Is the law damaging our politics?

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Nick Spencer talks to Jonathan Sumption about his book
Trials of the State

Nick: In 1911 there was one solicitor in England for every 3,000 inhabitants. Now there is one for every 400; the proportion is even lower than the US. In the twelve months to May 2010, more than 700 new criminal offences were created in the UK. Areas like Foreign Policy or Overseas Military Operations that were traditionally considered to be largely beyond the purview of the Courts are now firmly in their sights. We live, in other words, in a legal age. We might consider this to be a good thing; after all, who on earth would prefer lawlessness to legality but maybe it's possible to have too much of a good thing. Perhaps the rising tide of law, signifies something more concerning.

Jonathan Sumption served as a Justice on the UK Supreme Court from 2012 to 2018; one of the very few people to have been elevated there directly from the Bar. The year after he stepped down, he delivered the BBC Reith lectures on law and the decline of politics, which explored and critiqued the rising tide of law and these were subsequently published as the book, 'Trials of the State'. Jonathan, welcome to Reading our Times.

I want to begin by talking about America, rather than the UK and I want to do that for two reasons, one is that I need to make clear that we are talking on the day before the US elections and listeners will be listening to us afterwards, so our audience may need to excuse us for not knowing as much as they do, but the second reason is that the election of Donald Trump first time round, was inextricably linked to the politics of the Supreme Court there. Now we have a Supreme Court here in the UK but it is rather less politicised, so can you start by giving us some clarity over the different role that the law and the Supreme Court play in the UK and the US?

Jonathan: The Supreme Courts in this country, in the United Kingdom is not a Constitutional Court alone, it is a Court, which is concerned with the whole range of legal problems at the highest level. In theory that is also true of the Supreme Court of the United States, but in practice the Supreme Court of the United States has been almost exclusively a Constitutional Court for quite a number of years now. That inevitably means that its profile in constitutional issues in the United States is higher than the Supreme Court's profile in such issues here. The constitutional profile of the Supreme Court in Britain has been raised by the fact, which is not

necessarily going to continue, that a large number of particularly difficult constitutional issues have arisen in the last few years; some of them arising from the Human Rights Act but some of them, those acrimonious of them, arising from Brexit. They were legal issues. We have a Constitution, which is largely based on Common Law rules and it's therefore not possible to exclude the Courts from detailing one what those rules are. I don't think this will necessarily be typical of the way things pan out in the next few years but it's the reason why comparisons with the US Supreme Court have been made in the past few years. Of course, the major difference is that we do not have any principal, now that we've left the EU, which entitles the Courts to disallow or abrogate Statutes, whereas the Supreme Court does have that power in the United States.

Nick: I think there's a profound irony in the idea that a Constitution and a Supreme Court such as exists in the US, is supposed to de-politicise a great deal of debate by taking it out of the political sphere but it seems, at least from this side of the Atlantic, to have exactly the opposite effect and to breed a particularly aggressive and divisive political culture; is that fair?

Jonathan: Well, it is, although of course, the picture is a bit more complicated. The essential problem is that there are certain issues, which, you know, democracy, that many people feel and I'm one of them, ought in principal to be decided by democratic processes. They include, in particular, major moral and social issues such as same sex marriages, abortion and a variety of other issues, which have galvanised the political scene in the United States over the last few years. Now it seems to me that the nature of these issues means that you can't de-politicise them; people legitimately differ in their views about these issues and the only way that you can resolve them is to arrive at a decision to which those people are party. I think the people have to own, even if it's only by a majority, decisions on these major moral questions. The Supreme Court has taken some of these issues over and the result of this has been, I think entirely predictably, that US elections have increasingly become competitions for the right to appoint Justices to the Supreme Court who represent a political point of view. This I think is the direct result of the involvement of the Supreme Court in issues which I regard as inherently political

Nick: This has become a bigger issue in the UK recently, hasn't it, and we'll come on to talk about that but I'm curious to know whether this politicisation of the US Supreme Court is a relatively recent phenomenon or whether you can track it back for decades or even centuries in US history

Jonathan: Well, you can track it back a long time but in a rather different form. The Supreme Court was, until the 1950s, an extremely Conservative institution. It was not a party political institution, but its Judges were social conservatives in a non-political sense; so, for example, they

were opposed to the regulation of employment on the grounds that it interfered with Freedom of Contract, which was a fairly common place Conservative position among people, whatever their party allegiance for many years.

