TRIALS OF THE STATE

Law and the Decline of Politics

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Preface

This book is based on the five BBC Reith Lectures broadcast on Radio 4 in May and June 2019. It substantially reproduces the text of the lectures, with additions and modifications provoked by the discussions which followed, and some expansion of points that could not be accommodated within the half-hour broadcasting slots.

The subtitle, *Law and the Decline of Politics*, fairly describes the contents. The law is the tool by which the state imposes its will. A lawyer's job is to say what the law is. But I am interested in a different and more fundamental question, which lawyers rarely ask themselves. Once we have found out what the law is, what makes it legitimate? Democratic institutions once lent legitimacy to laws, even in the eyes of those who disagreed with them. But for a number of years, public confidence in them has been draining away. The alternatives are some form of autocracy

and a regime of judge-made law. *Trials of the State* presents thoughts which have developed in my mind over a number of years, but which the BBC series prompted me to present in a rather more disciplined form.

We are all prisoners of our own experience. I have passed most of my life in the study and teaching of history and in the work of the English courts. Lawyers live on the margins of politics, whether they like it or not. My own lifetime has witnessed radical changes in Britain's internal life and its place in the world, which have had a transformative impact on British politics. These are not claims to universal expertise. But they are not a bad starting-point. After all, none of the questions that I have posed is new. The competing claims of law, ideology and politics to legitimacy have been explored by academic lawyers and political scientists for many years. Britain's collective experience of these issues goes back a long way. Our institutions and our legal and parliamentary cultures have the longest continuous history in the world. Yet recent events have tested them. The debates on Britain's relations with the European Union have brought to a head many constitutional issues that were latent for years before the referendum of 2016.

I am grateful to Gwyneth Williams, until recently Controller of BBC Radio 4, who invited

me to deliver the 2019 Reith Lectures, and to the dedicated and professional team at the BBC, in particular presenter Anita Anand, producer Jim Frank and editor Hugh Levinson. Friends and colleagues with whom I have discussed these questions have contributed more than they can ever realise to the result, although they will not necessarily agree with my views. Some of them were kind enough to criticise early drafts of the lectures, an essential process from which I have gained a great deal. My biggest debt, however, is as always to my wife, Teresa, who has lived with these lectures for almost as long as I have, and saved me from countless obscurities and solecisms.

Jonathan Sumption
June 2019

I

LAW'S EXPANDING EMPIRE

In the beginning, there was chaos and brute force, a world without law. In the mythology of ancient Athens, Agamemnon sacrificed his daughter so that the gods would allow his fleet to sail against Troy. His wife murdered him to avenge the deed, and she in turn was murdered by her son. Athena, the goddess of wisdom, put an end to the cycle of violence by creating a court to impose a solution, in what today we would call the public interest: a solution based on reason, on the experience of human frailty and on fear of the alternative. In the final part of Aeschylus' great trilogy the *Oresteia*, the goddess justifies her intervention in the world of mortals in these words: 'Let no man live uncurbed by law, nor curbed by tyranny.' That was written in the fifth century BC. But the message is timeless and universal. Law is not just an instrument of corrective or distributive justice. It is an expression of collective values and an alternative to capricious violence and despotism.

It is a vice of lawyers that they think and talk about law as if it was a self-contained subject, something to be examined like a laboratory specimen in a test-tube. But law does not occupy a world of its own.

It is part of a larger system of public decision-making. The rest is politics: the politics of ministers and legislators, of political parties, of media and pressure groups and of the wider electorate. My subject is the place of law in public life. The twin themes which I want to explore are the decline of politics and the rise of law to fill the void. What ought to be the role of law in a representative democracy like ours? Is there too much law? Is there, perhaps, too little? Do judges have too much power? What do we mean by the rule of law, the phrase which so readily trips off the tongues of lawyers? Is it, as cynics have suggested, really no more than a euphemism for the rule of lawyers?

The expanding empire of law is one of the most significant phenomena of our time. Until the nineteenth century, most human social interactions were governed by custom and convention. The law dealt with a very narrow range of human problems. It regulated title to property. It enforced contracts. It protected people's lives, their persons, their liberty and their property against arbitrary injury. But that was about all. Today, law penetrates every corner of human life. The standard modern edition of the English statutes fills 50 stout volumes, with more than 30 volumes of supplements. In addition, there are currently about 21,000 regulations made by ministers under statutory powers and nearly 12,000

regulations made by the European Union. In a single year, ending in May 2010, more than 700 new criminal offences were created, three-quarters of them by government regulation. That was admittedly a bumper year, but the rate of increase continues to be high.

On top of that, there is the relentless output of judgements of the courts, many of them on subjects that were hardly touched by law a century ago. The powers of the family courts now extend to every aspect of the well-being of children, which once belonged to the enclosed domain of the home. Complex codes of law, enforced by specialised tribunals, regulate the world of employment. An elaborate system of administrative law, largely developed by judges since the 1960s, governs most aspects of the relations between government and the citizen. The special areas which were once thought to be outside the purview of the courts, such as foreign policy, the conduct of overseas military operations and the other prerogative powers of the state, have one by one yielded to the power of judges. Above all, since 2000 a code of legally enforceable human rights has opened up vast new areas to judicial regulation. The impact of these changes can be measured by the growth of the legal profession. In 1911 there was one solicitor in England for every 3,000 inhabitants. Just over a century later, there is about one for every 400, a sevenfold increase.

