LAW IN A TIME OF CRISIS

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FOREWORD

These essays are based on lectures which I have given over the past decade, before, during and since my time as a Justice of the Supreme Court. They are all loosely concerned with law and public affairs in the broadest sense of those terms. I have updated them so that they speak as of 2020. In a few cases I have also added observations which I would not have felt able to make while I was a serving judge. All of them were written as occasional pieces, but they deal with questions which I hope have a significance extending well beyond the occasions which provoked them.

I have practised law, as an advocate and then a judge, for more than forty years. Lawyers participate in a process governed by formal rules designed to produce objective decision-making. But the process is not mechanical. It is intensely personal. There is a difference between an open mind and an empty mind. Very few judges approach questions of principle with a blank sheet of paper and work things out from first principles, as some philosophers claim to do. They usually start with hypotheses based on their own instincts, observations and experience, and test them until they find an answer which is more satisfactory (or less unsatisfactory) than any other. Their starting instincts and their personal observations and experience inevitably involve a bias towards certain kinds of solution. There are black-letter lawyers and lawyers who bring a greater measure of inventiveness to their task. There are activist lawyers and those who believe that the law should impose as little as possible on human affairs. There

are instinctive believers in legal solutions and instinctive sceptics. The intensely deliberative nature of judicial decision-making, at any rate at the appellate level, usually irons out the grosser personal idiosyncracies. However, most of the problems with which lawyers have to deal are not about law at all. They are about fact and evidence. Lawyers are formed by experience to analyse complex factual issues in which they have no pre-existing expertise, often concerned with arcane scientific, economic or statistical concepts. It is a valuable discipline.

In spite of being a lawyer, I have never shaken off my origins as a professional historian, and never really wanted to. One result is that, as those who followed my 2019 Reith Lectures will know, I am sceptical about some things that other lawyers tend to take for granted. I am sceptical about the contribution that law has made to our public life, which many constitutional and administrative lawyers would regard as one of the law's crowning modern achievements. Law can resolve differences that would otherwise be resolved by violence, but I am sceptical of its ability to improve the lot of our society, let alone that of mankind at large. I doubt the value of multiplying rights, which often serve only to magnify and perpetuate grievances. I believe that litigation is an evil, a symptom of the breakdown of social norms. It is a necessary evil but an evil even so. Above all, I do not share the contempt that so many lawyers feel for the political process.

The strengths of the legal method at its best are objectivity, consistency, transparency and intellectual honesty. But in public affairs, these are not always virtues. Public life is too messy and human beings too idiosyncratic for that. Politics are not an unremitting search for truth. Their prime purpose is to enable people with conflicting opinions and interests to live together in peace. This necessarily entails

untidy compromises and a measure of opacity and fudge. Sometimes we have to make space for the irrational because it has become too powerful an influence on our fellow citizens. Many of the conflicts with which politics are concerned cannot be analysed in purely rational terms. In some cases, instinct is not just the starting point for a process by which alternative hypotheses are tested. It is the guiding principle throughout. This has been a notable feature of the political scene in the past decade. Fear and insecurity, not reason or logic, dominated the arguments about Covid-19. Questions of identity have emerged as decisive in debates about immigration, Brexit and many other issues. This seems likely to be a lasting change, after many years in which such questions were swept aside. Perhaps the most fundamental question that we can ask about ourselves is Who are we? Is it a sufficient answer to say that we are human, or do we need some smaller category by which to identify ourselves? What is it to be English as opposed to Scottish, French or European? Are we in any meaningful sense the same people as those who once persecuted heretics or witches, or bought and sold slaves, or bombed Dresden? All of these are questions of identity. It pays to understand our past, because we are all in one way or another its prisoners. Those who study the past have many advantages – a vast fund of vicarious experience to broaden their outlook on human affairs and a ringside seat at the follies and delusions of mankind.

