

What would John Griffith have made of Jonathan Sumption's Reith Lectures?

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Abstract

In his 2019 Reith Lectures on the rise of law and decline of politics, Jonathan Sumption presents a thesis that, on its face, seems identical to that of J.A.G. Griffith's defence of the political constitution. Given the radical differences in their views on equality, democracy, and redistribution—with Griffith working in the tradition of democratic socialism espoused by the Webbs, Tawney and Laski, and Sumption expressing the libertarian philosophy underpinning Thatcherite policies—this is puzzling. This article sets their views in historical and political context and argues that the similarities are superficial, whereas the differences are profound. It then proceeds to show the weaknesses in Sumption's defence of his thesis.

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I

IN HIS chorley lecture of 1979, John Griffith gave a powerful defence of what he called 'the political constitution'.¹ His target was an emerging coalition of Liberal and Conservative lawyers then advocating reform of the British constitution. The reformers were proposing intellectual renewal by resurrecting natural rights theories and institutional renewal by making the European Convention of Human Rights enforceable in domestic law. Griffith's objections to these proposals were both philosophical and political. Arguing that law was being elevated from its proper function as a means to an end into some metaphysical entity, he maintained that, once realised, the effect would be to place the resolution of important political questions in the hands of a legal elite happily engaged in the scholastic task of not only determining the meaning of such abstract freedoms as thought, expression and association, but also of resolving how those freedoms were to be qualified in the interests of national security, public safety, protection of public order, public health, or economic wellbeing. Such political decisions should be made by those who remain accountable and removable. Law, he concluded, provides no substitute for politics.

Griffith's argument was not novel. His lecture expressed a view on the relationship between law and politics that had been consistently espoused from the 1920s by public lawyers like William Robson and Ivor Jennings, whose legal thought had been shaped by democratic socialist politics. Taking their intellectual inspiration from the Webbs, Tawney and Laski, they promoted a conception of rights that remained relative to function and were adamant that the common law judiciary wedded to *laissez-faire* and protection of property rights was unsuited to discharge the task of rights adjudication. Social rights were to be promulgated in parliamentary legislation and made real by executive officials committed to the pursuit of the common good and held accountable for the exercise of those powers through administrative processes. The rule of law should certainly be upheld if by that was meant public bodies keeping within the limits of their statutory powers. But in the hands of the judiciary that phrase had become a fog of words, or as Griffith put it in his lecture, 'a fantasy invented by Liberals of the old school in the late nineteenth century and patented by Tories to throw a protective sanctity around certain legal and political institutions and

principles which they wish to preserve at any cost'.²

The early twentieth century socialist jurists maintained that a new type of jurisprudence was needed to meet the challenges of the emerging positive state. Their arguments were in direct conflict with the orthodoxy of Victorian constitutionalists who had expressed great anxiety about the coming of democracy. A.V. Dicey, the leading Victorian constitutional lawyer, initially had been more sanguine than many about the 'leap in the dark' of Disraeli's Reform Act, but by the early twentieth century he had changed his mind. Faith in parliamentary government, he now saw, had been suffering an extraordinary decline. Legislation passed under the influence of 'socialistic ideas' was sapping the foundations of liberty and, with the loss of the Lords' veto power in 1911, the last effective constitutional safeguard had been destroyed.

This Victorian mentality remained the dominant legal worldview until the latter half of the twentieth century, when it was gradually displaced by a grudging acceptance that the administrative state was here to stay. But the arguments of the socialist jurists never gained a foothold in the legal establishment and, as it turned out, Griffith's Chorley lecture was to be the swan song of that movement. In that year, the Conservatives came to power driven by a powerful new ideology and over four successive terms they radically restructured the British state. Through a sustained programme of privatisation, deregulation and the institutionalisation of market disciplines in those public services that remained, they permanently altered the character of the modern British state.

