JOHN LAWS AND HIS CONTRIBUTION TO PUBLIC AND ADMINISTRATIVE LAW

1. John Laws was a memorable and delightful person and an exceptional and original jurist. Today I have been asked to concentrate on his role as jurist and in particular on his outstanding contribution to public and administrative law. However, before developing that theme, I would like to pay tribute more generally to this remarkable man who so sadly died in April this year.
2. The bare bones of John’s legal career can be shortly stated. Having been called to the Bar in 1970, he quickly proved to be a very successful barrister. In 1984, he was appointed First Junior Treasury Counsel (Common Law), colloquially the Treasury Devil, an exceptionally prestigious and demanding role. He held that position until he was appointed a High Court Judge in 1992. Less than seven years later, he was appointed to the Court of Appeal, where he served as a Lord Justice until he retired from the Bench in 2018.
3. Anyone who met John, even once, would not connect that very dry summary with such a memorable person. Physically, at least in the last twenty years, he presented as a slightly roly-poly figure with thick floppy hair, and piercing, twinkling eyes sheltering behind fairly thickly lensed spectacles, with an engaging but acute expression, and a taste for colourful, some might say arresting, even jarring, ties and socks, and a love of ancient and modern Greece and a fondness for cats. Whether one met him at a social or a professional event. it did not take long to appreciate his unusual combination of intellectual acuity, verbal fluency, moral probity and personal benevolence, spiced with a mild, but unmistakable and endearing dose of eccentricity.
4. Outside court, John was the opposite of a snob: he treated everyone he talked to as his equal, and in court he dealt with advocates and colleagues not according to their status but in accordance with what they said. He genuinely cared about people and is fondly and gratefully remembered by many former law students and pupils for the genuine interest he showed in them, and the practical support which he gave them, particularly in Inner Temple where he was a devoted committed bencher and a memorable Treasurer. His commitment to bar students and to the legal community generally is well demonstrated by the fact that for some fifteen years he was the Visitor at Cumberland Lodge, an educational establishment dedicated to academic workshops, and much used by the Inns of Court for training young barristers. In court and out of court, he always enjoyed a debate, and he could be relied on to conduct any debate with intellectual brilliance, verbal elegance and courteous good humour, and, however strongly he felt, without bitterness or side. The breadth of his knowledge and the depth of his thinking in legal and other intellectual areas was impressive, and, coupled with his erudition in philosophy, history and the classics, this all would have made him an intimidating person had it not been for his relaxed, gregarious, warm and unpretentious character.
5. There was an unusual fearlessness about John, which was closely connected with his commitment to principle and, in a very unpriggish way, his strong sense of morality. This manifested itself when he was at the Bar, both in practice and in his private life. As another very impressive and admirable judge, Stephen Sedley, explained in a lecture four years ago[[1]](#footnote-1), as a barrister John placed the development of a principled body of law ahead of the need to win a particular case. Stephen referred to the 1988 Parkhurst Prison case[[2]](#footnote-2), where John appeared as counsel for the Government and:

“*declined to invite the House of Lords to reverse the High Court’s landmark decision in St Germain[[3]](#footnote-3) that the procedures of prison boards of visitors were justiciable – a reversal that would have won him the case – and instead undertook [a] Sisyphean task*.”

It is brave for any advocate to abandon an argument that might win the case, but John would always do so if winning the point would leave the law in an unsatisfactory state. As a result, in the Parkhurst Prison case, John received the unusual accolade of a kind comment from Lord Bridge in his judgment for his “*eminently sensible and commendable attitude*”[[4]](#footnote-4).

