the great American Judge Learned Hand confessed that he could not predict whether the spirit of equity and fairness which emanated the constitution would survive without judges to enforce them. But he added these words, "This much," he said, "I think I do know, that a society so riven that the spirit of moderation is gone no Court can save, that a society where that spirit flourishes, no Court need save. That a society which evades its responsibilities by thrusting upon the Courts the nurture of that spirit, that spirit will in the end perish."

The ultimate expression of claims of law to set limits on political action is a written constitution. In the next, and final, lecture in this series, I shall look at calls to introduce one in the United Kingdom and at what such a constitution might say. Thank you.

(AUDIENCE APPLAUSE)

ANITA ANAND: Thank you very much, Jonathan. We're going to open this up for questions from our audience in just a moment but before we do, is it not a case of old world arrogance that you will come over here and tell these good people, when the majority of countries in the world right now have written constitutions, that we do it better because we haven't written it down?

JONATHAN SUMPTION: I haven't said that we did it better. We obviously start from completely different points of view. In the United States a written constitution on the legal model has nearly a quarter of a millennium of history, so that is where you start and I am not for one moment suggesting that that is something that you should dispose of or modify, it's 240 years too late for that. But, in the United Kingdom we start from a tradition in which our constitution is essentially political. It differs from almost every other country in the world in that respect. We are where we are and it is relevant when you try to answer the question: Ought the United Kingdom to move closer to a legal model? Then it seems sensible to me that one should look at the experience, pre-eminently that of the United States, of managing such a model.

The United States Constitution experience has demonstrated that there are dilemmas when you try to have both a democratic model and a legal one. That is something from which the United Kingdom ought to learn.

ANITA ANAND: But you do believe in – in your country and my country that we are slightly more fleet of foot, we have more flexibility because we have an unwritten – is that true or not true, that you believe that we have more flexibility because we have an unwritten constitution?

JONATHAN SUMPTION: I believe that we have a great deal of flexibility. I don't wish to suggest that the United States lacks that degree of flexibility.

ANITA ANAND: Question over there?

MARK MEDISH: Thank you. Mark Medish, a lawyer in Washington DC. I wanted to probe further on your view of the role of judges. You had made the observation in reference to due process and privacy cases decided by the Supreme Court that American judges, justices, sometimes appear to arrogate power, that they almost act as legislators through their practice of interpretation of legislation and of the constitution. And I was just wondering if you think that judges in your country as somehow less powerful? Don't they have the same powers of interpretation that can have hugely consequential impact on the outcome of cases and controversies and in that case, what really is the difference between a written and an unwritten constitution if judges, who must be the arbiters, still have this awesome power of interpretation?

JONATHAN SUMPTION: Judges in the United Kingdom have the same power of interpreting written instruments as they do in the United States, although they carry that power less far than at any rate the Supreme Court has done but their – the basic theoretical framework is the same. Moreover, judges in the United Kingdom have the same appetite for developing rights, as many judges do in the United States. That is something which I think is relatively recent. It's not recent in the States, it is recent in the United Kingdom, and is, I think, undesirable. The difference between our systems is that what the Supreme Court decides to be a right, a constitutional right, is thereafter written in stone unless the Supreme Court itself modifies its view subsequently or, unusually, there is a constitutional amendment. Whereas in the United Kingdom there are no entrenched rights that cannot be modified by parliamentary legislation, if necessary, by a single vote. That's the difference.

ANITA ANAND: Thank you very much. The gentleman over there?

REVEREND GRAYLAN HAGLER: I'm Reverend Graylan Scott Hagler, I'm the pastor of Plymouth Congregation of the United Church of Christ here in Washington DC and what I'm intrigued by is the total absence of any kind of racial analysis when it comes to the interpretation and the use of the constitution and law in the United States because it is basically the constitution and the language that was put in there, embedded in there, that gave our black folks the opportunity to hope that those words would be interpreted in a way that would lead towards their emancipation. And that eventually happened as attitudes got changed but the reality, if we waited for attitudes to change, it would never, ever happen, which was our process of almost 400 years of slavery in this country. And so, in a sense, you know, it was the words in the constitution, it was the battleground in order for people to get Brown v. Board of Education, even the Dred Scott decision failed or Plessy v. Ferguson,

but they kept coming up because that constitution was in place that guaranteed some rights. So what is your perspective on that analysis?