Much of the intellectual groundwork of the Thatcher revolution had been laid in the 1970s by Sir Keith Joseph, her closest political ally. A disciple of F.A. Hayek and Milton Friedman, in 1979 Keith Joseph published a book on *Equality* with Jonathan Sumption. Written for the specific purpose of countering Tawney's influential book from 1931 with the same title, they claimed that Tawney's argument 'had been lost in the ocean of instinctive approval'. Just as Tawney's study explained the socialist conception of equality, Joseph and Sumption's illuminated

the creed of inequality at the heart of the Thatcherite project. And whereas Tawney begins with an approving reference to Matthew Arnold's criticism that 'in England inequality is almost a religion', Joseph and Sumption present Arnold as 'typical of the many egalitarians for whom inequality was ... a fraud deliberately worked by powerful men in their own interest'.³

This backstory is pertinent. Forty years later, following his retirement from the UK Supreme Court to which he had been appointed directly from practice at the bar in 2012, Lord Sumption was invited to give the 2019 Reith Lectures. No surprise there perhaps: his predecessors include such distinguished former judges as Lords Radcliffe and McCluskey. But his chosen theme was the rise of law and the decline of politics and, disconcertingly, his thesis is identical to Griffith's. In earlier lectures he had claimed that drawing the boundary line between law and politics is the biggest problem facing English law.⁴ In the Reith lectures, Sumption argues that although courts have the important task of preventing governments exceeding their powers, their recent more active role in reviewing the merits of government policy decisions is a usurpation which undermines the value of the political process. He also closely follows the logic of Griffith's argument in specifically targeting the way that domestication of the European Convention on Human Rights has exacerbated this tendency by enabling the judiciary to discover and enforce rights that are neither fundamental nor uncontroversial.

How is it possible that lawyers espousing radically different political views and coming from different political traditions hold such apparently similar views on the limits of the law and the value of politics?

II

Some might seek to explain these similarities with reference to the political changes that have taken place over the forty years since Griffith's lecture was published. That is not enough; after all, the clearest statement of Sumption's political views was published in the same year as Griffith's lecture. That said, if, as seems justified, we use Tawney as the

surrogate for Griffith's beliefs on equality, then of course there is a significant time gap between Tawney's work on equality and Sumption's. And this is relevant because—although Griffith would undoubtedly have rejected this—one of Sumption's main claims in *Equality* is that since Tawney's day 'class distinctions have faded to the point where they are no more significant than the shape of a man's hat and the intervals at which he is paid'.⁵ This leads him to present his basic thesis: that the striving for equality today is born of envy and the narcissism of small differences.

The difference between Sumption and Tawney on this critical political question is vast. In *Equality*, Tawney rejects the suggestion that the principle of equality can be reduced either to formal legal equality or to some minimal sense of equality of opportunity. He dismisses the idea that formal equality or, what amounts to the same thing, economic liberty is 'sufficient prophylactic against the evils produced by social stratification'. This type of equality simply frees property and enterprise from social restraints and leads to division. The appeal to such a general principle also conceals the essential point that the character of a society 'is determined less by abstract rights than by practical powers'. That is, the character of a society rests 'not upon what its members *may* do, if they can, but upon what they *can* do, if they will'.⁶

The main target of Tawney's critique, however, is a narrow conception of equality of opportunity. Equality of opportunity is valuable only when 'each member of a community, whatever his birth, or occupation, or social position, possesses in fact, and not merely in form, equal chances of using to the full his natural endowments of physique, of character, and of intelligence'. He is scathing about the claim that only those with unusual talents might have some possibility of escaping the circumstances of their birth. Without a large measure of actual equality, such opportunities to 'rise' must necessarily be illusory. Any doctrine which puts the emphasis on opening avenues to individual advancement remains 'partial and one-sided'.⁷