The rule of law is one of those clichés of modern life which tends to be invoked, even by lawyers, without much reflection on what it actually means. The essence of it can be summed up in three points. First, public authorities have no power to coerce us, other than what the law gives them. Second, people must have a minimum of basic legal rights. One can argue about what those rights should be. But they must at least include protection from physical violence and from arbitrary interference with life, liberty and property. Without these, social existence is no more than an exercise of raw power. Third, there must be access to independent judges to vindicate these rights, administer the criminal law and enforce the limits of state power. At least as important as these, however, is a clear understanding of what the rule of law does not mean. It does not mean that every human problem and every moral dilemma calls for a legal solution. So why has this vast expansion of the domain of law happened?

The fundamental reason is the arrival of a broadly based democracy between the 1860s and the 1920s. Mass involvement in public affairs has inevitably led to rising demands on the state: as the provider of amenities, as a guarantor of minimum standards of security and as a regulator of economic activity. Optimism about what collective action can achieve is natural to social animals. In Britain, this

feeling was intensified by the experience of two world wars in which the state mobilised resources on an unprecedented scale towards a single objective. The impressive results enhanced its prestige and suggested that the same effort might successfully be applied to the arts of peace. Confidence in the benign power of collective action to improve the lot of humanity was the biggest single factor in the landslide election of a Labour government in 1945. Law is the prime instrument of collective action. Rising expectations of what it can achieve lead naturally to calls for legal solutions.

In some areas, this is dictated by the very nature of the problem. Consider, for example, the unwelcome side-effects of technological and economic change, which economists call 'externalities': industrial sickness and injury, pollution, monopoly and climate change, to name only some of the more obvious ones. Economic growth is the spontaneous creation of numberless individuals. But spontaneous action cannot address the unwanted collective costs that go with it. Only the state can do that. So we have laws against cartels, pollution and so on. However, there are other areas where the intervention of law is not forced on us. It is a collective choice, which reflects pervasive changes in our outlook. I want to draw attention to two of these changes, which have contributed a great deal to the expansion of law's

empire. One is a growing moral and social absolutism which looks to law to produce social and moral conformity. The other is the continual quest for greater security and reduced risk.

Let us look first at law as a means of imposing conformity. This was once regarded as one of its prime functions. The law regulated religious worship until the eighteenth century. It discriminated between different religious denominations until the nineteenth. It regulated private and consensual sexual relations until quite recently. Homosexual acts were criminal until 1967. Today the law has almost entirely withdrawn from these areas. Indeed, it has moved to the opposite extreme and banned the discrimination that was once compulsory. Yet in other respects we have moved back to the older idea that law exists to impose conformity. We live in a censorious age – more so, perhaps, than at any time since the evangelical movement transformed the moral sensibilities of the Victorians. Liberal voices in Victorian Britain, such as John Stuart Mill, were the first to protest against the implications for personal liberty. Law, he argued, exists to protect us from harm, not to recruit us to moral conformity. Yet today a hectoring press can discharge an avalanche of public scorn and abuse on anyone who steps out of line. Social media encourage a resort to easy answers, and generate a powerful herd instinct which suppresses not

just dissent but doubt and nuance as well. Public and even private solecisms can destroy a person's livelihood. Advertisers pressurise editors not to publish controversial pieces, and editors are sacked for persisting. Student organisations can prevent unorthodox speakers from being heard. It has even been suggested that the mere presentation of opinions to young people which are fundamentally opposed to their own is a threat to their emotional security from which they are entitled to be protected. These things have made the pressure to conform more intense than it ever was in Mill's day. It is the same mentality which looks to law to regulate areas of life that once belonged exclusively to the domain of personal judgement. We are a lot less ready than we were to respect the autonomy of an individual's choices. We tend to regard social and moral values as belonging to the community as a whole, as matters for collective and not personal decision.

In 2017, the courts and the press were much exercised by the case of Charlie Gard, a baby who had been born with a rare and fatal genetic disease. The medical advice was that there was no appreciable chance of improvement. The hospital where he was being treated applied to the High Court for permission to withdraw treatment and allow him to die. The child's parents rejected the medical advice. They wanted to take him out of the hands of the NHS

and move him to the United States so that he could receive an untested experimental treatment there. The American specialist thought that the chances of improvement were small, but better than zero. The parents wanted to take the chance. Unusually, they had raised the money by crowdfunding, and were able to pay the cost without resorting to public funds. The case raised a difficult combination of moral judgement and pragmatic welfare. The courts authorised the hospital to withdraw therapeutic treatment, and the child died.*

There are two striking features of this story. The first is that, although the decision whether to continue treatment was a matter of clinical judgement, the clinicians involved were unwilling to make that judgement on their own, as I suspect they would have done a generation before. They wanted the endorsement of a judge. This was not because judges were thought to have any special clinical or moral qualifications that the doctors lacked. It was because judges have a power of absolution. By passing the matter to the courts the doctors sheltered themselves from legal liability. That is an understandable instinct. Doctors do not want to run the risk of being sued or prosecuted, however confident they are of their

* *Great Ormond Street Hospital for Children NHS Foundation Trust v. Yates* [2017] 4 WLUK 260; [2018] 4 WLR 5.