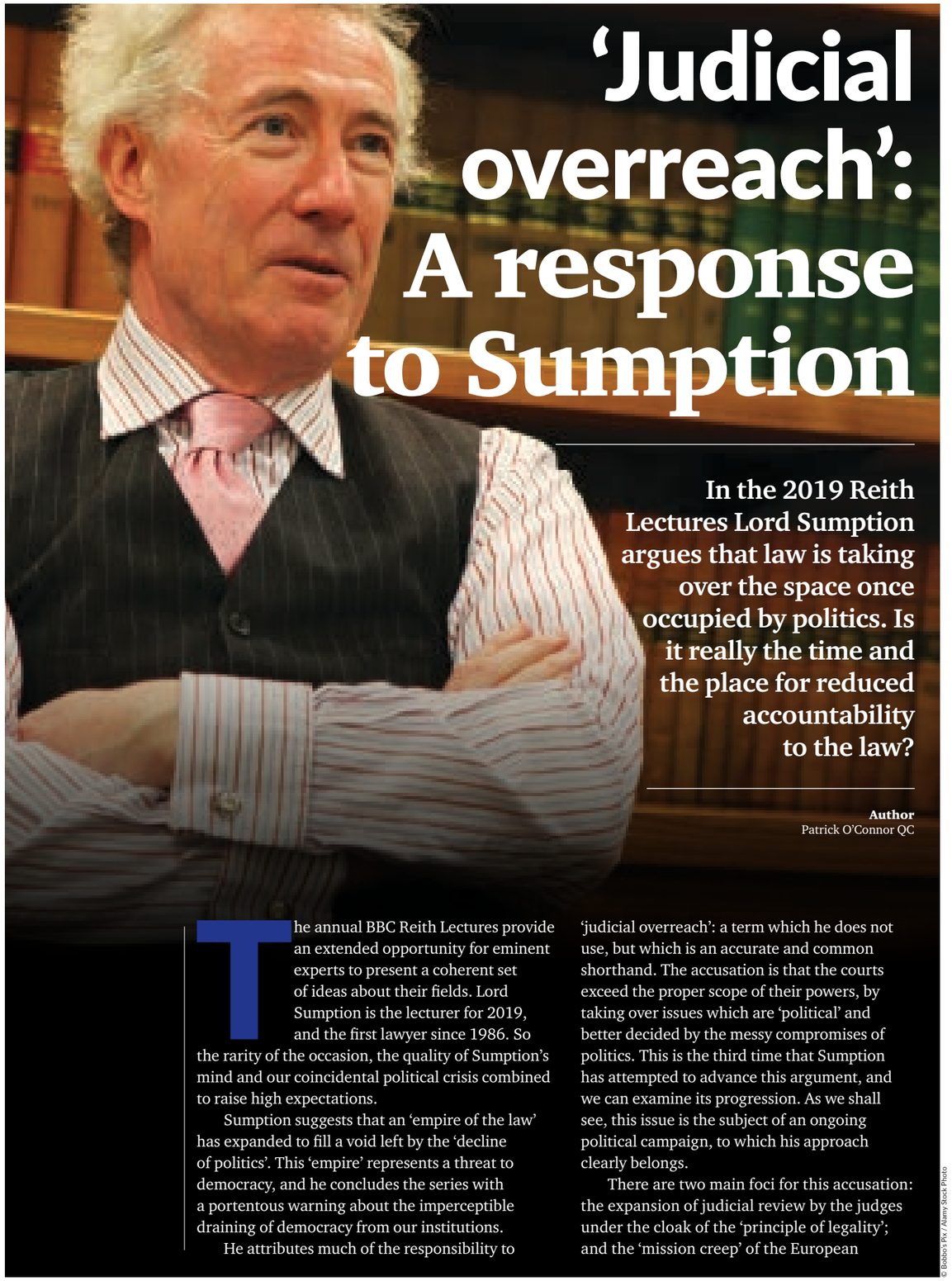

‘Judicial overreach’: A response to Sumption

In the 2019 Reith Lectures Lord Sumption argues that law is taking over the space once occupied by politics. Is it really the time and the place for reduced accountability to the law?

