
THE REITH LECTURES 2019: LAW AND THE DECLINE OF POLITICS
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Reith Lecturer: Jonathan Sumption
Lecture 3: Human Rights and Wrongs

ANITA ANAND: Welcome to the third of this year's Reith Lectures with the former Supreme Court Justice Jonathan Sumption.

We are in Edinburgh's Parliament House, a building which dates back to the 16th century. This place has long been home to the Court of Sessions, the highest court in Scotland, and here in the great hall we are dominated by a stunning stained glass window depicting the moment King James V confirmed the Court of Sessions right here in 1532. This is a place, therefore, steeped in regal and legal history, an entirely suitable setting for Jonathan Sumption to continue his series of lectures on the role of the law in our public and private life.

So far Jonathan has questioned what he calls "law's expanding empire" and discussed how best democracy can accommodate political difference. Today he will be taking a look at human rights, in particular the role of the European Convention on Human Rights and the Strasbourg Court. The lecture is called Human Rights and Wrongs.

Please welcome the BBC 2019 Reith Lecturer, Jonathan Sumption.

(AUDIENCE APPLAUSE)

JONATHAN SUMPTION: Human rights are where law and politics meet. It can be an unfriendly meeting. A few years ago the then Prime Minister, speaking to the House of Commons, described a recent Supreme Court judgment about human rights as "appalling". The same Prime Minister, on a later occasion, said about another human rights decision that it made him "physically sick". These are strong words. What's the fuss about?

There is nothing new about human rights apart from the name. A quarter of a millennium ago Sir William Blackstone, the author of the earliest methodical survey of the common law, called them "natural rights". They were, he believed, recognised by the law because they belonged to human beings by the immutable laws of nature. The idea behind this is simple and undeniably attractive. It is that there are some inalienable rights which human beings enjoy, not by the largesse of the state, not by the forbearance of their fellow citizens, but because they are inherent in their humanity. This is the idea which underlies modern human rights theory.

There are, however, some problems about it which, if we are honest with ourselves, we must recognise. To say that rights are inherent in our humanity without law is really no more than rhetoric. It doesn't get us anywhere unless there is some way of identifying which rights are inherent in our humanity and why, and that is essentially a matter of opinion.

In a democracy differences of opinion on what rights ought to exist are resolved politically through legislation but advocates of human rights have always been suspicious of majorities, which ultimately control democratic legislatures. The idea behind modern international human rights law is that certain fundamental rights should have a higher status than ordinary laws so that they cannot readily be dislodged politically, even with the authority of a democratic legislature. In principle, democracies can enact whatever rights they like. The object of human rights law is to ensure that they get certain rights, whether they like them or not. To achieve that, however, it is necessary to identify some other source of legitimacy for these rights apart, that is, from the wishes of the population.

In a more religious age than ours this was perfectly straightforward. Rights were part of the moral law or deigned by God. In a totalitarian state it's equally straightforward. Rights, so far as they exist at all, are ordained by the ruling group in accordance with its ideology. But in a secular democracy, what is it that makes rights legitimate if not the decision of representative bodies? What is the source, independent of popular endorsement, which enables us to identify some rights as so fundamental that they must not be removed or limited by political decision?

This is the city of David Hume, the great philosopher of the 18th century Scottish Enlightenment. He rejected the whole concept of natural law. It is always dangerous to paraphrase Hume but, essentially, he rejected it because you cannot derive moral principles from abstract reasoning or empirical observation. They derive their legitimacy from collective moral sentiment.

Rights do not exist in a vacuum. They are the creation of law which is a product of social organisation and is therefore, necessarily, a matter of political choice. So, when we speak of some rights as being inherent in our humanity, we are not really saying anything about the nature of humanity. We are making a personal moral judgment that some rights ought to exist because they are so fundamental to our values, and so widely accepted, as to be above legitimate political debate.

Almost all of us believe that there are some rights in that category but the idea only works if the rights in question are truly fundamental and generally accepted. If there is room for reasonable people to disagree about them, then we need a political process to resolve that disagreement. In that case, they cannot be above legitimate political debate except in a

totalitarian state. There are probably only two categories of right that are truly fundamental and generally accepted.

