

A Conversation with Professor Sir John Grant McKenzie Laws

by

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This is the twelfth interview for the Eminent Scholars Archive with an Arthur Goodhart Visiting Professor of Legal Science.

Sir John Laws was, until recently, a Lord Justice of Appeal, Court of Appeal of England & Wales.

This interview was held in the Goodhart Lodge and the audio version is available on this website. Questions in the interviews are sequentially numbered for use in a database of citations to personalities mentioned across the Eminent Scholars Archive.

Interviewer: Lesley Dingle, her questions are in **bold type**.

Sir John's answers are in normal type.

Comments added by LD, [in italics]. Footnotes added by LD.

1. Sir John, you are the twelfth Goodhart Professor to be interviewed for the Eminent Scholars Archive. You retired in 2016 as a Lord Justice of Appeal, having risen through the ranks of legal practitioners and the judiciary where you started as a barrister in 1971. You have been the Goodhart Professor of Legal Science for the academic year 2016/17. We are very grateful to you for agreeing to share some reminiscences of your life and your career as well as your experiences here in Cambridge over the last year. After summarising these activities I hope that you can give us some thoughts on legal topics and notions with which you become associated through your published writings, particularly some topical constitutional issues. So could we start with your early life? You were born, Sir John, on 10th May 1945 as the Second World War ended.

Yes. That was two days after VE Day and apparently I was late and my mother was very angry that she missed all the parties.

2. Where were you born?

In Nottingham, where my mother's parents lived at the time.

3. Were your parents involved in the law?

No, they were both doctors. They were both in the Royal Army Medical Corps in the wartime serving in Egypt. My mother came back pregnant and she had one of these strange things that apparently happen in pregnancy – every time she saw a particular steward on the boat she was sick but not otherwise.

4. From 1950 to 1963 you were at school, first at Durham Cathedral Choir and then at the secondary Durham School. Any mentors that stand out from that period?

Well, there were very good classics masters at Durham School. One was called

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Bobby Smithson³, the other was the school chaplain, a chap called Jack Marsden⁴, and I think they, and also the Latin and Greek I learned at the choir school, at prep school, gave me a love of the classics, the ancient classics, which I have always had.

5. What, at that point, were your main academic interests?

Latin. That's surprisingly, no doubt, but it was. I greatly disliked sport and still do.

6. In 1963 you went up to Exeter College and you graduated in 1967 with your BA and you wrote in 2004 that Lord Birkenhead's biography, "Led me, for the little that it is worth, into the law," and I wonder if you could expand on the circumstances of this very important event in your career?

Well, my father had a copy of the really rather poor biography of F E Smith, Lord Birkenhead⁵, that had been written by Birkenhead's son and I read it or perhaps I only read some of it, I don't recall, as a young teenager, and I suppose I thought, as teenagers perhaps are inclined to, that this was a very romantic profession with a lot of contest in it and I remember announcing to my grandfather on August 1st of my 13th year that I was going to be a barrister. I know it was August 1st because that was the day we always went up to northeast Scotland for the summer holiday.

7. You list Philosophy as one of your interests in "Who's Who". Did you read Philosophy at Exeter?

I read what at Oxford is called "Greats" at Exeter College, Oxford. That is to say, the ancient classics plus Philosophy, and the course included quite a lot of modern philosophy so I have been particularly interested ever since then in moral and political philosophy which I think are disciplines that are intertwined with the law and they have made a great deal of difference to my approaches to the law or views about the law, for what that may be worth.

8. Any influential teachers or lecturers that you remember from Oxford?

Yes, two. There was a young Canadian called John Baker, who was teaching the modern philosophy, and I don't remember any particular incident, but he was a very good teacher, very clear, very precise and very encouraging. The ancient history tutor was an older man called Dacre Balsdon⁶, a very well-known teacher amongst classicists. He was what you might call an archetypal bachelor don. The first essay I wrote for him was on Greek colonisation, I think, and, as was the tradition, the younger graduate reads the essay to the don who listens and then comments on it and as I read this essay to Dacre Balsdon he blew perfect smoke rings from his very long cigarette holder and at the end of the essay he said, "This essay is like a soufflé that hasn't risen," and after that I am sure I wrote other bad essays but none that were quite so boring.