Inevitably, many of these essays touch on politically controversial issues. It is many years since I had any political allegiance. I have watched governments of different political complexions come and go with equal indifference. But no one should be indifferent to what happens in their society, and certainly I am not indifferent to what has been happening in mine over the past few years. Should an ex-judge be speaking about them at all? Judges have opinions like

everyone else. As active, intelligent and observant citizens, how could they not? The convention, of which I wholeheartedly approve, is that serving judges do not allow their political opinions to be known. There are two principles at work here. First, judges should not make judicial decisions which properly belong to the world of politics. Second, they should not identify themselves with politically controversial positions that may undermine the perceived objectivity of their judicial decisions. It is their duty not just to put aside their personal political preferences when deciding cases, but to be seen to put them aside. None of these considerations is relevant to a former judge who is no longer making judicial decisions. I accept that one reason why people listen to me is that I was once a Supreme Court Judge, but that is not because they imagine that I am speaking judicially. I am now simply a citizen.

Jonathan Sumption
Greenwich, October 2020

HISTORY IN THE MODERN WORLD

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THE HISTORIAN AS JUDGE

Forty years ago, I left my history fellowship at Magdalen College, Oxford, in order to become a barrister. I would like to be able to say that I was moved to do this by a thirst for justice in an imperfect world and a conviction that this was the best way that I could help my fellow citizens. Actually, my reasons were rather vulgar. I wanted to be able to pay my grocery bills, with perhaps a bit more left over than an academic salary could offer. Since then, I have thought of better reasons. But retrospective rationalisation should never be trusted, as I quickly discovered in my new profession.

I have never had any occasion to regret the decision. The law has paid my grocery bills. It has also left me with enough control over my own life to be able to continue my interest in historical scholarship. One of the shameful things about the current Research Assessment Framework for universities is that it makes it difficult for a professional academic to write a work of real substance. The emphasis on quantity rather than quality means that in order to sustain the finances of his or her department, an academic must have a regular output of published work. This means that the time available for research and writing tends to be consumed by the production of annual articles for peer-reviewed periodicals, which boost the department's research score without necessarily adding much to the sum of human understanding. A distinguished academic historian pointed out, in a review of my

most recent volume on the Hundred Years War, that it was only by leaving the pressures of academic life for the presumably less pressured environment of the law that I had been able to write a work of historical scholarship on that scale. This idea provoked some hilarity among my friends. But actually the reviewer was not far from the truth.

Intellectually, the change from academic history to law was less of a jolt than I had expected. The study of the common law is an intensely historical process. Like any system of customary law dependent mainly on precedent, it is based on judicial decisions about the legal implications of a large number of tiny human stories. One could, of course, view these stories in the abstract, as if they were intellectual exercises written for a moot or a professional examination. But that would deprive them of much of their interest as well as of their poetry and their humanity. They are legal cautionary tales. But they are also accidental fragments of English history. As sources of law, they are completely different from the written codes that provide the basis of judicial decision-making in civil law countries. The French civil code originated in a deliberate attempt by Napoleon's jurists to efface the social values of the pre-revolutionary past. The result was, and is, a document that achieves an almost total degree of intellectual abstraction. It could be the law of almost any country on earth. Indeed, it is the law of quite a lot of countries on earth, having been adopted with minor variants in many places that have few cultural or historic connections with France. By comparison, the sources of English law could not have originated anywhere but England. They reflect the intense humanity of English law, something that makes its study both fascinating and enjoyable.

During my time on the Supreme Court I, like most of my colleagues, have been much exercised by the legal implications of British military operations in Iraq and Afghanistan.

The case law on this subject is like a precis of the history of British foreign policy over four centuries. It includes decisions about the Anglo-Danish trade wars of the seventeenth century, the depredations of the East India Company, to which Edmund Burke devoted some of his greatest parliamentary speeches, the ill-fated British occupation of Buenos Aires in 1806, the role of British mercenaries in the Portuguese civil wars of the 1830s, the forcible suppression of the West African slave trade by the Royal Navy, the scramble for African colonies at the end of the nineteenth century, the Jameson Raid and British interventions in Cyprus in the 1960s. And not only English history. There are also insights into the revolutions of 1830 in Germany, the civil wars of Venezuela and Mexico at the end of the nineteenth century and some of the more brutal incidents of the Russian Revolution.