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The annual BBC Reith Lectures provide an extended opportunity for eminent experts to present a coherent set of ideas about their fields. Lord Sumption is the lecturer for 2019, and the first lawyer since 1986. So the rarity of the occasion, the quality of Sumption’s mind and our coincidental political crisis combined to raise high expectations.

Sumption suggests that an ‘empire of the law’ has expanded to fill a void left by the ‘decline of politics’. This ‘empire’ represents a threat to democracy, and he concludes the series with a portentous warning about the imperceptible draining of democracy from our institutions.

He attributes much of the responsibility to ‘judicial overreach’: a term which he does not use, but which is an accurate and common shorthand. The accusation is that the courts exceed the proper scope of their powers, by taking over issues which are ‘political’ and better decided by the messy compromises of politics. This is the third time that Sumption has attempted to advance this argument, and we can examine its progression. As we shall see, this issue is the subject of an ongoing political campaign, to which his approach clearly belongs.

There are two main foci for this accusation: the expansion of judicial review by the judges under the cloak of the ‘principle of legality’; and the ‘mission creep’ of the European Convention, through its ‘living instrument’ interpretation by the courts.

PRINCIPLE

Several basic issues are however ignored, without which this thesis lacks coherence. Behind the mellifluous delivery, no explanatory principle is suggested which can distinguish those ‘political’ issues which fall outside the proper domain of ‘the law’. Nor does Sumption suggest a ‘political’ mechanism by which such issues could be decided. Is it realistic to imagine a Parliament which could find the will, and the necessary time and resources? Nor does he suggest a practical means by which the ‘law’ should withdraw from its extended ‘empire’. Would this need legislation, or should the Supreme Court re-consider several decades of decisions about the boundaries of public law? By what means would an ‘originalist’ interpretation of Convention rights be imposed, and what does that mean anyway? No answers are given.

Sumption also does not distinguish between the judge-chosen ‘overreach’ of the ‘principle of legality’, and that under the Human Rights Act, imposed by Parliament. The latter is difficult to characterise as a ‘threat to democracy’. Different remedies would be required for each, but remedies are not his concern.

These flaws bring into question the practical significance of these lectures in the real world. Is some unifying principle engaged here, or are we presented simply with a list of laws with which a retired lawyer disagrees: a slightly elevated version of Rumpole’s gripes?

CONSISTENCY

So to his examples, and Sumption has a curious way with them. Consistency is not his strongest suit.

In his F A Mann lecture of 2011, Sumption suggested four examples of ‘judicial overreach’, including the *Pergau Dam* case (‘Judicial and Political Decision-making: The Uncertain Boundary’). All four were promptly refuted by Stephen Sedley in the *London Review of Books*. In his 2013 Kuala Lumpur lecture, these examples disappear (27th Sultan Azlan Shah Lecture, ‘The Limits of Law’). Instead he castigated the *ex parte Witham* decision of 1997. This struck down an Order imposing unaffordable fees for a litigant, since it impeded the right of access to the courts, without express power. He called this a ‘revealing example’ of ‘precisely the kind of policy decision which on any orthodox view of English public law is not for judges. It is an inescapably political question.’ The 2017 Supreme Court in the *Unison* case reached the same decision upon the same grounds as *Witham*, which was expressly approved. Sumption now describes the *Unison* decision as ‘perfectly orthodox’. This is beyond cavalier.

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Middle Temple Hall set the scene for Lord Sumption’s first Reith Lecture (RL1): ‘Law’s expanding empire’ in May 2019, followed by RL2: ‘In praise of politics’, RL3: ‘Human rights and wrongs’, RL4: ‘Rights and the ideal constitution’, RL5: ‘Shifting the foundations’. The lectures can be found on BBC Sounds/iPlayer.