First, there are rights which are fundamental because without them life is reduced to a crude contest in the deployment of force. So we have rights not to be arbitrarily detained, injured or killed. We have equality before the law and recourse to impartial and independent courts. Secondly, there are rights without which a community cannot function as a democracy, so there must at least be freedom of thought and expression, assembly and association, and the right to participate in fair and regular elections. Of course, democracies should confer many more rights than these but they should confer them by collective political choice and not because they are thought to be inherent in our humanity or derived from some higher law.

Today, the main source of human rights in Britain is an international treaty, the European Convention on Human Rights. It is a basic constitutional principle that international treaties have no effect on people's legal rights or duties without an Act of parliament. In theory, this means that parliament always has the last word on the contents of our law, even when it originates in a treaty. There is, however, one category of treaties which largely escapes parliamentary control. I will call them "dynamic treaties". A dynamic treaty is one which does not just say what our domestic law should be, it also provides a supranational mechanism for altering and developing it in future.

For those who believe that fundamental rights should exist independently of democratic choice, dynamic treaties have an obvious attraction. They create a source of law which is independent of democratic political choices. The European Convention on Human Rights is a classic dynamic treaty. The *Human Rights Act 1998* empowers the British Courts to strike down any rule of common law, regulation or government decision which is found to be incompatible with the Human Rights Convention. Even an Act of parliament can be declared incompatible with the convention, which is a signal to parliament to repeal or amend it.

Crucially, the *Human Rights Act* requires the British Courts to take account of rulings of the European Court of Human Rights, the International Court set up in Strasbourg to interpret the convention. In theory, the British Courts could reject decisions of the Strasbourg Court. In rare cases they do. Occasionally, Strasbourg modifies its position in response but defiance is really not an option if Strasbourg persists. That would put Britain in breach of international law, something which, by longstanding constitutional principle, the domestic courts should avoid if they possibly can.

The Human Rights Convention was not originally designed as a dynamic treaty. It was drafted in the aftermath of the terrible history of the Third Reich and it was conceived as a partial statement of rights universally regarded as fundamental. No torture, no arbitrary killing, no imprisonment, freedom of thought and expression, due process of law and so on. It is the Strasbourg Court which has transformed it into a dynamic treaty. The doctrine of the Strasbourg Court is that the convention is what it calls "a living instrument". The court develops it by a process of extrapolation or analogy so as to reflect its own view of what additional rights a modern democracy ought to have.

Now, of course, the court wouldn't need to do this if the additional rights were already there in the treaty. It only needs to resort to the living instrument doctrine in order to

declare rights which are not in the treaty. Now it's fair to say that some development of the text is unavoidable when applying an abstract statement of principle to concrete facts. In addition, some concepts in the convention, such as the notion of inhuman or degrading treatment, plainly do evolve over the time with changes in our collective values. But the Strasbourg Court has gone much further than that. Article 8 of the convention is probably the most striking example of this kind of mission creep.

Article 8 protects the human right to private and family life, the privacy of the home and personal correspondence. It was designed as a protection against the surveillance state in totalitarian regimes. But the Strasbourg Court has developed it into what it calls a principle of personal autonomy. Acting on this principle, it has extended Article 8 so that it potentially covers anything that intrudes upon a person's autonomy unless the Court considers it to be justified.

Now, it will be obvious that most laws seek, to some degree, to intrude on personal autonomy. They impose standards of behaviour which would not necessarily be accepted voluntarily. This may be illustrated by the vast range of issues which the Strasbourg Court has held to be covered by Article 8. They include the legal status of illegitimate children, immigration and deportation, extradition, criminal sentencing, the recording of crime, abortion, artificial insemination, homosexuality and same sex unions, child abduction, the policing of public demonstrations, employment and social security rights, environmental and planning law, noise abatement, eviction for non-payment of rent and a great deal else besides. All of these things have been held to be encompassed in the protection of private and family life.

None of them is to be found in the language of the convention. None of them is a natural implication from its terms. None of them has been agreed by the signatory states. They are all extensions of the text which rest on the sole authority of the Judges of the Strasbourg Court. This is, in reality, a form of non-consensual legislation.