This is, of course, an extreme example. One does not usually turn to law reports for stories of adventure or high politics. But even the placid ponds of the pre-1875 Chancery Division produced nuggets of historical gold, and sometimes more than nuggets. Much of the law of land tenure, conveyancing and trusts is unique to England and to those countries that have adopted English law. It reflects the preoccupations of the eighteenth- and nineteenth-century English aristocracy, the main purpose of which was to preserve their family line and its association with particular places, and above all with particular houses and pieces of land. Today, these considerations have lost almost all their former significance. But the basic principles of a system created in the very different social world of our ancestors still provides the framework of this area of law. One could make a very similar point about the law of undue influence, which seeks to save women and young people from the consequences of unwise transactions into which they were pushed, usually by overbearing relatives or manipulative religious mentors.

This branch of the law originated in a patriarchal society very different from the one in which we now live. It also owes much to a very Protestant suspicion of all religious enthusiasm. We are no longer very Protestant or all that patriarchal. But the law of undue influence is still with us. One of the best ways of understanding the law in these areas is to read Sir John Habakkuk's remarkable Ford Lectures of 1985, *Marriage, Debt and the Estates System, 1650–1850*. But for those who cannot face 800 pages of social history, however well written, the novels of Jane Austen and Anthony Trollope are a very adequate substitute. *Pride and Prejudice* is in a sense a prolonged commentary on the law of entailed land, with just enough fantasy to allow for a happy ending. Elizabeth Bennet had too small a marriage portion to hope for a good match, but still ended up by marrying the fabulously rich Darcy. In real life she would probably have been glad to make do with Mr Collins.

I have always found it difficult to resist turning to standard reference books such as the *Dictionary of National Biography* or the old *Cambridge Modern History*, in order to fill out the details of the older reported cases. Law reporters are austere fellows, and most of them are rather spare with detail. There is an obscure decision of 1816, which I once cited in court about the interpretation of a life insurance policy. It tells you nothing about the circumstances of the deceased's demise apart from judicial hints that it was rather shady. You have to look up old newspaper obituaries to discover the curious but legally irrelevant fact that the deceased was struck over the head with a pewter pot while celebrating the defeat of Napoleon – in Paris of all places. *Portarlington v Soulby* (1833) is not the sort of case that every practitioner carries about in his mental library. It is about the enforceability of gambling debts. It is perhaps a symptom of the triviality of my mind that I found it fascinating that Lord Portarlington, in addition

to being a feckless and unskilful gambler, had been cashiered from the army for arriving at the battle of Waterloo five hours late with two days growth of beard. As it turned out, this was not an entirely useless piece of information. It helped me as Counsel to retain the interest of the Appellate Committee of the House of Lords when taking them through one of the drier judgments of Lord Brougham. You might think that this is just self-indulgence and romanticism. If so, you would be half right, although you should never underestimate the importance of entertainment as a tool of advocacy, or the poetic element in any well-written judgment.

There are, however, a number of more fundamental points to be made.

The first is perhaps too obvious to be worth stating. The rationale of any rule of law, and particularly a long-standing rule of law, is not always self-evident. It helps to understand how, historically, it came about and in response to what perceived mischief. Depending on the answer, the rule may be inapplicable, or simply redundant. But even if it is neither, it will at least be easier to understand. A good example is provided by two recent cases, *Crawford Adjusters v Sagicor* in the Privy Council and *Willers v Joyce* in the Supreme Court. In both of them, the court had to consider whether there was a tort of maliciously commencing or conducting civil proceedings, analogous to the well-established tort of malicious criminal prosecution. Opinions were divided, but in both cases the majority thought that the alleged tort did indeed exist. I am not proposing to go into the details of that argument, especially as I was in the minority in both cases. The point that I want to make about these cases is that it was necessary for us to ask ourselves why there appeared to be, in the existing authorities, a distinction between civil and criminal litigation. And whether such a distinction was justifiable today. These are difficult questions to answer without going back into

some rather arcane aspects of English social history which explain why a tort of malicious criminal prosecution existed: the use of the law courts by litigants as a tool of oppression and an instrument of vendetta in the late middle ages, which led to the invention of a number of new torts; and the problems of public order in seventeenth- and eighteenth-century England, a society with no organised police force or system of public prosecution. Of course, a simpler way of approaching a question like that would have been to forget the history and proceed straight to the last stage of the inquiry. Never mind what happened in the fifteenth or the eighteenth century. What does justice require now? Ultimately, of course, that is the question that one does ask. But in a customary system of law like ours, it cannot be answered without reference to what earlier generations of judges have thought and said about it. The baggage of the past is always with us. Courts cannot ignore authority by which they are bound. Even the Supreme Court cannot approach the law of tort as if Britain were an uninhabited island awaiting its lawgiver, instead of a complex society shaped by a long past.