9. Sir John, what were your ambitions for a career in law at that time?

I don't know if I looked ahead very far. I certainly wanted to be a successful court

³ R W (Bobby) Smithson

⁴ Reverend John Robert (Jack) Marsden, 2nd Master, Deputy Head; Freemason, Founder of Old Dunelmian Lodge

⁵ Frederick Edwin Smith, 1st Earl of Birkenhead (1872-1930), known as F. E. Smith. Conservative politician and barrister, Lord Chancellor (1919-22)

⁶ (John Percy Vyvian) Dacre Balsdon (1901-77), Exeter College, Oxford, Lecturer in Ancient History (from 1929, Faculty Lecturer from 1935, later CUF Lecturer), Tutor from 1928, Sub-Rector 1928-40, Acting Bursar 1948-9, Senior Tutor 1950-61, vacated 1969



advocate, the traditional route for the bar. I don't believe that when I was an undergraduate or a student, a law student a little later, I had any particular, focussed ideas about the bench, that came a bit later on. So my energies were concentrated on practice at the bar in a traditional way really of common law chambers.

10. So how did you proceed after your BA?

Well, I took the degree, Oxford finals in '67. I then came to London and was already a member of the Inner Temple, having decided to go to the bar, and went through the bar exams and was called to the bar at the Inner Temple in 1970, pupillage 1970 and 1971 and then I remained in the same chambers, general common law chambers they were, throughout my career until I went on the bench in 1992. As I say, they were general common law chambers so one saw a very wide range of practice, but after some years I got more involved in public law, administrative law because a more senior person in my chambers, now Lord Brown of Eaton-under-Heywood⁷, was what's called the "Treasury Devil", that is to say the advocate, the member of the bar who is instructed in the major civil cases on behalf of the government, whatever political colour it may be, and so some of the work he couldn't do for the government filtered down to me and I succeeded him as Treasury Devil in 1984, and after that doing a lot of public law cases and that became my major interest I suppose.

11. Coming then, Sir John, to your legal career, you have had a very illustrious career. You were called to the bar, the Inner Temple in 1970, having left Exeter College in 1967, and were those three years spent studying for the bar?

Yes, mainly. I did a little teaching back at Oxford. I was asked to go back and teach some undergraduates on a Saturday morning for the philosophy part of the Greats degree and so there was that. I also did a bit of ad hoc teaching in London. Otherwise I was pursuing the bar course which I did in quite a leisurely fashion. Though I didn't fail any exams I think I had some gaps between one and the next one so I was called, as you say, three years after finishing at Oxford in 1970.

12. Why did you choose the bar rather than a career in academia?

Because I thought that it would be interesting and rewarding and fun to be a court advocate.

13. You were a barrister at common law from 1971 to 1992, 21 years. What cases did you specialise in?

Well, after some years I became more and more interested in public law and had a number of cases for the Crown and then I was appointed to be Treasury Devil in 1984 and the Treasury Devil is an exception to the cab rank rule of the bar, that he doesn't take any clients other than the government of the day. Whether or not there is an election and the government changes, the Treasury Devil continues acting only for the government, and most of the cases then were public law cases. At that time judicial review was beginning to come into its own.

There were also quite a lot of cases... well, certainly, yes, a fair number of cases in the European Court of Justice, where I went maybe a dozen times and one or two visits to the Strasbourg Court as well. In previous years the Treasury Devil had possibly, I am not sure about this, had a wider range of work because there was public law and administrative law work, so the Treasury Devil might do some of the heavier personal injury cases or other

⁷ Simon Denis Brown, Baron Brown of Eaton-under-Heywood, (b.1937), Lord of Appeal in Ordinary (2004-09), Justice of the Supreme Court of the United Kingdom (2009-12)



litigation for the Crown, but by my time in the second half of the 80s judicial review was very much the coming thing.

14. Right.

During that time I was involved in the “Spycatcher”⁸ litigation which took me to Australia, I was involved in the “Death on the Rock”⁹ inquest in Gibraltar, which took me there, to Gibraltar, and a large number of cases in the Court of Appeal and the House of Lords here at home.

15. Very interesting. Sir John, that to some extent explains your foreign qualifications.....

At the bars of New South Wales and [Gibraltar]

16. Yes.

Yes, it was because of those two cases, it was necessary to be admitted to the local bars in order to take part.

17. I wondered about that.

You were in 1984 to 1992 the First Junior Treasury Counsel in common law.

Yes, that’s the Treasury Devil, yes.