Now, I'm not complacent about our human rights record in the United Kingdom. We have a strong libertarian tradition but we have done some things which are contrary to our own traditions and morally and politically indefensible. In my lifetime, parliament has twice responded to political violence by authorising internment without trial in peacetime. So I have no problem with the idea of an international court to act as an external check. But most of the rights which the Strasbourg Court has added to our law are quite unsuitable for inclusion in any human rights instrument. They are contentious and they are very far from fundamental.

This has transformed the convention from an expression of noble values, almost universally shared, into something meaner. It has become a template against which to assess most aspects of the ordinary domestic legal order, including some highly disputable ones, and the result has been to devalue the whole notion of universal human rights. Many people will feel that some, at least, of the additional rights invented by the Strasbourg Court ought to exist. I think so myself. But the real question is whether the decision to create them ought to be made by judges.

Judges exist to apply the law. It is the business of citizens and their representatives to decide what the law ought to be. Many of the issues thrown up by the convention are not even issues between the state and the individual. They are really issues between different

groups of citizens. This applies particularly to major social or moral issues, such as abortion, fetal tissue research or medically assisted suicide, about which opinion is often deeply divided.

In a democracy, the appropriate way of resolving such disagreements is through the political process. If I say that we should recognise a human right, in appropriate cases, not to be evicted from a council house for non-payment of rent and you say that somebody who hasn't performed his side of the bargain should have no such right, then the only alternative to a political resolution of our difference is to invite the judges to legislate. The main problem about human rights law is that it does this too readily. It transforms controversial political issues into questions of law for the Courts. In this way it takes critical decision-making powers out of the political process. Since that process is the only method by which the population at large is able to engage, however indirectly, in the shaping of law, this is, I think, a problem.

If we are going to deal with fundamental human rights in a way which has radical implications of this sort, then we need to have a very clear idea of what a fundamental human right really is. In particular, we have to distinguish a fundamental human right from something which is merely a good idea. It is often pointed out that parliament has authorised this way of making law by passing the *Human Rights Act* and, of course, so it has. What is more, in 1998 when it did this the expansive tendencies of the Strasbourg Court were already apparent but not everything that a democratic parliament does is consistent with a democratic constitution. Parliament could abolish elections. It could ban opposition parties. It could forbid criticism of official policy. It could transfer its powers to a dictator, as the German parliament did in 1933 and the French one in 1940.

Decisions of this kind would have the authority of a democratic parliament but they would hardly be democratic. So, the fact that parliament has incorporated the convention into our law does not relieve us from the need to look at its implications for the working of our democracy. The problem can be most clearly seen in decisions about qualified convention rights. Most convention rights are qualified. They are subject to exceptions for cases where an interference with the right in question is judged, as the phrase goes, to be necessary in a democratic society for some legitimate purpose.

According to the convention, legitimate purposes include the prevention of crime, the protection of public health or the economic wellbeing of society. If a national measure interferes with a protected right, the Courts ask whether the interference has a legitimate purpose and, if so, whether that purpose is important enough to justify the interference in question. Ultimately, as the Appellate Committee of the House of Lords held in 2007, the convention requires them to strike a fair balance between the rights of the individual and the interests of the community.

In the Courts, most arguments about human rights are not about the existence of the rights but about the scope of these exceptions and qualifications. The Strasbourg Court tends to give a wide scope to the rights protected by the convention, as we have seen with Article 8. It does this precisely in order to enable more and more legislative and governmental measures to be justified in Court. This poses, in an acute form, the role of judges in a democracy. Who is to decide what is necessary in a democratic society, or what purposes are legitimate, or what the prevention of crime, or public health, or the economic wellbeing of society requires, or what is a fair balance between the individual and the

community? These are all intensely political questions. Yet, the convention reclassifies them as questions of law, thus reforming them from the realm of democratic decision making and referring them instead to national and international courts.

Our domestic courts have occasionally expressed surprise and dismay at decisions emanating from Strasbourg, but their own legislative instincts are at least as strong. Five years ago the Supreme Court had to deal with one of the most sensitive and controversial moral issues of our time, assisted suicide for terminally ill patients. Our society is divided about this. What is life worth when one's ability to enjoy it has gone? What do we say about human autonomy? Does it entitle an individual to assistance in killing himself always or only sometimes? Are these just questions for the patient or does society have an interest of its own?