Tawney does not argue for some crude Procrustean sense of equality. He recognises

that inequality of power is justified when that power is used for approved social purposes and 'when it is not more extensive than that purpose requires, when its exercise is not arbitrary, but governed by settled rules, and when the commission can be revoked, if its terms are exceeded'. The problem is not power and inequality as such: it is 'capricious inequality and irresponsible power'. Gradations of authority and income derived from differences of office and function are justified as promoting that social purpose but distinctions based on birth, wealth, or acquired social position impede its attainment.⁸

In Britain, Tawney concludes, liberty and equality have traditionally been considered antithetic. If liberty means 'that every individual shall be free, according to his opportunities, to indulge without limit his appetite ... it is clearly incompatible, not only with economic and social, but with civil and political, equality'. In this sense, 'freedom for the pike is death for the minnows'.⁹ Properly understood, equality is not antithetical to liberty, but only to a particular conception of it.

The contrast with Sumption's beliefs could hardly be more pronounced. Sumption claims that the kind of egalitarian society 'being constructed in the name of equality in many parts of the world', whether acting in the name of Marx or Tawney, amounts to 'levying war on humanity'. Its effect is 'simply to replace inequalities of wealth by inequalities of power'. The quest leads only to 'the transformation of government from an instrument for the enforcement of shared principles into an instrument by which part of the population imposes its principles on another part'. This is especially egregious because although 'private wealth like political power may corrupt ... unlike political power its corruption does not harm others'.¹⁰

Sumption's basic creed rests on the claims that a 'society of autonomous individuals is the natural condition of mankind', that it is natural that humans 'pursue private rather than public ends', and consequently that the 'duty of government is to accommodate themselves to this immutable fact about human nature'. Acknowledging Tawney's point that the rich recognise that their interests are served by political stability and

those interests might require that 'the differences between rich and poor are kept within bounds', he accepts that, to that extent, redistribution is justified: 'But its justification goes not one inch further'. All further claims to equality are based on 'romantic notions of fellowship' which turn out to be self-defeating.¹¹

Sumption concludes that there is 'no greater tyranny possible than denying to individuals the disposal of their own talents', that 'there is no such thing as assessable merit', and that 'statistical demonstrations of income distribution in support of the egalitarian cause are an appeal to envy and an abuse of people's dissatisfactions and disappointments in support of a cause with which those dissatisfactions and disappointments have no logical connection'.¹² His main purpose is to defend the acquisitive society against the egalitarian aim of organising society on the basis of social purpose. This may go some way to explaining why he abandoned his academic career as an historian because he was 'fed up with being broke'. Sumption also rejected a political career, not just because of the 'demands it makes on one's time' but because 'there is not much of any interest below the top'.¹³ A career at the commercial bar beckoned.

III

In the light of these radically different political views on equality, can there really be any similarity in Griffith and Sumption's accounts of law, politics and constitution? It is of course conceivable that those with different views on equality could hold similar views on the proper spheres of law and politics. But that would depend on a similarity in understanding of the nature of law and politics and this, I suggest, is implausible. I begin by first situating Griffith's argument in its appropriate political context.

Griffith believed in a socialist cause, similar to that advocated by Tawney, which anticipated using the machinery of the state to bring about a peaceful transformation of capitalism to socialism. The establishment of political democracy was only the first stage in the extension of democratic principles and methods into other spheres of economic and

social life. And the success of that strategy rested on the ability of a Labour Party advocating socialist policies acquiring majorities in the House of Commons and then using parliamentary legislation to bring about social change. For this purpose, a legal philosophy that conceived law simply as a means to an end and treated the Act of Parliament as the highest form of law was eminently suitable. This was of first importance because, after universal suffrage was achieved in 1928, it was still the case that all the other institutions of the state—the Lords, the judiciary, the higher civil service, the defence forces—remained under the control of an old order that might place obstacles in the way of such a programme. Any legal philosophy other than a sociological positivism that views law as an expression of will and recognises the will of Parliament to be the highest law could be used to defeat these democratising objectives.