18. This was during the Thatcher and the Major years of government and I wondered, how did you make this jump, did you apply for this position?

No. The system is, and has been since, I think, the early 19th century, certainly a long time, the Treasury Devil is appointed by the Attorney General. I have never heard of anyone applying for the job. I suppose there is nothing to stop you writing to the Attorney and saying, “Make me the next Treasury Devil,” but I don’t think it would increase your chances very much. By the time I was appointed in 1984 I had done quite a lot of government cases, the cases which the then Treasury Devil couldn’t do because he would be in two or three places at once, it’s a very busy job, and as had a lot of other barristers.

There was a panel and, indeed, there are three panels now, I think, of barristers doing government work, so to speak, under the Treasury Devil, and that means that the treasury solicitors and the Attorney General’s office get to know the various members of the bar who are doing government work and also they’ll see members of the bar appearing against the government. So they get quite a pool from whom eventually the next Treasury Devil will be selected and that was me in 1984.

19. You dealt with governmental matters for eight years and looking back, was the work particularly political during this period?

In fact, it was about seven-and-a-half, I think. Well, that, I think, depends what you mean by “political”. It was not concerned with what you might call “party political disputes” at all. I was concerned only with, obviously, the litigation that the government got involved in. Now, that could be highly political in one sense. I mean, cases like the “Spycatcher” case could be said to be political; how far should the state censor people who want to write about the security service? The “Death on the Rock” also can be said to be highly political. The background of it was ultimately the Irish troubles, of the efforts of the IRA in that case to

⁸ Apropos Peter Wright. See, for example

http://news.bbc.co.uk/onthisday/hi/dates/stories/october/13/newsid_2532000/2532583.stm

⁹ See, for example http://www.bbc.co.uk/history/events/three_ira_members_shot_dead_in_gibraltar



commit murder and destruction in Gibraltar. Other cases, there were a lot of Home Office cases, prisons, a lot of planning cases for the Department of the Environment. Many could be said to be political in a small “p” sense and the work was very varied across the departments of state.

20. Sir John, in 1992 you were appointed as judge of the High Court, Queen’s Bench, having served your apprenticeship as a Recorder. Do these appointments take place by invitation or do you apply to become a full-time judge?

Well, the system has changed since 1992. In 1992 and for a little while after, I think, the appointment to the High Court is by invitation by the Lord Chancellor¹⁰ or the appointment is made by the Queen on the Lord Chancellor’s advice. Now, as is well known, there is a Judicial Appointments Commission. Applications are invited and there are quite extensive, if not exhaustive, procedures for such appointments, but in my time it was by invitation. However, it’s been the convention, certainly since the 19th century, that the Treasury Devil, unless, I suppose, he or she misbehaves himself in some way, is offered a High Court judgeship after he has done, or she has done – there hasn’t been a lady devil yet, I’m sure there will be soon – after he has done five or six years. I did seven-and-a-half which was longer than the average.

There was one Treasury Devil in the 20th century, but only one, who didn’t go on to the High Court bench and that was a man called Valentine Holmes¹¹ who was Treasury Devil during the Second World War and it’s said that there were a lot of furrowed brows at the prospect of him becoming a High Court judge, largely, I think, because he was fond of going to the dog races with his clerk. Why that should have put people off, I don’t know, but the truth may be he didn’t want to be a judge. All the others, however, have become High Court judges.

21. You were knighted during this period and presumably this was a momentous occasion?

For me, certainly, yes. Involved a private audience of the Queen, which to any loyal subject would be momentous, I would imagine.

22. Any recollections of the occasion?

I remember it very well but, of course, I will not describe my private conversation with my sovereign. I should add I had a very good lunch with my wife afterwards.

23. Are there any highlights or general impressions that you can share with us that cover these years?

The years in the High Court?

24. Yes.

Yes, there are one or two things. The High Court judges, there are exceptions and the system has changed somewhat but, broadly, the High Court judges go out on circuit round the country, England and Wales, and they spend about half their time, did then, in London in the Royal Courts of Justice and the rest going out to various provincial centres, and I went out on circuit a lot from Newcastle in the northeast, where I went as often as I could really because I had come from that part of the world and also the judges’ lodgings were very delightful up

¹⁰ At the time Lord Chancellor was James Peter Hymers Mackay, Baron Mackay of Clashfern, KT, PC, QC (born 2 July 1927) Lord Chancellor (1987–1997)

¹¹ Sir Valentine Holmes KC (1888-1956)



there, down to Winchester in the southwest, and I greatly enjoyed going out on circuit. My wife came with me a lot of the time.