The Strasbourg Court had previously held that the whole issue was culturally and politically too sensitive to permit of a single pan-European answer. Each convention state would therefore have to decide it in accordance with its own values. The essential question for the Supreme Court was who should give Britain's answer, parliament or the courts? Parliament had already given Britain's answer. The *Suicide Act 1961* says that assisting somebody to kill himself is a crime. Over the years, parliament has considered proposals to change the law but has always decided against it. Yet, five of the nine judges who sat on this appeal thought that the question was ultimately one for the courts. Two of the five would have declared the *Suicide Act* to be incompatible with the convention. The other three decided not to do that but only because it would be premature until after parliament had had an opportunity to consider the matter. One of the three even threatened that unless this was satisfactorily addressed, the courts would do it for them.

Now, if that threat meant anything, it meant that the courts should be prepared to exercise legislative powers in place of the legislature. I am not alone in questioning the constitutional proprietary of all of this. The meaning of the *Suicide Act* is a question of law. The question whether the *Suicide Act* is a good thing is not a question of law, it's a question of moral and political opinion. I was one of the minority who considered that this was entirely a matter for parliament. I thought that on such an issue as this, my own opinion had no greater weight, by virtue of my judicial office, than that of any other citizen. I still think that.

The implicit message of cases like this is that even in a democracy such issues are not in the last analysis to be left to the general body of citizens. Certainly the views of parliament are a factor but how much attention the courts should pay to them is a matter of judicial value judgment. From time to time the Strasbourg Court has said this out loud. It has twice held that the statutory rule in Britain that serving prisoners cannot vote is incompatible with the convention. What was interesting about these decisions was the way in which the Strasbourg Court dealt with the fact that parliament had approved this rule.

In its first decision in 2005 Strasbourg said that parliament cannot have thought properly about the human rights implications. In its second decision in 2008 it couldn't say that because the House of Commons had by then debated the 2005 decision and reaffirmed its original view. So Strasbourg simply said, "Well, it was a question of law and not one for parliament at all." There is an obvious irony in the Strasbourg Court's rejection of parliamentary authority in the name of democracy and yet, that irony brings us close to the heart of the present issue.

What we are seeing here are two rival conceptions of democracy. One is that democracy is a constitutional mechanism for arriving at collective decisions and accommodating dissent. The other is that it is a system of values. After the end of the Second World War the democratic label was claimed by the autocratic communist states more or less forcibly established by the Soviet Union in Eastern Europe, such as the German Democratic Republic. What they meant by democracy was a value-based system in which communism was treated as inherently democratic, although not chosen or necessarily supported by the people or even open to meaningful discussion among them.

The values of the Strasbourg Court are, of course, very different from those of the post-war dictatorships of Eastern Europe but they do have this much in common. They both employ the concept of democracy as a generalised term of approval for a set of political values. The choice of elected representatives are, on that view, only legitimate within the limits allowed by these values. Democracy is a word with strong emotional resonance. Everyone wants to appropriate it as a label for their own preferred positions. So we distort the language, not in order to deceive, but to avoid confronting awkward dilemmas. This is not just a question of vocabulary.

Democracy, in its traditional sense, is a fragile construct. It is extremely vulnerable to the idea that one's own values are so obviously urgent and right that the means by which one gets them adopted don't matter. That is one reason why it exists in only a minority of states. Even in those states it is of relatively recent origin and its basic premises are under challenge by the advocates of various value-based systems. One of these is a system of law-based decision making which would entrench a broad range of liberal principles as the constitutional basis of the state. Democratic choice would be impotent to remove or limit them without the authority of courts of law.

Now, this is a model in which many lawyers ardently believe. The essential objection to it is that it is conceptually no different from the claim of communism, fascism, monarchism, Catholicism, Islamism and all the other great isms that have historically claimed a monopoly of legitimate political discourse on the ground that its advocates considered themselves to be obviously right. But other models are possible. One can believe in rights without wanting to remove them from the democratic arena by placing them under the exclusive jurisdiction of a priestly caste of judges. One can believe that one's fellow citizens ought to choose liberal values without wanting to impose them.