In the 1890s they began to strike down all Labour regulation Statutes. In the 1930s they were hostile to the big New Deal projects put forward by President Roosevelt. Again the reason for that was not that they were Republicans, whereas Roosevelt was a Democrat; the reason was that they had a basically Conservative frame of mind, which found the intervention of the State in the economic sphere, surprising, novel and objectionable, so you can describe that as a political position and in a sense it is but it isn't a political position in anything in like the same sense that we have here.

In the 1950s the Supreme Court was absolutely in the forefront of the campaign to desegregate schools, and to advance the cause of Civil Rights. This was profoundly distressing to Conservatives, particularly as the ringleaders of the Supreme Court were people who had been appointed because they were thought to be Conservatives and they went native as the accusation said, but you know, most people certainly myself included, would regard those as very admirable, aspects of the work of the Supreme Court. But I think that on any objective view, it would have been much better if they had been achieved legislatively than judicially and this brings in another feature of the United States, which is very different from our own system, which is the extreme immobility of the legislative process in the United States. Because of filibusters, because of the complexities of the procedural rules in both Houses of Congress, it is extremely difficult to achieve significant change legislatively in the Federal Legislature of the United States. There is an automatic block, which is very difficult to remove, even on a non-Constitutional issue and there's a virtually total block on a Constitutional issue. So what we have is a Legislature incapable of reform initiatives of any significance, and that is one reason why the Judiciary has taken over some of the functions of the Legislature. It's a reason which I have some sympathy with; on the other hand, it is very difficult to defend intellectually, and one would much prefer that the need for it had not arisen.

Nick: Hmm; the point about Judges reflecting certain, ideological commitments of the time applies in the UK as well, doesn't it; you make the point in the book that before the Second World War, Judges in the UK were often regarded as allies of predatory capitalism and hostile to organised and public social care provision. That invites the question why is it that Judges seem to track ideological public opinion, if the law is supposed to be above the cut and thrust of these ideological differences, why is it that you see such a significant shift in Judicial attitudes and commitments, say before and after the Second World War?

Jonathan: Well, I don't think that the Judges before the First, the Second World War would have been happy to be described as allies of Predatory Capitalism but they had a small 'c' conservative frame of mind. The biggest problem in that period was not in fact social provision,

although there was a problem with that, it was the status of Trades Unions. Before the First World War, that had been a hotly contested issue with the Courts because traditional definitions of the Law of Conspiracy meant that associations of people, to defeat the commercial interests of someone else e.g. an employer, fell within traditional definitions that had actually been devised to deal with other sort of problems, like conspiracies to ferment riots or to oppress Juries and so on. But the legal elements fitted and in a world where Trades Unions were regarded as essentially socially disruptive, you didn't have to be very partisan politically in order to feel that this was objectionable. But the important point about this is that it didn't undermine the basic flexibility of English Law because ultimately the Statute intervenes to confer a status on Trades Unions and diminutives from the laws of Conspiracy and the problem was resolved that way.

That couldn't have happened in the United States for two reasons. First of all, it couldn't have happened because the Legislative immobility, procedural immobility in Congress and secondly, it couldn't have happened because once you classify something as a Constitutional issue, the only way in which you can change the law is by a majority of three quarters of the States, and all the impediments in the way of Constitutional change that exists in almost any written Constitution. And that is one of the big problems of the US Constitution, its immobility adds to the immobility of the Legislative process.