You meet the local circuit judges, the high sheriffs, sometimes magistrates and other local people. You get to know bits of the country that perhaps you wouldn't have got to know otherwise. That was a very good experience. The other thing I would mention is sitting in what is now called the Administrative Court, then the Crown Office List, and doing public law cases, the sort that I had done as a barrister, now I was doing as a judge and much enjoyed it.

25. After seven years of being a judge in the High Court, in 1999 you became a Lord Justice of Appeal and, presumably, one of the qualifications for this is to have been a High Court judge?

It's not a statutory or necessary qualification. It's possible legally to be promoted direct from the bar to the Court of Appeal. Indeed, Lord Radcliffe¹² many years before was appointed direct from the bar to the House of Lords, but the customary *cursus honorum* is from the High Court to the Court of Appeal.

26. Sir John, is there anything you can tell us that might epitomise your role over this period, in which there were some very interesting political developments both locally and internationally?

Well, I remember some particular cases. The one that interests the academics most is a case called "Thoburn"¹³ and known as the "Metric Martyrs case" in which I gave a judgment describing and explaining, as I thought it to be, the power relationship between Brussels and Westminster. You won't want me to go into the technicalities of the judgment, but that was a case that's of, if I may say so, some importance or the subject matter is of some importance in relation to the extent to which our membership of the European Union affected our national sovereignty and, on my view, it affected it a lot less than is thought by others. That was quite an important case.

One other I would mention, a case called "Witham"¹⁴, was a case in which the then Lord Chancellor purported to increase the court fees by a very considerable percentage, thus preventing some people from litigating at all in areas where there was no legal aid and we held, that is to say Lord Justice Rose¹⁵ and I, that the order was unlawful because it effectively prevented access to a constitutional right, namely, access to the Queen's courts. So those two are perhaps quite important cases.

A third one was a case about the Chagos Islanders in which I held that the Order in Council to move the Chagos Islanders was unlawful and at first the government was not going to appeal against it, but then I think they did or they made another order and the saga

¹² Cyril John Radcliffe, 1st Viscount Radcliffe (30 March 1899 – 1 April 1977), best known for his role in the partition of British India. First Chancellor of the University of Warwick (1965-77)

¹³ Steve Thoburn v Sunderland City Council [2002] EWHC 195 Admin.

Steve Thoburn, (1965-2004), a Sunderland market trader, was convicted for selling goods only in imperial measures in 2001. <http://news.bbc.co.uk/1/hi/england/wear/3511428.stm>
<http://www.bwmaonline.com/Legal%20-%20Extract%20from%20LJ%20Laws.htm>

¹⁴ Regina v Lord Chancellor, Ex parte Witham [1998] Q.B. 575

See <http://swarb.co.uk/regina-v-lord-chancellor-ex-parte-john-witham-admn-7-mar-1997/>

<http://www.tandfonline.com/doi/pdf/10.1080/10854681.1997.11426956>

¹⁵ Sir Christopher Rose (b. 1937) Lord Justice Rose, Court of Appeal of England and Wales, Privy Council of the United Kingdom. Retired 2006



went on for a long time [*LD - it is ongoing*]¹⁶.

27. Fascinating. Before we come to your visiting academic positions, just to conclude this section, during your career, Sir John, you have reached high judicial office. What would you say were the most significant legalistic developments that occurred during your career?

I should have thought the development of human rights law is probably one that particularly comes to mind. As is well known, we have been signatories to the European Convention on Human Rights for a very long time, since the 50s, but in 1998 the Human Rights Act brought the rights in the European Convention into domestic law so they could be litigated in our own courts and that has really transformed the tensions and relationships between the claims of citizen and claims of government. Areas like the deportation of foreign criminals who may seek to resist the deportation on the grounds they have got children here, fair trial issues, sending people away to places where they claim they might be tortured, all these are issues that have proved extremely lively and are all, so to speak, children of the Human Rights Act.

The Human Rights Act, I think, has been a great force for good, but it has also had its dangers. I said in a lecture once that human rights are like the human heart, the bigger they get, the weaker they get, and I think there is some truth in that. I think we have sometimes elevated the claims of human rights to a point where the public interest has been diminished, but that would be a long and big conversation and the devil would be in the detail.