In the next lecture in this series I want to turn to the experience of the country which has confronted these dilemmas for longer than any other democracy, namely the United States of America. Thank you.

(AUDIENCE APPLAUSE)

ANITA ANAND: Jonathan, thank you very much. Clearly there are failings in the ECHR in your mind. Would you go as far as say, "Right, we should leave. Pack our bags, we're off."

JONATHAN SUMPTION: I think a much better solution would be a change of heart among both the domestic judiciary and the Strasbourg judiciary about how far it is legitimate to go in differing from democratic institutions. So, that is the solution that I

would like to see, and there are some signs that this may be beginning but, ultimately, if there is no significant change, yes, I would withdraw from the Human Rights Convention. I hope that won't be necessary.

ANITA ANAND: Okay, but what – what is the thing that would push you over the line?

JONATHAN SUMPTION: I can't say what would happen in future that might persuade me that we should leave, I've given a general description, but it isn't true that there are established positions. Judges, whether in Strasbourg or here, do not usually dig trenches around their positions. They are sensitive to mood, they are sensitive to values. I think that there has been a noticeable change of approach in some Strasbourg decisions in the last five or six years. I also think that there are indications that a younger generation of judges is less enthusiastic about the new toy placed in their hands by the *Human Rights Act* than some of those who were already judges when it was enacted.

ANITA ANAND: So – so even with the backdrop of Brexit, as we are seeing it unfurl around us and some of the intransigencies that that has – has laid bare, you are still helpful that there will be, at least, give in this monumental decision about human rights?

JONATHAN SUMPTION: The intransigencies that you refer to about Brexit have not come from judges.

ANITA ANAND: Let's take some questions from the floor. Can we get… one over here?

CATHERINE SMITH: Thank you. Catherine Smith, Chair of the John Smith Centre which promotes trust in politics and public service. You suggest we need a political process rather than the courts to resolve human rights issues that are not truly fundamental. If that were to happen, would we not need a different type of discourse from and between our politicians to allow the very real tensions that you describe between individuals' rights and those of society to be properly weighed in the way that the courts currently do? And separately from that kind of capability question, I wondered who you thought the public would trust more to make these careful judgments, politicians or judges?

JONATHAN SUMPTION: Well, do we need a different kind of political forum to address them? I don't think so. What is quite striking is that some of the most impressive and informative debates that have happened within our lifetimes in the House of Commons have been directed to just such an issue. For example, the abortion debates surrounding the 1967 *Abortion Act* were very remarkable in the extent to which MPs debated in an informed and enlightened way the issues involved, and I think that that was one reason why in this country, as in most of Europe, abortion has now become relatively uncontroversial, whereas in the United States, where it was a matter of judicial decision, it remains extremely controversial. Partly, I think, because the decision there was made in a way which marginalised the contribution of the electorate at large.

As to which the public would trust? There's no doubt that the public generally, at the moment, are saying in all the polls that politicians are somewhere down the bottom of their trust list and judges somewhere up the top. I think the problem about this is that when presented with a judicial decision, the great majority of people tend to ask themselves, "Do I

like the result?" rather than, "Is this a way that we ought to be making decisions?" and the reason that that's a problem is that if you have a method of making decisions which consigns to irrelevance the views of the public at large, you may get a result next time round where you don't like the result and don't like the method either.

ALAN PATERSON: My name is Alan Paterson. I'm a Professor of Law, Strathclyde University. The standard answer to judicial accountability over human rights is, well, parliament enacted the *Human Rights Act* but you've kind of taken the ground from under their feet by saying, "Yes, but a democratic parliament can behave in an undemocratic way"…

JONATHAN SUMPTION: The *Human Rights Act* is a sufficient explanation of why the courts review governmental and legislative decisions in the way they do and the jurisdiction of the Strasbourg Court, which the *Human Rights Act* requires them to have regard to, is a sufficient explanation of most of the decisions which I would criticise as going too far. But it is one thing to say that these decisions of the courts are in accordance with the law. It's another thing to say that they are legitimate. A large part of the theme of all of these lectures has been to examine the concept of what makes law legitimate and my complaint is not that there is a breach of the statute, my complaint is that this is not legitimate.