Twentieth century achievements towards these objectives should not be underestimated. They included, in Tawney's words, 'the legal enforcement of minimum standards of life and work; the expansion of different forms of communal provision designed to make accessible to all advantages previously confined to the minority with the means to buy them; the use of financial measures to reduce economic inequalities; and the transference of certain foundation services to public ownership'.¹⁴ By the 1970s, however, belief in the continuing efficacy of the project was faltering, signified by concerns over 'stagflation', governmental overload, and a growing fiscal crisis of the state. When after 1979, the legal philosophy advocated by socialists appeared to have been taken over by Thatcherite forces pursuing an agenda of the 'free economy and strong state', socialists were left without any legal-constitutional resources of resistance.

This dilemma led to a splintering of the left, with such radicals as Ralph Miliband, G.A. Cohen and Tom Nairn in 1988 joining Liberals—and some Conservatives—as founder signatories to Charter 88, a movement advocating fundamental constitutional reform. Scrolling down three decades, we see the fruits of this new constitutional philosophy expressed by a new generation of

liberal judges educated in a rights-based rather than a traditional rule-based jurisprudence, and possessing a greater willingness to engage in active review of what they perceive to be reactionary legislation.

Sumption's Reith lectures on 'Law and the Decline of Politics' are written in the context of—and in opposition to—these developments.¹⁵ That is understandable. Less understandable is that his argument appears to be founded on the need to maintain democracy as the constitution's key value. This element of his argument calls for closer examination.

In a reprise of Dicey's thesis in *Law and Public Opinion in the Nineteenth Century*, Sumption first claims that the 'vast expansion in the domain of law' in modern times is attributable to 'the arrival of a broadly-based democracy between the 1860s and the 1920s'.¹⁶ The coming of political democracy has led to 'rising demands of the State as a provider of amenities, as a guarantor of minimum standards of security and as a regulator of economic activity'. And what drives this 'growing public appetite for legal rules' is 'the quest for greater security and reduced risk'.¹⁷ In place of the socialist claim that legislative power protects the most vulnerable and promotes more opportunity, he is suggesting that, having acquired the vote, the people—the masses—are using it to demand that the state protect them from the ordinary risks of life.

This is tendentious. The developments he highlights are the result of a new phase of modernisation, driven by technological innovation and symbolised in the progression from the steam train to supersonic flight, from coal to nuclear fission, from the typewriter to the microchip. These developments also signify a shift from *laissez-faire* to organised capitalism, an evolution that is only in the most tangential sense associated with the extension of the franchise. These structural changes are now presenting people with risks of a novel type and scale. Socialist legislation had indeed sought to mitigate some of those risks. 'The brutal truth', wrote Tawney, 'is that down to 1939 the economic system was kept running by hunger and fear' and only since the Second World War has a policy of full employment coupled with welfare provision destroyed the conditions of that 'barbarous discipline'.¹⁸ In claiming that

the quest for security is attributable to the arrival of democracy, Sumption makes the elementary error of confusing effects with cause.

It is perhaps because many of the emancipatory aspects of welfare policies have been eliminated since 1979 that Sumption now replaces envy with security as the driving force of legislative action. What has changed in recent years, he argues, is 'the degree of risk that people are prepared to tolerate in their lives' and that 'unlike our forebears, we are no longer willing to accept the wheel of fortune as an ordinary incident of human existence'.¹⁹

That rather depends. The great majority have always lived with a high degree of unforeseeable risks—of being plunged into poverty by illness, pregnancy, industrial accident, factory closure, and so on. The welfare state alleviated some of these, but we now face a range of newly manufactured risks generated by forces that can sometimes seem beyond political control. Often these are global risks, unrestricted by place or time, and when they do materialise, as with the 2008 banking crisis, the state's role has been to bail out those responsible. The risks have certainly changed, but does this have anything to do with our capacity to tolerate them? And though they have changed, their distribution remains the same: wealth accumulates at the top and the burden is borne at the bottom.