28. Coming then to your visiting academic positions, over the years you have been a visitor at various academic institutions – Northumbria. You have been an honorary fellow at Robinson College and Exeter College.

That's right.

29. These might be considered standard academic positions. Is there anything that stands out from any of these situations?

I wouldn't describe honorary fellowship of an Oxford and Cambridge College as standard in any sense. I think it's extremely honorific and I have been very delighted to have had those honours. Particularly this year when I have been in Cambridge as the Goodhart Professor, that has allowed me to go very frequently to Robinson to make new friends there as well as meet old ones. I was dining there, a very informal dinner in the senior common room last night, and that has given me much pleasure and I hope that when I have finished here at Cambridge I will maintain those links in a lively fashion. So that's as regards the fellowships.

The Oxford fellowship was of my own old college. I gave one of my Hamlyn Lectures there and I greatly enjoyed being an Honorary Fellow there as well. In 1964 when I was undergraduate at Exeter my now wife and I went to the commemoration ball which was to commemorate, was it 600 years? Yes, that's right, the 600th anniversary of the foundation of the college and then in 2014, 50 years later, we went to the commem ball again to celebrate the 650th anniversary of the college so that was great fun, but that's entertainment rather than work, so to speak.

¹⁶ See <https://www.theguardian.com/world/2017/jun/28/chagos-islanders-take-marine-park-case-to-supreme-court>



30. Sir John, could you tell us something about your association with the Cumberland Lodge?

Cumberland Lodge, yes. Cumberland Lodge is a trust. It occupies a grace and favour house in Windsor Park, it was a royal residence. In the wartime, the Second World War, in 1943, I think, Queen Elizabeth, later the Queen Mother, read a book by a woman called Amy Buller¹⁷ called “Darkness over Germany”. She was a lady from Liverpool, I think, or she worked in Liverpool, who knew the German language very well, had German friends and visited Germany a great deal during the early years of the Nazi era, and she wrote this book, which has been republished, I haven't read it yet but I am going to, essentially about the influences that she saw had brought the Nazi youth under the Nazi flag, so to speak.

The Queen Mother was so impressed by this, and I think the King read it too, that arrangements were made after the war, in 1947, to hand over this house, Cumberland Lodge, to a trust to be run by Amy Buller to bring together young people in this country. Essentially what, for want of a better expression, you might call a Christian flavour, but the idea is that the young people from the universities and elsewhere should come, should learn, should think, should talk freely, should understand different and conflicting ideas and that has been going on ever since. I first went there as a bar student in 1969, I think, because each of the four Inns of Court sent their students for two weekends a year and I got to like it very much and went back several times.

Later when I was at the bar, getting quite senior at the bar, I ran the Inner Temple committee that organised the weekends and then three or four years ago, a few years ago, no, more than that, I think, I was appointed Visitor of Cumberland Lodge in succession to Princess Margaret. The Visitor doesn't have to do any duties unless there is some terrible fall out between the principal and the trustees, which is very unlikely and certainly hasn't happened, but it means I have maintained a very strong link with the place. I was lecturing there last week about extremism and it's a very... I don't know what word to use really other than “excellent”. It's a splendid, a worthwhile institution that does a great deal of good.

31. Sir John, you are coming to the end of your time in Cambridge.....

I am, I am afraid, yes.

32.and could you summarise your activities and give your impressions of your year here, starting perhaps with the topics that you taught?

Well, I gave a course of lectures over two terms on the subject of judicial review and the rule of law to third year undergraduates and I learnt a great deal preparing those lectures. I hope the students did too; I am in the middle of marking the papers. It's been, for me, a very interesting and worthwhile experience teaching the young as opposed to dishing out judgments. It's very different but strangely similar. In each case you are hoping that you will persuade those who are concerned that you are right. Of course, if you are the judge your word goes, subject to any appeal, but you still want those who are concerned to think, “Yes, that's the right intellectual answer,” or, “The right moral answer,” and, of course, you feel the same teaching students.

I think also you learn a lot because you may have thought some particular point to be obvious for 20 or 30 years and then somebody may say something in class and you think, “Oh maybe it's not so obvious after all.” So teaching, I think, is a kind of youth drug, it keeps you intellectually curious. So that's one thing.