JONATHAN SUMPTION: Well, emancipation wasn't achieved by the original constitution and, indeed, wasn't achieved, in a real sense, by the constitution at any stage. It was achieved by a bloody seven year civil war. The results of that civil war were subsequently embodied in the amendments to the constitution which immediately followed it. It is clearly right that the original constitution – effectively it did not deal with slavery, it was ambiguous on the subject and that was because it was a subject on which the founding fathers would probably never have been able to agree, and that was a missed opportunity at a time when slaves were beginning to be emancipated in much of the rest of the civilised world.

REVEREND GRAYLAN HAGLER: In a sense, the emancipation was a battleground that was fought out in the civil war but also was fought out in the legislature. But the real issue is what follows, after reconstruction, is Jim Crow, what we know as Jim Crow in this country, the bricks of Jim Crow get taken down by basically the challenge of the law that forced legislative bodies to have to deal with things like desegregation and had to deal with things like public accommodations, that basically was the battleground on which we fought, as well as in the street.

JONATHAN SUMPTION: That battle was won politically. I agree that the Supreme Court contributed something to it, rather late, in Brown and Board of Education in particular, but essentially, as I read the situation historically, I mean, correct me if I'm wrong, the legislation of the 1960s and subsequently was what really produced that change. That seems to me to be the way that it ought to work, except in one sense, it ought to have been achieved very much earlier.

BRIAN CHUNG : Hi. My name is Brian Chung, I'm a graduate of both this university, the George Washington University, and the Queen's College Oxford. Both here in the US and in the UK we've seen that leaders have come to power promising to restrict the rights of minorities such as asylum seekers, terrorist suspects and particular religious groups, and Congress and parliament have gone along or generally failed to protect these rights. So my question is, how would your ideal system of constitutional law or politics protect the rights of these persistently unpopular minorities?

JONATHAN SUMPTION: As I understand it, the United States Constitution does not permit the executive to operate a system for admitting migrants which is biased on racial or religious grounds. Certainly that is the principle in the United Kingdom and, so far as I'm aware, of pretty well all European countries. All countries have an immigration policy and it seems to me likely that in any democratic country there will be laws which restrict the right to migrate into that country. I don't regard that as inherently objectionable. I would certainly regard it has inherently objectionable if these laws operated by discriminating between some races or religions and others but I'm not sure that I would accept that migrants can be regarded as a minority in the sense which you mean.

ANITA ANAND: Which system looks after minorities better, a written constitution or an unwritten constitution?

JONATHAN SUMPTION: I don't really think that there's any difference in that

respect. It would be possible for the United Kingdom to have laws which did discriminate against migrants from some races. In fact, we don't do that. It would not be possible in the United States. So to that extent, clearly, the American system has a more durable-----

ANITA ANAND: Sounds more robust?

JONATHAN SUMPTION: More durable protection. At the same time, there are many things in any constitutional polity which one would wish to prevent but which are already effectively prevented politically, and I think that our system does politically protect minorities from ethnic or religious discrimination.

VERA GOGOKHIA: I'm Vera Gogokhia here, and I come from Georgia, the other Georgia across the ocean. My question is what does – what do you think Brexit's [stance here]? Is it because of the very specific political system model that UK has-----

ANITA ANAND: Wow, there we go.

VERA GOGOKHIA which might be different from other countries, from other EU countries, or do you think it is the reaction to the decline of politics?

JONATHAN SUMPTION: I'm not sure I think either is true. I think that Brexit is the result, partly, of economic frustration, which is not peculiar to the United Kingdom but is very strongly felt there. It is partly the result of a romantic view of the British past, which in some important respects is very different from the past of other European countries. After the Second World War every European country had been invaded and had had its existing political system effectively destroyed, either in the course of the war itself or in the course of the Nazi conquests which preceded it. The fact that this didn't happen in Britain has given very many British people a feeling that they can operate independently from social and economic movements which exist across Europe and, indeed, in some cases, across the world. I personally think that this is an illusion but historically I think that that is the explanation.

I do not think that it has anything to do with our constitution except in one respect, which is that we adopted a mode of decision making, namely a referendum, on a particular issue which, I think, was constitutionally completely misguided. If you believe, as I do, that the prime function of any constitution is to provide a method of decision making which has the best prospect of accommodating dissent and disagreement within the citizen body, that's a state of affairs that you are likely to regard, as I do, as completely unacceptable.

ANITA ANAND: That is all that we have time for. My thanks to all of you here at George Washington University, to you who are listening at home and, most especially, to Jonathan Sumption. Thank you very much indeed.

(AUDIENCE APPLAUSE)