Blind to these structural changes, Sumption believes the main cause of law's expanded domain is that ordinary people now regard security as an entitlement. We have, he claims, arrived at 'one of the supreme ironies of modern life: we have expanded the range of individual rights, while at the same time drastically curtailing the scope of individual choice'.²⁰ Can this really be justified to those for whom access to education opened up a world of opportunities not available to their parents, or to women who have only recently escaped traditionally imposed roles, or to ethnic minorities no longer facing the most blatant forms of prejudice, or to disabled people who now have greater access to public facilities?

For Sumption, the state has become a Leviathan; in place of a seventeenth century 'absolute monarchy', we have created

'absolute democracy'.²¹ Whatever else this analysis demonstrates, it reveals a great gulf between his and Griffith's views on democracy. What Griffith saw as the possibility that the majority would no longer be treated as instruments manipulated by property owners, Sumption regards as a threat to existing liberties. The danger we now face, he concludes, is that 'demands of democratic majorities for state action may take forms that are profoundly objectionable, even oppressive, to individuals or to whole sectors of our society'.²² Since their views not only on equality but also on democracy radically diverge, what prospect is there of their ideas of politics and law converging?

IV

The title of Sumption's second Reith lecture is 'In Praise of Politics'. The most provocative aspect of his argument is not, as he seems to think, his defence of 'the political process with all its imperfections'.²³ It is that, following his analysis of the threats presented by the establishment of democracy, he conceives politics not as the method by which popular demands might be advanced, but by which they may be limited and controlled. There are, he says, two basic methods by which popular demands might be curtailed: one is by enacting a modern constitution that becomes the fundamental law which the judiciary will protect, and the other is through the practices of representative democracy in which politicians are entrusted with the task of making laws and holding governments to account. Sumption's lectures are devoted to extolling the virtues of the latter over the former.

There are serious weaknesses in his argument. In the British tradition of democratic socialism, politics is a set of practices that acknowledges the equal worth of individuals, holds out the prospect of each having an equal voice in the collective activity of governing, and provides the means of enabling individuals to negotiate their differences and devise collective ways to achieve objectives that cannot be met with the same degree of success by individual effort. As we will see, this is not the conception of politics that Sumption defends.

A skilled advocate, he first presents the merits of adopting an entrenched constitution. The attractions of giving judges the task of constitutional guardians, he concedes, are manifold. Judges are 'intelligent, reflective and articulate', they are 'intellectually honest' and 'they know a great deal about the world'. Even as they have recently 'inched their way towards a notion of fundamental law overriding the ordinary processes of political decision-making', they have always operated on the principle of legality. And law—he means judge-made law—is 'rational', 'coherent' and 'analytically consistent and rigorous'.²⁴ Such praise deviates dramatically from the classic account Griffith has given in *The Politics of the Judiciary*.²⁵ Surely anyone who believes Sumption's eulogy of judges and law must be racing to sign up for constitutional reform. But these virtues notwithstanding, Sumption argues that the price for handing over the resolution of debatable policy issues to judges is too high. The main problems are that litigation is not a participatory process, that it cannot mediate differences and that in public affairs legal values may not always be virtues: 'Opacity, inconsistency and fudge may be intellectually impure, which is why lawyers don't like them, but they are often inseparable from the kind of compromises that we have to make as a society if we are going to live together in peace'.²⁶

What, then, is his case for politics? Attentive to the dangers of the tyranny of electoral majorities, Sumption places his faith in the principle of representative government. Representative politics, he argues, has been the most effective way of taking the multiplicity of interests into consideration and accommodating differences. And the most efficient way of achieving this accommodation has been through political parties. He rightly notes that, being coalitions of opinion, British political parties have never been monolithic. But he wrongly asserts that they are 'the creatures of mass democracy'.²⁷ British political parties in fact came into existence during the eighteenth century. They were formed not as expressions of democracy, but as mechanisms by which the landed class could wrest control of the state from the Crown and then control parliamentary business. Ministries could be efficiently formed and

overthrown, notwithstanding differences in party allegiance, because members of this landed class shared a common background, received the same schooling and values, intermarried, moved in the same circles, and drew on the same common stock of ideas. Whether Whig or Tory, they believed in the essentials of commercial and imperial action and in the need to protect life, liberty and property from undue governmental interference. The feted flexibility of the British constitution rested on the foundation of a set of material interests it was the fixed policy of the state to protect.