The other thing I would say and I would particularly emphasise this, is my wife and I

¹⁷ Ernestine Amy Buller (1891-1974), published *Darkness Over Germany* in 1943, Longmans



are both Oxford graduates, as it happens. We have been made hugely welcome here by the other members of the Law Faculty, by the staff of the Law Faculty, by everyone at Robinson College and by others. My wife has joined a couple of groups here in Cambridge, they have been very welcoming. We could not, I think, have been more kindly and generously treated.

33. Did you come here originally with a particular plan of collaboration with anybody in the faculty?

I had corresponded with Professor David Feldman¹⁸ and with one or two others and it was necessary to decide before I started last October what I was going to do, how I was going to use the year. So I had decided before October that I would give this course of lectures and as regards that I have been greatly helped in the administration and the discussions and in every possible way by others in the Law Faculty. Professor Feldman has been involved with me in running the lectures, though it's me that's given them, and he could not have been more helpful.

34. Any overall conclusions on the opportunities that the chair presents?

Well, the chair, I think, I hope this is right, is designed, frankly, to leave the Goodhart Professor quite a lot of time to decide what to do himself and I think the idea is that it's an opportunity for your own research and writing. I have not exactly been doing any research but I am hoping, and I have started, but it's at early stage still, to use this course of lectures as the foundation for a book, which will be certainly about constitutional law but it will also be... it will be about the morals of constitutional law, if that makes sense. We will have to see what the book says.

35. So that will be your next project when you leave Cambridge?

I think so. I have got one or two other things to do, the odd lecture to give, but that would be a project over some little time, yes.

36. Any other plans?

I have got a novel in my head to write, but I am not going to tell you about that.

37. Well, that sounds very interesting.

Could we touch on some broader legal topics now, your views on major legal issues? You have written several books and chapters in books as well as numerous journal articles. Could we briefly talk about the topics which have interested you especially? I have looked, Sir John, as best I could, at some of your output and several themes seem to stand out for me. Judicial review, constitutional matters, Wednesbury and unreasonableness, yet your first publication listed in your "*Who's Who*" was in 1977 and a "*Dictionary of Medical Ethics*". This stands out from your other...

Yes, maybe the entry is misleading and I hope it isn't. I didn't write the whole dictionary, I contributed one small piece in it and I can't remember what it was about.

It was 1970-something, I think that, 1977 possibly. Yes, it's a long time ago. I have got it on the shelf somewhere, but it's travelled into the distant fog of memory.

38. Two areas on which you have written widely are judicial review and the unreasonable test in Wednesbury.

Yes.

¹⁸ David Feldman, Rouse Ball Professor of English Law (2004-), Exeter College, Oxford (1972-76)



39. How did it come about that you found these topics so very worthy of your attention?

Well, out of my practice at the bar and on the bench. Judicial review is the bread and butter of my work in the courts. It interests me in principle because it is about the relationship between citizen and state. It's therefore about the difference between a free society and an unfree society and that difference seems to me to pervade so much of the important issues that we confront in the modern world, very obviously. Here in England we have a constitutional balance between the courts and the elected government. If the balance goes too far down in one direction you will get the government dictating to the people, if it goes too far down in the other direction you will get the courts elevating human rights above the general interest. It has to be kept in balance. That interests me from the political, moral and legal point of view. It is a constant struggle to keep the balance. So far we have not done too badly. No doubt there is always room for improvement.

40. Your interest in matters constitutional has become very topical because of potential changes flowing from Brexit and the imminent modification of the *status quo* compared to when you wrote your articles. It would be fascinating to know your views on these issues, Sir John.

Well, as far as Brexit is concerned, I have no particular voice on economic matters or the difficulties that are going to be encountered in the negotiation, I can only speak about constitutional questions. One thing that troubles me very greatly has been the use of the referendum. I don't mean because of the result, I mean because of the institution of the referendum. If you have important questions effectively decided by a popular vote through a referendum you are setting up a democratic poll that is in opposition to another democratic poll, namely, representative democracy in the form of the parliament, the legislature. You are having direct democracy and indirect democracy vying for position.

It's well known that many members of parliament in both houses felt in their own political consciences that Remain was the right answer, but they voted for the bill that authorised the Article 50 decision in light of the referendum result. Now, what is their representative politician to do? Is he to follow Edmund Burke¹⁹ and give his electors the benefit of his own conscience, or is he merely to act as a delegate which, it could be said, is what is being done if MPs simply follow what a referendum has told them? I think this is constitutionally troublesome.