To give you an example, not long ago the Supreme Court decided in Citizens United, the Supreme Court of the United States, that there could be no limits on the amounts that Corporations could spend on political campaigning; that they had the same rights as private individuals to promote their views by large scale expenditure. Now, I think pretty well every other civilised democracy in the world would regard that as deplorable. The major problem about that decision is that because it was a decision about the interpretation of the Constitution, it is written in stone, that is going to be the position, whatever Congress says forever and a day, unless you can get a majority of the States, super majority of the States behind you, so the whole legal framework of the US Constitution is designed to prevent change and the only dynamic element to it is the Supreme Court. Now that has resulted in the politicisation of the Court. Whatever you think of decisions like Roe and Wade and Brown and the Board of Education and so on, you can't, I think, possibly defend this as a sensible way of making law. In Europe, pretty well every State bar Malta and now Poland, has a Statutory right to abortion on a regulated basis. It's an uncontroversial issue except in the extreme fringes in Europe. It's highly controversial in the United States because it was a decision which was made judicially, i.e. on a basis which excluded the American people from having a say.

Nick: While we're still on the US, before we come to the UK, a lot of people voted for Trump back in 2016 because he had the opportunity to appoint three Supreme Court Justices; he did

Jonathan: Well they didn't know that he would have that opportunity but they thought that whatever opportunities he was presented with, he would use to appoint Conservative Justices.

We have today a very unbalanced Supreme Court and its membership is wholly dominated by Conservative Catholics.

Nick: And what difference do you think that'll make?

Jonathan: Well, that depends on how respectful they are of precedence, I think that there will undoubtedly be issues, moral issues that will come forward, which will be decided differently in the current makeup of the Supreme Court than it would have been five years' ago. For example, the decision on same sex marriages was a decision which would probably have been differently decided, before a differently constituted Court. I have very great difficulty in regarding something which is so heavily dependent on the personality of individual Justices as really being law at all but the problem about this, is that if you take an issue like same sex marriages or abortion, it isn't easy to point to legal criteria, on which they can be decided. You inevitably, find yourself asking, what is your own opinion on this. Those who say, I am one of them, the job of the Courts is to ascertain what the law is, and the job of the Legislature is to change the law, if you say that, then it seems to me that you are, the Courts are exercising their classic role of the exiguous of existing legal sources. On the other hand, if you asked them to decide what the law ought to be, which is essentially the issue of these profoundly significant moral cases, it is very difficult to see by reference to what considerations other than their personal opinion they can decide it.

Nick: So on that basis, if, as many Conservatives hope and dream, there was an opportunity with the Supreme Court to review Roe vs. Wade, you would be inclined to return to the status quo ante, where it was no longer simply a Supreme Court issue but it was decided on a State by State basis beforehand, wasn't it?

Jonathan: Yes

Nick: Is, is that an appropriate direction of travel?

Jonathan: Well Roe and Wade is not just, of course, a decision about abortion, it's also a decision about the distribution of powers between the State and Federal Legislatures. Abortion was permitted, often on a regulated basis in a significant number of States, before Roe and Wade so that it isn't quite true to say that Roe and Wade created a Right of Abortion, which otherwise

didn't exist. What it said was that the States were bound to accept the Right to Abortion, whereas previously they had been at liberty to make their own decisions on that point.

Nick: Let's turn to the UK because you point out that this has quite a long history in American political and legal culture but the situation in the UK has changed quite radically, hasn't it, in the last 25 years or so, with the passing of the Human Rights Act in 1998 and also I want to draw in a very important theme that is mentioned in the book; that of Dynamic Treaties or Living Instruments I think the phrase is, isn't it? Can you explain to us, what's happened with regards to British Law in the last 25 years and why this has become so much more of an issue here than it was?

Jonathan: A Dynamic Treaty is a Treaty that which not only says what the law ought to be, but provides a mechanism for its amendment, which is independent of the Constitutional procedures of the United Kingdom. The two classic examples of Dynamic Treaties are the Treaties constituting the European Union, which we've now left, and the Human Rights Convention

The Human Rights Convention was not originally intended to be a Dynamic Treaty, but it has been transformed into one by the Court of Human Rights at Strasbourg, which has adopted a doctrine, empowering it to extrapolate from the provisions of the Convention by a process of, partly extrapolation, partly analogy to devise many additional rules, essentially on the basis that a society, which adopts the rules contained in the Convention ought to want to have these other rules. I personally regard this as a wholly illegitimate method of law making. It seems to me that it is for the States Constitute who signed up to the Treaty to amend it in such respects as they think necessary. This result has been, however, that the European Court of Human Rights has assumed a jurisdiction to regulate a prodigiously wide range of social and moral issues of a kind, which for exactly the reasons I gave earlier, ought to be decided democratically.