The British constitution retained this character well into the twentieth century, when Arthur Balfour confidently proclaimed that 'our whole political machinery presupposes a people so fundamentally at one that they can safely afford to bicker; and so sure of their own moderation that they are not dangerously disturbed by the never-ending din of political conflict'.²⁸ The great modern achievement of the British parliamentary system has been to ensure that the Labour Party, formed to give parliamentary representation to the working class, could be fitted into this frame. It is this tradition that draws Sumption's admiration. The parliamentary system, he recognises, has evolved a method of decision making 'which has the best chance of accommodating disagreements between citizens as they actually are', achieving results which, 'however imperfect, are likely to be acceptable to the widest possible range of interests and opinions'.²⁹

This is puzzling. Can such a view be reconciled with Sumption's earlier claims that modern government merely converts inequalities of wealth into inequalities of power, or that it has evolved from a method of enforcing shared principles into an instrument for imposing convictions held by one section of the population on another? Perhaps he believes that since 1979, British government has abandoned an egalitarian ethos—if so, this might be the closest point of coalescence between his and Griffith's views.³⁰ But in any case, Sumption now modifies his position, saying that democracy cannot mean majority rule; a majority is sufficient to authorise governmental acts but 'is not enough to make them legitimate'.³¹

The conditions of legitimacy in which he has such faith are the type of representative politics extolled by Burke and Madison. Sumption is rather economical on this point but his position seems similar to Madison, who in No. 10 of *The Federalist Papers* argued that the effect of representation is 'to refine and enlarge the public views by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations'. Madison was defending the establishment of a modern republic which had democratic elements—the election of leading figures who 'can fairly be expected to bring to their work a more reflective approach'—but which was designed to contain popular demands and maintain the traditions of aristocratic rule.³² Sumption, it would appear, hankers after the traditions of parliamentary government of the high Victorian era.³³

But do these traditions retain their authority today? Sumption readily acknowledges the warning signs that Parliament is no longer performing its traditional role effectively. He accurately identifies the signals: declining turnout at general elections, decline in membership of political parties, the waning of the two-party system, survey data indicating decline in rates of public engagement and a growing distrust of professional politicians, a growth of 'regional nationalisms', faltering economic growth and relative economic decline, and growing inequalities. These factors feed a perception of the remoteness of politicians from citizens and generate feelings of disempowerment. They are all signals of the erosion of the conditions of legitimacy of the parliamentary system. Such limitations when combined with his eulogistic portrayal of the value of judges as constitutional guardians might suggest that his own arguments present a strong case for basic reform. But this is not in his brief. Warning us against the temptation of seeking institutional solutions to political problems, his discourse concludes on an enigmatic note: if 'our political culture has lost the capacity to identify common premises, common bonds and common

priorities' then the problem—and solution—lies 'in ourselves'.³⁴

V

Quite where that leaves us is anybody's guess. At the last moment Sumption falters. Suggesting that perhaps a couple of institutional reforms might improve matters, he proposes adopting a more proportional system of representation in parliamentary elections (one variant of which was rejected by referendum in 2011) and the avoidance of referendums. His comments on referendums are revealing. Recognising Brexit as a divisive issue, he deplores the fact that although 'a classic case for the kind of accommodations which a representative legislature is best placed to achieve' it has proven difficult to manage. The culprit is the 2016 referendum which has taken decision making out of the hands of professional politicians, has prevented them undertaking an independent assessment of the national interest and which 'obstructs compromise by producing a result in which 52 per cent of voters feel entitled to speak for the whole nation and 48 per cent don't matter at all'.³⁵