It may be that because of the very particular acute importance of the Brexit issue it was justified to hold a referendum. I have not a fixed opinion about that. I think it's probably easier to justify the referendum that took place in 2014 on Scottish independence because that was actually about the breakup of the United Kingdom, but whether or not the Brexit referendum was itself justified, setting up these opposing polls is, I think, constitutionally troublesome. That is the first thing, I would say.

The only other thing I would say is that I have always thought it a mistake to assert, though it is very often asserted, that our sovereignty was diminished by membership of the European Union. What actually happened when we passed the European Communities Act in 1972 is that Parliament delegated the law-making power to Brussels institutions. That's the consequence of section 2 of the statute. Since the European Communities Act can be unmade, just as it was made, we have not lost the sovereignty of the power to legislate for

¹⁹ Edmund Burke, (1729 - 1797). Anglo-Irish statesman, author, orator, political theorist, and philosopher. MP of the Whig party



ourselves. Now, that's easy to say and I am not suggesting that unravelling Brexit is going to be in the least straightforward, but it's important constitutionally to recognise that fact.

41. In 2012 you wrote an article entitled “The Good Constitution” published in the *Cambridge Law Journal* and you said that, “The British constitutional system is evolving from one of parliamentary supremacy to one of constitutional supremacy.”

This is the David Williams Lecture I gave in May 2012. I do think that the sovereignty of parliament needs to be balanced by the importation of basic constitutional principles: fairness, reason and the presumption of liberty. Unless parliament legislates in accordance with those principles it betrays the people because it's not acting then in accordance with the principles that are needed to protect the people.

42. In that article you cite Professor Bogdanor²⁰ as saying that since 1997 the Human Rights Act, together with membership of the EU, has provided us with a new British constitution. Do you think this is desirable or is this process irreversible?

I think we have an evolving constitution. The feature of British public law, constitutional law for which we should, frankly, be most grateful, is its ability to evolve without revolution. We haven't had any revolutions since the 17th century, but we have had enormous constitutional development since then; the enlargement of the franchise and in the last half century the growth of public law, judicial review, in particular. These things are able to happen because the common law is always the same and always different. It can evolve while retaining its essential core. That is something which moves me to believe that it would be a very bad mistake to have a written constitution because a written constitution places all the wisdom of the state in a single moment, whereas, of course, as Burke said, society is a contract between the living, the dead and those not yet to be born, and the methods of the common law reflect that and we are very fortunate that that is so.

43. Sir John, in the same article, page 582, you say that, “Without democracy, law is the puppet of tyrants while, without law, democracy is mob rule.” Do you see judges acting as neutral arbiters in this tension and would this be the “rule of reason” that you mention in your 1998 *Wednesbury* book chapter²¹?

Oh yes, the rule of reason. Judges are not... they are impartial arbiters, they are not neutral arbiters. They are impartial because they will not favour one side over the other for the sake of doing so. They are independent, obviously, for the same reason. Neutral is, however, a different concept. Neutral might mean that they do not bring any sense of particular values to their task but they most certainly do; they are reason, fairness and the presumption of liberty. It is because of values of that sort that they will interpret a statute in one way rather than another. They are impartial, therefore, but not neutral.

44. I found your Hamlyn Lectures booklet, which you mentioned earlier, particularly interesting. [It was] published in 2014, entitled “*The Common Law Position*,” CUP. It has many allusions to the UK's position in the EU, and vis-à-vis the European Court of Human Rights. Could we just finish with some consideration of the issues that arise

²⁰ Professor Vernon Bogdanor, CBE, FBA (b. 1943), research professor at the Centre for British Politics and Government, Kings College London. Emeritus Professor of Politics and Government, University of Oxford, and Senior Tutor and Vice-Principal at Brasenose College

²¹ 1998. *Wednesbury* In Forsyth C & Hare, I *The Golden Metwand and the Crooked Cord*, (festschrift for William Wade - essays on Public law). Clarendon, 185-201



therein?

I will focus just on the first and the third chapters. In the first chapter, “Common Law and State Power,” you emphasise how social change has helped modify the common law. Interestingly, I have recently interviewed Professor John Baker²² and he, on this very issue, says that in an historical sense, as it pertained to Tudor times, found the linkage was problematic. He says, “It is not as straightforward as social historians sometimes assume,” and I wondered if you could comment on that, Sir John?