What this example illustrates is that it may be necessary to understand the historical background against which past cases were decided in order to ascertain what the law is. But there is more to it than that. A lawyer requires many skills. Knowing the law is only one of them, and not necessarily the most difficult. Among the others, perhaps the most important is an ability to weigh evidence and to analyse facts. Most litigation depends entirely on fact and not on law at all, except perhaps for a few basic and indisputable propositions. Even when there is a real issue of law, it will usually be found to turn on the correct classification of the facts. The more arcane the facts, the more valuable it is to have some background knowledge of the kind of conditions that produced them. I can think of few better illustrations than the work of

an immigration and asylum judge. People who leave their homes and friends to seek a new life in a new and unfamiliar part of the world do not do so casually. Most of them are propelled by grinding poverty, personal misfortune, political crisis, persecution or natural disaster. Even economic migration is, I suspect, a portmanteau term for a complex bundle of motives. To comfortable and secure Englishmen, this is an alien world. I cannot speak from experience, but I would expect that a feel for the social world from which these people come is essential if one is to decide what the facts of their cases are likely to be. It is just one illustration, although quite an important one, of the value of a grasp of history and its methods for the practice of law, whether as an advocate or a judge.

Until relatively modern times all this would have been regarded as a truism. Let me take you back to the origins of the Oxford law faculty in the nineteenth century, another alien world, but one in which these questions were much discussed. At Oxford, a proper undergraduate school of English common law did not exist until 1850, although civil law had been taught there for centuries. However, for the first twenty-two years of its existence it was not an independent faculty. It was a joint school with modern history. The joint school provoked many questions about the value of history to a lawyer. The general opinion was that you could not be a good lawyer without a proper grasp of history. The first Chichele Professor of Modern History, Montague Burrows, delivering his inaugural lecture in 1862, told his audience that the object of the combined school was to 'form the judicial mind for the purpose of dealing in the best manner with all the problems of thought and practical life'. William Stubbs, the Regius Professor of History and perhaps the most influential Oxford historian ever, regarded the study of history as indispensable to a profession founded on the exercise of

sound judgment. Historical enquiry, he once said, was an 'endless series of courts of appeal, ever ready to reopen closed cases'. The great medievalist John Horace Round had a rather different take on it. The problem with lawyers, he thought, was that they were too respectful of authority. Their vision was 'bounded by their books', whereas the historian was trained to question authority and to work from first principles. Acquaintance with the historical method could only be good for them. There is, I am afraid, something in Round's view, even now. He eventually concluded that lawyers were incorrigible and pressed for them to be allowed to go their own way, with their own faculty. That is what eventually happened in 1872. But many people regretted the separation, including at least two of the university's four law professors. Professors Maine and Holland told a Royal Commission a few years later that they regretted the creation of a separate school of law, giving substantially the same reasons for their opinion as Burrows and Stubbs.

After 1872, most would-be lawyers have voted with their feet. Judging by the sample whose careers I have been able to trace, in 1914 the great majority of the English judiciary, High Court and above, had degrees in classics, with history coming a distant second and law a long way behind. Fast forward to 1939 and the picture has hardly changed. It is only comparatively recently that a majority of practising lawyers have had law degrees. Even now, it is not universal in England as it is in many continental countries. I do not think that it was an accident that Tom Bingham, one of the great judges of the past century, read history at university and was an avid reader of history all his life. His interest in history unmistakably marked his style in both his judicial and his extra-judicial pronouncements. It also profoundly affected his approach to social problems. Of course, you can know a great deal of history without having studied it at university if you really set

your mind to it. But however it is acquired, I have no doubt that a grasp of the dynamic of human societies through their history makes for a better judge. More generally, I would say that it improves the quality of almost every kind of decision-making. If President Woodrow Wilson had been a better historian when he set the agenda of the Versailles peace conference after the First World War, I doubt whether eastern Europe would have suffered the disasters that engulfed it in the two decades that followed. It can fairly be said that in the past half-century, British foreign policy has been somewhat accident-prone. Can this be something to do with the fact that the last prime ministers with a profound grasp of history were Harold Macmillan and Alec Douglas-Home?