About this Sumption is not wrong. But again he is surprisingly economical in his consideration of the issue. He writes as though the referendum were triggered by some automatic mechanism rather than being a manifesto commitment of the party that won the 2015 election. And he fails to register that it was authorised by an Act of Parliament approved in the Commons by 90 per cent of MPs, with even Caroline Lucas for the Greens declaring in the debates that they 'have long called for a referendum on EU membership, not because we are anti-EU, but because we are pro-democracy'.³⁶ If the parliamentary representatives in whom Sumption places his faith have failed, it is surely because they are constitutional neophytes who have failed to think carefully about the institutional mechanism they set in train. Rather than simply decrying the exercise, Sumption might have taken the opportunity to reflect on the importance not just of parliamentary practice but also of constitutional design.

The bigger issue concerns the substantive question of UK membership of the EU. Sumption spends an entire lecture criticising the fact that the main source of human rights law in Britain is an international treaty, but has nothing to say about the EU. The human rights treaty, he informs us, is a 'dynamic treaty', one that escapes parliamentary control because it 'provides a supranational mechanism for altering and developing it in future'.³⁷ Yet this is small beer compared with the EU treaties. In the case of human rights, domestic courts need only take account of the rulings of the Strasbourg court and do not have the power to disapply Acts of Parliament. In contrast, the EU treaties establish supranational mechanisms not only for extending the meaning of the treaties, but which also impose duties on domestic courts to apply the rulings of the Court of Justice of the EU and, if necessary, to disapply parliamentary legislation. And EU legislation is a much greater source of law than that deriving from Strasbourg.

If Lord Sumption is truly concerned about the extent to which law making has been taken away from normal parliamentary processes, the attention he gives to human rights issues as compared with regulatory law making by EU institutions is startling. We are again required to speculate. So, whereas socialists might praise Roosevelt's four freedoms (freedom of speech, freedom of worship, freedom from want, and freedom from fear) and Beveridge's bid for freedom from want, disease, ignorance, squalor and idleness, the four freedoms on which the EU is built (of goods, services, capital and labour) are the type of purely economic freedoms about which Sumption might be expected to be more enthusiastic.

VI

Sumption's study of the rise of law and decline of politics is a curious work. I have tried to show that its similarities with Griffith's views are superficial, the differences profound. The differences in their beliefs on the political value of equality, on the achievements of political democracy, on the strengths of the parliamentary system, on the merits of the judiciary, and on the

possibilities of politics are so great as to make comparison of their views on the proper role of law and politics spurious. But even on its own terms, Sumption's arguments are eccentric. They could be made, it seems, only by someone who has spent his entire life in the cloistered environments of English public schools, Oxford colleges, the Inns of Court and latterly in Parliament Square. They employ the predictable technique of invoking the greats, opening with Aeschylus, with nods towards Blackstone, Hume, Burke, Madison, Mill and de Tocqueville, before closing with Disraeli, 'the only true genius ever to rise to the top of British politics'.³⁸ It is an 1844 novel by Disraeli which helps us appreciate Sumption's theme of self-reliance. In *Coningsby*, in which the eponymous hero leaves Eton penniless, is obliged to work at the bar and eventually has his fortune restored, Disraeli writes that 'the peril of England' is found not in laws and institutions but in 'the decline of its character as a community'. It is as provocative a thought as the ending of the last of Sumption's lectures and it left this reader hoping for a further moment of introspection by the lecturer. But that never comes.