European Legislatures are not frozen like the United States Legislature, it is possible to deal with this legislatively and the objection to dealing with it legislatively, which comes from advocates, the supporters of the Human Rights Convention, the objection that they put forward is essentially a very different one. They don't say Legislatures are frozen, they say the Legislatures and the electors behind them, will not accept the agenda that we have and because it is, they say, a transparently right and just agenda, we've got to find some other way of bringing it into effect. Now, that seems to me to be totally inconsistent with any kind of democratic State, and what they have essentially done, is to say that, well democracy doesn't actually mean the Rule of the Majority; what it really means is a set of values, which are characteristic of a democracy. The problem is, people disagree about what values are characteristic of a democracy and in a democracy, the way that we resolve these disagreements is through the electoral and Legislative process, that there isn't a single set of values, which is transparently right and has to be imposed; there are a variety of values about which people differ and we have to have a mechanism for reconciling that difference in a way that Judicial decision making manifestly fails to do.

Nick: So, why do you think they've arrived at the view that there are these issues, these considerable number of issues that are transparently right and just, if it seems self-evident that we live in a plural society, in which different views clash and without obvious easy resolution, why do they think that there are so many transparently right and just issues that don't need that form of democratic deliberation and compromise?

Jonathan: I don't know the answer to, that question, but those who believe that they are transparently right, and I should make it perfectly clear that in my opinion, many of the things that the Strasbourg Court has decided are transparently right, I just don't regard that as a good enough reason for imposing it on the Constituent States of the Counsel of Europe. I simply think that there have always been people who have taken the view, the same view as the Strasbourg Court on these moral issues. All that has changed is that they have been given a weapon for imposing their view on their fellow citizens

Nick: Article 8 plays a particularly important role in this and you spend a bit of time in the book, outlining the way that its intention to, I think it's protect private and family life, and privacy of the home has enabled, facilitated a certain degree of Mission Creep, I think is the phrase you used. And has been used to legislate on a hugely wide range of issues, hasn't it? How has that come about and what affect has that had?

Jonathan: Well the way that it's come about, is that the right of privacy has been reinterpreted, as a right of emotional and developmental autonomy, as a right to a personal fulfilment, and obviously any law is going to curtail some of the things that people might want to do in the absence of such a law, so you have to decide, what things are legitimate and what are not, but what they've done is to, to develop the right of privacy so as to make it into a much more general right of personal fulfilment and autonomy and this is actually exactly the same process, as has occurred in the United States. Roe and Wade, was a development of the right of privacy, which had been accepted about ten years' earlier in the United States in a perfectly ridiculous case, about a Connecticut Statute preventing contraception and the Justices differed in their reasons. They all agreed and rightly that this was an absurd Statute to have; the question was whether Connecticut was entitled to have an absurd Statute, and they devised right of privacy. So the development, which has led to this situation in Strasbourg is really very similar to that which had occurred some years' earlier in the United States.

Nick: Brexit is held a little bit in the background of our conversation. I've got a joint question, a double question for you here, which is to what extent firstly do you think this perceived over-

reach of the European Court was a contributing factor to Brexit and secondly, what impact do you think Brexit will have on British Law?

Jonathan: Well, those are both rather large questions

Nick: Yes, sorry!

Jonathan: I don't think that the over-reach of the Strasbourg Court had any impact on the Referendum Campaign, or on the views of those on either side of the debate in that Campaign. The Strasbourg Court is nothing to do with the European Union. I agree that some people thought that it was but essentially the two issues are completely distinct. We have left the European Union, we have not left the Counsel of Europe. As to the question, what impact Brexit will have on the development of British Law, it's very difficult to predict. The current situation is that in almost all respects, the law remains unchanged as it was on the eve of our departure unless and until it is changed by Parliament or conceivably by the Courts. The direction of that change is difficult to predict, but I suspect that there will be significant statutory departures, from EU Law not least because having put ourselves at a disadvantage, tariff wise, by leaving the EU, we will have to find other ways of competing with EU markets, which give us an advantage and one of the obvious ways of doing that are by reducing regulatory burdens and reducing fiscal burdens. Those may both involve, particularly the reduction of regulatory burdens, departures from EU Laws but the exact form which they will take is extraordinarily difficult to predict at the moment.