We are, increasingly, a historically illiterate nation. Periodic opinion polls show that many of our fellow citizens have difficulty in saying in what century the Norman Conquest and even the Second World War occurred. A generation of children has been brought up on a remarkably narrow historical syllabus, essentially confined to the first half of the twentieth century, which is probably the most uncharacteristic century of Europe's past and unquestionably the most uncharacteristic century of Germany's. It offers very little insight into the way that societies develop over time. The result is to distort our understanding not just of history but of humanity itself. It also generates expectations of rapid change which all historical experience shows to be unrealistic. Many of the problems that confront a modern judge reflect these collective limitations.

It is permissible to regret the growing tendency of would-be lawyers to devote themselves only to the study of law from the age of eighteen. The law is an exclusive and possessive discipline, a priestly craft. But its study is not a particularly good training for the handling of evidence, or for acute social observation, or for the exercise of analytical

judgement about facts, all of which are essential judicial skills. I am not for a moment suggesting that law graduates lack these qualities. But they do not derive them from their legal studies. I would also suggest that for those set upon a legal career, the study of a different subject at a formative time of one's life is personally enriching. It is a source of intellectual satisfaction, whatever contribution it may or may not make to one's subsequent professional life. Certainly, I have found it so. Over the years, I have made a great many enemies in law faculties up and down the land by suggesting that law should be offered only as a second degree, as it is in North America. I would not press this point today, for I doubt whether it is realistic, given the limited public funding available for extended study at university. But in an ideal world there would be much to be said for it.

There is, I think, a broader sense in which history supports a judge's role. It is a prodigious source of vicarious experience. We are all familiar with the tired journalistic cliché that judges are out of touch with real life because they are middle class and, by the standards of our society, comfortably off. The truth is that the cliché applies not just to lawyers but to everyone. Everybody is out of touch with real life. This is because real life is too vast and too varied for more than a small part of it to be experienced by any one man or woman. We need several lives, but we are granted only one. This is not just a problem peculiar to judges. It is as true of the noble lord who rules the state as it is of the noble lord who cleans his plate, or the aristocrat who banks at Coutts and the aristocrat who cleans his boots. In the nature of things, most experience is vicarious, not personal. History enables us to understand many things about humankind that we cannot hope to experience personally. Of course, its value would be very limited if we were all that different from our ancestors. But one of the things that one learns from our

three millennia of recorded history is that humanity does not really change very much. What changes is not its basic instincts and desires but its capacity for giving effect to them. Indeed, one of the abiding tragedies of mankind is surely that its technical and organisational capacities have expanded so much faster than its social or moral sensibilities.

One of the most interesting sources that I use for my work as a historian is the French chancery registers of the late middle ages. Several hundred volumes of them sit in the Archives Nationales in Paris. They consist mainly of pardons. In these fascinating documents, one has little potted biographies of tens of thousands of late medieval criminals, almost all of them poor wretches who for one reason or another had found themselves on the wrong side of life's chances. I met many of these people during the twelve years that I sat as a part-time Recorder in London Crown Courts. The accounts of their doings and the assessments of their culpability read exactly like the social enquiry reports prepared for sentencing hearings. At the opposite end of the social scale, the ambitions and activities of courtiers and officials are remarkably like those of dealers and managers in modern investment banking houses. There really is nothing new under the sun.

By the admittedly narrow standards of modern professional life, the bar and the bench are surprisingly varied groups of people. There are, I believe, no longer ex-policemen and ex-merchant seamen at the bar, as there once were. But among the sample of barristers and judges of whom I have some knowledge, I can count a former actor, a concert pianist, a doctor, a chemist, and several accountants, merchant bankers and surveyors, as well as a number of refugees from academic life in disciplines other than law. It may be that someone else will speak about 'the concert pianist as judge'. I am by no means unusual in having once done something else, and I am certainly not unique in continuing to do

it in tandem with the law. It has enriched my life. I hope that it has made me better at both things.

This talk was originally delivered on 6 October 2016 in the Rolls Building of the High Court. The audience consisted of judges of the Upper Tribunal, who hear appeals from the decisions of specialised tribunals, generally about administrative decisions of government services, including immigration appeals.