In a thoughtful and balanced lecture to the Administrative Law Bar Association in 2014, Sumption cited six public law Supreme Court decisions, exemplifying judicial restraint with respect to the executive and the role of Parliament (‘Anxious Scrutiny’). For some reason, none of these are cited for public appreciation in the Reith Lectures.

GARD AND *EVANS*

Sumption regularly affects a studied ambivalence, including towards the tragic case of the fatally ill baby, *Charlie Gard* (‘RL1’). The Family Court, endorsed at three levels of appeal, decided that it was not in the baby’s best interests to be taken abroad for an untested experimental treatment as the parents wished. The case attracted the kind of simplistic headlines and online threats to hospital staff, which he abhors. Yet Sumption suggests that the answer should have been left within the broad range of decisions for responsible parents to make.

He characterises the court’s jurisdiction as a ‘nationalising’ of the parents’ decision by an ‘organ of the state’. He glosses the clear evidence that the baby was continuously suffering, and would be harmed by prolonged survival to no purpose. He suggests gratuitously, and by a casual misreading, that the doctors brought the proceedings to shelter themselves from legal liability. In fact they had a clear legal obligation to do so, and not unilaterally to overrule parental wishes.

Having clearly taken an emotive and critical position, he then steps back and abjures any criticism of the court’s decision. Knowing the risks of selective quotation and populist ignorance, about which the judge in the case was highly sensitive, this is a strange and irresponsible example for Sumption to have chosen and treated in this way.

The inherent jurisdiction of the courts over the welfare of children at common law dates back to feudal times, and has been on a parallel statutory basis since at least 1886. There has been no time in recent legal history when any parental prerogative over children was entirely ungoverned. Sumption stretches the term ‘reactionary’ to new dimensions. By these remarks, he has refuted his own 2016 lecture, questioning the need for specialisation in family law.

Sumption suggests that an ‘empire of the law’ has expanded to fill a void left by the ‘decline of politics’. This ‘empire’ represents a threat to democracy, and he concludes the series with a portentous warning about the imperceptible draining of democracy from our institutions.

These sentiments echo certain recent newspaper headlines, and are liable in our febrile times to be selectively cited by decidedly undemocratic forces within our society. They require the clearest justification.

References
Pergau Dam:'ex parte the World Development Movement' [1994] EWHC 1 (Admin); *LRB* Sedley Vol. 34, No. 4, 23.2.12; *ex parte Witham* [1998] QB 575; *Unison* [2017] UKSC 51; 2016 Sumption lecture: 'Family Law at a distance': 8.6.16; *Evans* [2015] UKSC 21; *Privacy International* [2019] UKSC 22; *Kennedy* [2014] UKSC 20; Lord Dyson lecture: Bentham Presidential address, 'Are the judges too powerful?', UCL Laws, 2014; Daly [2001] UKHL 26; Professor Loughlin quote: 'Lord Sumption and the Limits of the Law', Bloomsbury, 2016, p. 42-43.

In RL2, Sumption launches an astonishing attack upon the integrity of his former colleagues. He accuses them of allowing their 'personal opinions and values' to be 'often decisive' under a cloak of the 'principle of legality': and that this is a 'claim to political power'. He suggests that they defy public opinion on 'immigration and penal policy'. These sentiments echo certain recent newspaper headlines, and are liable in our febrile times to be selectively cited by decidedly undemocratic forces within our society. They require the clearest justification.

Sumption focuses upon *Evans v Attorney General*, the Prince of Wales correspondence case, to exemplify the judges' 'expansive view of the rule of law'. He suggests that the majority five Supreme Court Justices and three Court of Appeal judges 'dressed up' their decision, which was really based upon their disapproval of the legislation.

This was a finely balanced case upon a rare and very difficult issue: namely attempts by Parliament to curb the authority of the courts. Since at least 1669, the courts have been sensitive to such attempts. It is unworthy not to concede that the majority and dissenters approached their conclusions with equal rigour and integrity. Lord Sumption himself must have sat upon similarly difficult cases. He implicitly acquits himself of his own accusation, presumably on the basis that he is very specially endowed with rigorous objectivity. Unfortunately, the nature and vehemence of these lectures suggests otherwise. Shamefully, the BBC has refused requests for a lecture in reply.