I’m sure he is right. The effect of social change on the law or the law on social change is not straightforward, but it is a feature of the law that it is ahead of its times and behind the times at the same time. It’s behind the times because there is an extent to which, as judges are not elected, they have to be careful when and how they react. They must not be policy leaders. On the other hand, they have to be ahead of the times because they may see constitutional difficulties on the horizon and they can sometimes give warnings through their judgments about that. It is a process that is difficult to describe because it has so many facets but essentially this is all about the methods of the common law. They are precedent history, the distillation of ideas over time. The law, as I said before, is always the same and always different and that’s why it is possible for social change in the law to inter-react in a way that is not, so to speak, socially violent.

45. Still on the chapter on “Common Law and State Power”, on page 24, you say that, “Judges must not lay down general principles. They can only relate to the facts of the case before them. To do otherwise is to encroach on a legislative function.....”

No, that is a quotation from Lord Sumption²³, who was speaking about the French judges. If the English judges were like that, I think... well, I mustn’t be rude about our continental friends, but I think we are luckier.

46. Sir John, the third piece in this book is on the “Common law in Europe”. Very interesting indeed, and on page 57 you mention Lord Denning²⁴, who likened the EU Treaty to “an incoming tide”....

That’s right.

47.which he implied could not be held back. Do you think that the tide will now ebb once the 1972 Act is repealed?

Yes, plainly, the tide will ebb. Whether it will go out entirely is another matter. After the election last week there is increased talk about Brexit taking perhaps a different shape than had been anticipated by some. I am in no position to predict what the outcome will be, whether the European Court of Justice will retain some kind of jurisdiction over some affairs here after the two-year period has finished, I don’t know, but certainly the tide will ebb, otherwise there would be no Brexit at all.

48. On page 80, you say that, “Although the Human Rights Act cannot force courts to abide by European Court of Human Rights decisions, because the UK has signed the Convention, Article 46.1, we must follow their case law and cases which involve the UK.” So if cases are still sent to the European Court of Human Rights after Brexit, the constitution can presumably still be strongly influenced by European judges?

²² Sir John Hamilton Baker (b.1944), Downing Professor of the Laws of England (1998-2011)

²³ Jonathan Philip Chadwick Sumption, Lord Sumption, (b. 1948), judge, author and mediaeval historian. Justice of the Supreme Court (2012-)

²⁴ Alfred Thompson Denning, Baron of Whitchurch (1899-1999), Master of the Rolls (1962-1982)



Well, it will continue to be influenced by judges at the Strasbourg court so long as we remain signatories to the Council of Europe, but it is to be remembered that the Council of Europe and the European Court of Human Rights is not part of the European Union at all. It is not dependent on our membership of the European Union and if, as is presumably to happen, we leave the European Union, we will remain members of the Council of Europe unless we separately withdraw from it. So that will not change.

I have an issue which I think I discuss in that lecture about the extent to which we should be following the jurisprudence of the Strasbourg court. Obviously, in a case that goes from Britain to Strasbourg our international obligations through our membership of the Council of Europe oblige us to abide by the result, but that is not the same as saying we have to follow the jurisprudence in every other case that Strasbourg decides, whether it's to do with Article 8, family life, or whether it's to do with Article 3, torture, or anything else, and I think, as I have said before, that our own courts and tribunals have sometimes, I fear, been too slavish in following the Strasbourg jurisprudence. Section 2 of the Human Rights Act obliges our courts to take account of the Strasbourg jurisprudence. That does not, to my mind, mean the same as agree with it.

49. Perhaps an unrealistic request, but could you look into your crystal ball and say what, if any, fundamental constitutional changes might ultimately flow from Brexit?

Well, I suppose it depends entirely on the terms on which we come out. There may be implications still arising out of Brexit for the independence of Scotland, although the political picture has changed so rapidly in relation to that, that one really can't say. That aside, I would have thought that there is nothing of a fundamental nature that will change our constitution, partly because we have never lost the sovereignty to legislate for ourselves. Our court system may be strengthened, there may be bigger issues being decided finally by our Supreme Court, that's a possibility, I suppose, but otherwise I would not see further than the outside of the crystal ball.

50. Thank you very much, Sir John, for an extremely interesting account.

A great pleasure.

51. I am very grateful to you.

Not at all.