ANITA ANAND: So you are saying categorically these are not legitimate?

JONATHAN SUMPTION: I think that some decisions go beyond what is legitimate in a democracy.

FIONA GARWOOD: I'm Fiona Garwood, I'm not a lawyer but I'm interested to know what you think about – you mentioned the rights of access to the courts and how that's reconciled with the restrictions and limitations now in legal aid for people to use that right to access the courts?

JONATHAN SUMPTION: The Strasbourg Court has never held that there is, as part of the right of access to the courts, a right to legal aid. But, if you ask me from my own view about that, in criminal cases a more generous attitude to legal aid is absolutely indispensable. If the state, with its great armoury of lawyers and money, has set itself against the citizen who is accused of a crime, I think that the citizen is entitled to legal aid and I think that the recent changes in the legal aid regime under which if you are acquitted you cannot recover more than a very modest part of your costs are, frankly, disgraceful.

As to civil legal aid, I would take a rather different view. There are some areas in which litigation is a wholly involuntary process. A lot of matrimonial breakup, for example, where I would apply a similar principle to the one which I think should apply in criminal law, but in many others I would say that the state does not have a moral, and should not have a legal obligation to fund litigation.

DREW WALDY: Hello. My name's Drew Waldy. I'm just your basic man in the street. The young girl who went to Syria, who's been on the news, do you think that her basic human rights have changed during this episode, should they have changed during this episode and, if so, at which point did they change?

JONATHAN SUMPTION: Well, when you say "changed during this episode," do I think that her human rights have changed as a result of her being deprived of British citizenship?

ANITA ANAND: You're talking about Shamima Begum here?

DREW WALDY: It's just the media would portray her as having no rights whatsoever-----

JONATHAN SUMPTION: Well, I doubt that that's right.

DREW WALDY: -----based on the decision that she's making so I'm not sure-----

JONATHAN SUMPTION: I don't think that human rights is actually – has any direct bearing on her situation, either before or after she was deprived of her citizenship. Essentially, the deprivation of her citizenship, the legality of that is going to depend on whether she had Bangladeshi citizenship because if she didn't, then the government was not entitled to deprive her of British citizenship, thereby rendering her stateless. If she was lawfully deprived of her British citizenship, then she has no right to come here. The *Human Rights Act* would not help her. It might have helped her if she was resident in this country because the right to deport her would have engaged her Article 8 rights but she's not in this country and it's very difficult to see that Article 8 is going to help her where she is. I'm frankly surprised at the suggestion that she could be regarded as the citizen of a country with which she has never had anything to do but that's the government's position and I have no doubt that it will be tested in the courts in due course.

ANITA ANAND: Can – but just on – on the, sort of, the kernel of the question there, if somebody chooses to go to a state that is waging war against your country, do they, should they, ought they to lose their standing when it comes to human rights?

JONATHAN SUMPTION: Well, what they lose is their citizenship. That doesn't necessarily deprive them of their standing when it comes to human rights. I have no problem about the notion of depriving people of their citizenship who have gone abroad to fight in foreign wars save this: it is an established principle of international law that you cannot deprive somebody of his – his or her citizenship if the result would be to render them stateless, and whatever they may have done, in Syria or anywhere else, that rule has always been applied and I have no doubt will be applied in this case.

ANITA ANAND: And should be.

JONATHAN SUMPTION: And should be, yeah, absolutely.

ANITA ANAND: I mean, the thing – the wonderful thing about – should be. Okay, I just wanted to know where you were coming from.

JONATHAN SUMPTION: Yes, absolutely.

ANITA ANAND: Okay. Seems like an excellent place to leave it. Thank you all very much indeed. We're going to have to end it there.

Next time we're going to be in Washington DC where Jonathan will be defending Britain's unwritten constitution but for now, a big thanks to our hosts here at Parliament House in Edinburgh, to our audience and to Jonathan Sumption, the BBC's Reith Lecturer.

(AUDIENCE APPLAUSE)