The issue was rejoined in the *Privacy International* case, a more recent Supreme Court decision. By a 4-3 majority, with Sumption dissenting, a strong ouster clause was strictly interpreted, preserving an area of judicial review. Ouster clauses destroy the constitutional balance between the courts and the executive. They exemplify 'executive overreach' to which the courts react, rather than 'judicial overreach.'

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To leave the European Convention on Human Rights would be an 'act of epic historical selfishness', writes barrister Adam Wagner for *Prospect Magazine*. See: bit.ly/2Fo6KmV

THE EUROPEAN CONVENTION

Sumption indulges in hyperbole, typical of critics of the Convention, but difficult to forgive from his position. He suggests that it is 'today, the main source of human rights in Britain'. This ignores the Supreme Court in *Kennedy*, explaining the primary role of common-law rights: and those many important human rights cases decided entirely under the common law or, at most, in parallel with the Convention. He suggests that the Human Rights Act has 'opened up vast new areas to legal regulation'. There are in fact very few such entirely new areas.

Sumption attacks the 'living instrument' approach to the interpretation of the ECHR, as enabling the Strasbourg Court to declare 'additional rights… which are not in the Treaty', by way of 'non-consensual legislation'. He does not identify these entirely new rights or explain why they are not simply new applications of existing rights. He suggests: 'The result has been to devalue the whole notion of universal human rights.' Are we simply to assume that the collective framers of the Convention did not anticipate extensive and profound developments in post-war society and the need for flexible rights to accompany them?

By imposing a judicial duty to 'take into account' Strasbourg Court decisions, Parliament, through the Human Rights Act, clearly approved the long established 'living instrument' approach of that court, as Lord Dyson has explained. Sumption's best response is that Parliament can do undemocratic things, but fails to explain why this is undemocratic.

The flexibility and pragmatic development of the common law is a great merit. Nobody suggests that the 1991 House of Lords judgment abolishing the common law 'marital rape exemption' was 'judicial overreach'. Many ancient 'common law' rights have kept pace with the times. It would be anomalous and unworkable for those rights to be interpreted according to living, flexible and pragmatic criteria, whilst European Convention rights are tied to a rigid 'originalist' approach. This especially applies to those many rights which arise in a single case, in parallel from both sources.

Sumption attacks the courts' involvement in balancing conflicting interests in relation to qualified ECHR rights. These are 'all intensely political questions' artificially classified as questions of law. However, such balancing exercises have never been, and never will be, confined to Convention rights. They inevitably occupy our courts every day. If not the courts, who is to assess and apply the balance of rights and their limitations, to the infinite variety of human problems? The prisoner rights case of *Daly v SSHD* was based first upon 'an orthodox application of common law principles', taking account of the balance between prisoners' rights and the need to maintain discipline and security in prisons. If that 'balancing exercise' was not 'judicial overreach', then why does it become so when, a few paragraphs later, parallel Convention rights are considered?

POLITICS

What can explain Sumption's persistence and vehemence on 'judicial overreach'? Without any explanatory theory or principle, he presents himself as free of any 'agenda', and even of personal views. A serious legal thinker would have engaged with serious analysis such as Ronald Dworkin's *Law's Empire*: surely an irresistible target. Sumption only mentions one writer from the last 100 years: the American judge Learned Hand. A principled concern about undemocratic law making would have addressed Orders in Council evading Parliament, which, for example, 'cleansed' the Chagos Islands of its people: or the deluge of statutory instruments which enter our law with only the most cursory of scrutiny. Sumption does neither. Something else is going on here.