Notes

- 1 J.A.G. Griffith, 'The political constitution', *Modern Law Review*, vol. 42, 1979, pp. 1–21.
- 2 *Ibid.* p. 15.
- 3 K. Joseph and J. Sumption, *Equality*, London, John Murray, 1979, p. 2; R.H. Tawney, *Equality*, London, Allen & Unwin, 1931.
- 4 J. Sumption, 'Judicial and political decision-making: the uncertain boundary', F.A. Mann Lecture, 2011; J. Sumption, 'The limits of law' in N.W. Barber, R. Ekins and P. Yowell, eds., *Lord Sumption and the Limits of the Law*, Oxford, Hart, 2016, ch. 2.
- 5 Joseph & Sumption, *Equality*, p. 13.
- 6 Tawney, *Equality*, pp. 113–115.
- 7 *Ibid.*, pp. 106 and 113.
- 8 *Ibid.*, pp. 117–119.
- 9 *Ibid.*, pp. 181–182.
- 10 Joseph & Sumption, *Equality*, pp. 42, 52, 101, 53.
- 11 *Ibid.*, pp. 100, 102, 122.
- 12 *Ibid.*, pp. 125, 73, 104.
- 13 Transcript of the first Reith Lecture, p.1; http://downloads.bbc.co.uk/radio4/reith2019/Reith_2019_Sumption_lecture_1.pdf; Interview, *The Independent*, 15 Oct 2011; <https://www.independent.co.uk/news/people/profiles/jonathan-sumption-donnish-but-deadly-2370949.html> (both accessed 27 September 2019).
- 14 R.H. Tawney, 'Social democracy in Britain' [1949] in his *The Radical Tradition*, R. Hinden, ed., London, Allen and Unwin, 1964, ch. 10 at p. 150.
- 15 J. Sumption, *Trials of the State: Law and the Decline of Politics*, London, Profile Books, 2019.
- 16 A.V. Dicey, *Law and Public Opinion in the Nineteenth Century*, London, Macmillan, 1905; Sumption, *Trials of the State*, p. 6.
- 17 Sumption, *Trials of the State*, p. 14.
- 18 R.H. Tawney, 'British socialism today' [1952] in *The Radical Tradition*, ch. 11 at p. 185.
- 19 Sumption, *Trials of the State*, p. 16.
- 20 *Ibid.*
- 21 *Ibid.*, p. 19.
- 22 *Ibid.*
- 23 *Ibid.*, p. 23.
- 24 *Ibid.*, pp. 33, 35, 41.
- 25 J.A.G. Griffith, *The Politics of the Judiciary*, 5th ed., London, Fontana, 1997.
- 26 Sumption, *Trials of the State*, p. 42.
- 27 *Ibid.*, p. 28.
- 28 A. J. Balfour, 'Introduction' to W. Bagehot, *The English Constitution*, Oxford, Oxford University Press, 1928, p. xxiv.
- 29 Sumption, *Trials of the State*, p. 83.
- 30 Griffith, 'Why we need a revolution', *The Political Quarterly*, vol. 40, no. 4, 1969, pp. 383–93, at p. 385: 'My view is that our present institutions and ways of proceeding are heading us more and more towards greater injustice and inhumanity and that only by radical change can we hope to avoid catastrophe'.
- 31 Sumption, *Trials of the State*, p. 81.
- 32 *Ibid.*, p. 27.
- 33 Griffith, 'Why we need a revolution', at p. 386: 'Our present political arrangements emerged out of that period of mid-Victorianism which we are still struggling to understand ... Today this same system of government is one hundred years old and looks its age. We are left with a device for replacing one set of political leaders with another set who are barely distinguishable'.
- 34 Sumption, *Trials of the State*, pp. 92 and 96.
- 35 *Ibid.*, p. 31.
- 36 C. Lucas, 'Yes to an EU referendum', Green Party blog, 21 October 2011; HC Debs, Vol 596, col. 1142 (28 May 2015). <https://www.carolinelucas.com/latest/yes-to-an-eu-referendum> (accessed 27 September 2019).
- 37 Sumption, *Trials of the State*, p. 51.
- 38 *Ibid.*, p. 95.