Nick: Yeah; we've had quite a dense legal and political conversation and as we draw it to a close, I want to pull the camera back a little bit and look at how what we've been talking about, reflects or shapes a broader cultural landscape. You write at one point, in the book, that much of this is borne from a continual quest for greater security and reduced risk. Can you unpack what you mean by that, and where you think that's come from?

Jonathan: I think that the arrival of a broadly based democracy in most Western European countries has been accompanied by greater demands of the State, and that I think is a natural human instinct. The public has an exaggerated idea of what the State can achieve, that clearly the State can achieve quite a lot, it can regulate in ways that do increase security for example in the workplace, and it can create uses of care of all manner of kinds, I'm certainly not suggesting there's anything wrong with that, it is a natural instinct to want protection against risk. The

problems arise when you enter into an area and where the cost of protection against risk is a serious loss of liberty, and there you have a very difficult, balancing exercise to perform.

Nick: You illustrate that in the book, don't you, by the example of speed on our roads and how we could minimise road accidents, but it would come at a certain cost.

Jonathan: Yes, I mean, a century and a half ago, there was an Act called the Locomotive Act, which said that, that no mechanically propelled vehicles, could proceed in towns at a speed greater than two miles an hour. Well now that was a very effective way of avoiding road accidents and it would be today, if we were to re-enact it. But we don't because although we don't like admitting it, the truth is that we regard the death of some hundreds of people every year on the roads as a price which we are prepared to pay for the convenience of getting around in greater speed and comfort. Life and Legislative life in particular are full of dilemmas like that. You cannot simply say there are absolute values and we will not trespass an inch beyond that. There are very few absolute values in the rest of a whole range of issues, there are really only plusses and minuses

Nick: Hmm; so there is this balance between security and risk. Also I think there's a question about confusing legal issues and moral issues; we're talking also in this series to Nigel Biggar, whose written a book about 'What's wrong with rights', which I know you know, because you commend it and one of the arguments he makes in the book in our discussion is there is a growing confusion of morality and legality and a desire for people to use the law to implement and cement what are good things rather than necessarily legal things. Do you agree with that and, and again, where does that come from?

Jonathan: Well, I don't think you can divorce law from reality, because there needs to be a moral basis of many laws, not all laws, there are some laws that are purely regulatory - there is no moral issue about whether you drive on the right or the left hand side of the road, you just have to have a rule of some sort for obvious reasons. But many other laws are essentially normative laws, they are based on a moral or political principal. So I don't think you can divorce these things entirely but what is entirely true and I think this is the main point that Nigel Biggar was making, is that there has been a growing tendency among people who have strong feelings on the moral issue about which people are divided - assisted dying is quite a good example - to say well, that I wish to use a law as a method of imposing my own moral take on this because I cannot be sure of getting it through a democratic process, that is a different and much more troubling issue.

Nick: Let me close with a quote, or rather close by asking you just to reflect on it; when reading the book and I was reminded of some lines from TS Elliot, from his Choruses on the Rock, which at one point he writes, people constantly try to escape from the darkness outside and within by dreaming of systems so perfect that no one will need to be good. I wonder whether you agreed with Elliot about that; whether we’re trying to dream up systems so perfect that ultimately no one needs to be good or, is that perhaps Elliot being a little bit morose

Jonathan: Well, you can’t, you can’t take that over literally, no system ever dispenses with the need for particular ways of human behaviour but the sentiment, that humanity is perfectible by law, was the point that Elliot was objecting to and he was right.

Nick: The book is called ‘Trials of the State, Law and the Decline of Politics’; Jonathan, thank you very much indeed for talking to ‘Reading our Times’.

Jonathan: Pleasure.