Sumption speaks 'In Praise of Politics' (RL2), but without identifying the politics. His title for RL3 is 'Human Rights and Wrongs'. *Human Rights and Political Wrongs* is the title of a recent publication by Policy Exchange, an influential, so-called 'centre-right' think-tank, and its Judicial Power Project (JPP): all secretively funded. This publication mirrors all of Sumption's positions. The JPP's basic premise is 'rising concern at judicial overreach'. This small coterie of academics seems to constitute the 'rising concern', with Roger Scruton perhaps as an acolyte. It has predictably welcomed Sumption's lectures. In a reflection of his tone, the Director has called for the dismissal of any judge who 'disobeys' a future statute in similar fashion to the *Privacy International* majority.

Restriction of the reach of the law and regulation has long been neo-liberal dogma for obvious ideological reasons, ever since F A Hayek's influential writings. He placed any involvement of the law with social justice as beyond the concept of the 'rule of law'. The 'free market' material interests of those with wealth and economic power pull against regulation and positive rights, as much as others need them. Sumption wrote most of a seminal work of 'neo-liberalism' with Keith Joseph. *Equality* was so extreme that its publication was delayed until after the 1979 general election for fear of embarrassment. The many gems include: 'It is more comforting to think that one is poor because one belongs to the class whose lot is to be poor.' The rich were to be the sole arbiters of their own perceived self-interest in 'political stability' and therefore of any re-distributive taxation… so much for democracy.

Sumption's views may well have matured somewhat since, but these lectures are fertilised with neo-liberal values. He reflects their basic confusion of the role of law, with state power: 'We cannot have more law without more state power to apply it… We have expanded the range of individual rights, while at the same time drastically curtailing the scope for individual choice.' He complains: 'Unlike our forbears, we are no longer willing to accept the wheel of fortune as an ordinary incident of human existence.' Sumption describes current anti-discrimination law as 'the opposite extreme' of former disciminatory law.

'Economic growth is the spontaneous creation of numberless individuals' is pure F A Hayek. The prosperity of 19th century Britain is ascribed to 'economic good fortune'. (The word 'empire' temporarily escapes Sumption.) He says: 'Politics is a market place.' He justifies a 'class of professional political intermediaries' and the 'elitist view' that they contribute 'a more reflective approach, a broader outlook and a lot more information than their electors': '… all political systems are aristocracies of knowledge'.

Sumption has never disavowed his propagation of this ruinous ideology, which has alienated swathes of society by gross inequality and undermined our democracy. He does himself and the public a disservice by avoiding discussion of his principles and 'normative assumptions'. His accusation that our judiciary has weakened democracy is politically motivated and absurd.

In 2016, Professor Martin Loughlin described Sumption's politics as the 'rhetoric of reaction… a distinctive English voice… of a privileged elite who finds intellectual stimulation in dwelling on the evident deficiencies in… modern constitutional democracies, without offering any serious analysis or any practical remedy.' By these lectures, Sumption has earned this encomium, but not the privilege of the Reith platform.

In our world of legal impunity in the City, of proliferating exploitation and poverty, of consumer deception, of environmental crisis and of basic legal norms under threat, can it really be the time and place for reduced accountability to the law? The legal arguments to this effect are shallow and without discernible principle. Only a deeply flawed ideology could suggest so. ●

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The Judicial Power Project has welcomed Sumption's lectures: **judicialpowerproject.org.uk/**

The debate continues: A hotly awaited session at the ALBA Summer Conference on 20 July 2019 was the 'Reith lecture (judicial power) response': delegates were treated to a panel debate including Lord Dyson, Sir Stephen Laws, Prof Vernon Bogdanor, Prof Meg Russell, Lord Falconer of Thoroton QC and chaired by Mrs Justice Thornton; followed by 'A Response to the Response': Lord Sumption in conversation with Lord Justice Singh.

About the author
Patrick O'Connor QC, of Doughty Street Chambers, has been a leading human rights practitioner for many years, specialising in criminal trials and appeals, public inquiries and inquests. He has written several well-regarded articles on criminal law, constitutional law, and neo-liberal ideology.