he 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.

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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.

In RL2, Sumption launches an astonishing attack upon the integrity of his former colleagues. He accuses them of allowing their ‘personal opinions’ to be ‘too 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 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-consensuality’. He does not, however, call attention to the law making which would explain why they are not simply new applications of existing rights. He suggests: ‘The result has been to devolve 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 accommodate 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 ‘understand such 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 if there is no room for those things to be interpreted according to living, flexible and pragmatic criteria, whilst European Convention rights are tied to a rigid ‘originalist’ approach. This especially_UNIX escalates as society and the nature and veneration of these lectures suggests otherwise. Shamefully, the BBC has refused requests for a lecture only.

The issue was rekindled in the Privacy International case, a more recent Supreme Court decision. By a 4-3 majority, with Sumption dissenting, a strong outer clause was strictly interpreted, preserving an area of judicial review. Outer clauses destroy the constitutional balance between the courts and the executive. They preclude ‘executive overreach’ in which the courts react, rather than ‘judicial overreach’.

The EUROPEAN CONVENTION

Sumption includes in hyperbole, a 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 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-consensuality’. He does not note that these express the law making which would have addressed Orders in Council evading Parliament, which, for example, ‘cleaned’ 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 secretive funding. This publication mirrors all of Sumption’s positions. The JPP’s basic premise is: ‘ruling court. It now faces a broader and a lot more issue than their electors’: ‘… all political systems are aristocracies of knowledge’.

Sumption has never disavowed his propagation of this irrationalistic view, which has alienated swathes of society by gross inequality and undermined our democracy. He does himself and our 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 distinctivestopped... of a privileged elite... who finds intellectual stimulation in dwelling on the evident deficiencies in... modern constitutional democracies, without offering any serious analysis or practical remedy’. By these lectures, Sumption has earned this epithet, but not the privilege of the Reith platform.

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