1. As for his personal life, his bravery and sense of principle led to a rather unexpected contribution to the law of England. In 1980, when he was well launched on his career at the Bar, a hard-core pornography shop opened near his home. John led a small group of local residents in bringing proceedings for an injunction seeking to shut down the business. His argument was that the inherent nature of the business was such as to amount to a nuisance because (i) it was inherently offensive to local residents and (ii) it could attract people who might accost local residents. Although these arguments were controversial, Vinelott J was persuaded to grant an interlocutory injunction closing the shop. This decision, which is reported as Laws v Florinplace in the All England Law Reports[[5]](#footnote-5), and although the hearing only resulted in an interlocutory judgment, the pornography shop lost heart and that was that.
2. Although John had strong moral beliefs, he could not have been less of puritan or a harsh judge of other people – quite the contrary. Although he had very high standards of intellectual and moral standards for himself, standards which he admirably stuck to, he was tolerant and at times indulgent when it came to the foibles and inconsistencies of others. I quickly came to appreciate his personal qualities when we were colleagues in the Court of Appeal: any court with John on the bench had an ambiance which was stimulating and friendly, but John was always focussed and assiduous.
3. As to John’s assiduity, I recall a small incident just after I had sat with John on an appeal in 2005. The next day, I was in the same courtroom with other judges on a different appeal, and in that second appeal, I happened to be sitting in the chair which John had occupied the day before. I picked up what I thought was my notebook and on opening it discovered it was John’s. I still remember being overwhelmed by the full, accurate and well expressed note that John had made of the earlier hearing, coupled with perceptive comments, and all written in clear handwriting, while he appeared to be wholly focussed on presiding over and engaging in the oral argument. Particularly to someone such as me who is incapable of taking a note which even he can read, John’s notes were remarkably impressive.
4. Turning to his legal abilities, John was not only a very able public lawyer; he was also lucky in his timing – and, however able we are, we all need luck. When John was called to the Bar, judicial review, JR, was something of a niche area. In the next fourteen years it mushroomed, so that by the time he was appointed Treasury Devil, it had become possibly the fastest growing area of litigation in the courts of England and Wales. And the volume of JR cases was still on the up when John was appointed a Judge in 1992. On top of that, of course, his time as a judge coincided with some fundamental constitutional changes and issues, including the development and integration of EU law, the passing of the Human Rights Act, the HRA, and internal constitutional changes including devolution legislation the Constitutional Reform Act.
5. I propose first to discuss some aspects of John’s outstanding contributions to JR and human rights law, and will then turn to his remarkable contributions to constitutional law. Before I do so, I should mention that, although generally I deprecate including many or longish quotes in lectures – as in judgments - I have broken that rule in this instance. Not only do I think that this is justified because this talk is about John’s contributions, but it is also because I cannot match, let alone improve on, his way with words, which managed to be both punchy and elegant.
6. John’s deep understanding of JR is nowhere better illustrated than in his judgment in the 2010 Divisional Court Cartcase[[6]](#footnote-6), which was described by Lady Hale in the Supreme Court as “*a typically subtle and erudite judgment*”[[7]](#footnote-7) - and she also referred to John having “*killed*” one particular argument “*stone dead*”[[8]](#footnote-8). And his Cart judgment was described by Lord Carnwath in the 2019 Supreme Court Privacy International case[[9]](#footnote-9) as a “*scholarly account*” of the “*supervisory role of the King’s court (curia regis), or the King’s or Queen’s Bench Division of the High Court as it became… tracing it back to the time of William I*”. Indeed, all the judgments in the Privacy International case are peppered with approving references to John’s Cart judgment.
7. Traditionally at least, the basic principle of JR was that judges would only quash a decision if it had not been arrived in accordance with the law, which rarely involved the court enquiring into the merits of a decision. That could only be done if the decision could be shown to be irrational in accordance with the principle laid down in the famous 1947 Wednesbury[[10]](#footnote-10) case. In 1994, John expressed the point with characteristic elegance and clarity in the High Court Fewings case[[11]](#footnote-11):

“*Although judicial review is an area of the law which is increasingly, and rightly, exposed to a good deal of media publicity, one of its most important characteristics is not, I think, generally very clearly understood. It is that, in most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, ‘Is this decision right or wrong?’ …. [I]t is essential that those who espouse either side of the argument should understand beyond any possibility of doubt that the task of the court, and the judgment at which it arrives, have nothing to do with the question, ‘Which view is the better one?’. Otherwise, justice would not be seen to be done…*”.

1. An important aspect of JR developed in the 1980s was the principle of legitimate expectation – the public law equivalent of estoppel. When he was Treasury Devil, John as an advocate representing the Government, opposed the idea that the courts should develop that principle as part of English law – for instance the House of Lords Findlay case[[12]](#footnote-12). And, early on in his judicial career in 1994, as Laws J in the Richmond-upon-Thames case[[13]](#footnote-13), he rejected the notion that “*the law as it has developed will encompass and enforce not only procedural but also substantive legitimate expectations*”, and said that “*the law of legitimate expectation, where it is invoked in situations other than one where the expectation relied on is distinctly one of consultation, only goes so far as to say that there may arise conditions in which, if policy is to be changed, a specific person or class of persons affected must first be notified and given the right to be heard*”.
2. However, a broader approach to legitimate expectation was articulated by the Court of Appeal in the 1999 Coughlancase[[14]](#footnote-14). John had a peripheral involvement in that case having given permission to bring earlier proceedings[[15]](#footnote-15).
3. Much more importantly, in a pithy concurring judgment in the Begbie case[[16]](#footnote-16), John considered the doctrinal basis for substantive legitimate expectation following Coughlan. It was an important first salvo of his proposed and ambitious re-formulation of the law of legitimate expectation and indeed of the law of JR more generally, both in conceptual terms and in terms of the judicial function. He observed that “*abuse of power has become, or is fast becoming a root concept which governs and conditions our general principle of public law”*, and which, he said, was the rationale for Wednesbury[[17]](#footnote-17) irrationality, the requirement of proportionality, and the Court’s insistence on procedural fairness[[18]](#footnote-18).
4. In considering the standard of review which the Court should apply when weighing the requirements of fairness against the public interest, John expressed doubt on the distinction set out in Coughlan, in which procedural expectations were said to be reviewable according to the Wednesbury principle, whereas substantive expectations were said to be assessed by recourse to abuse of process and fairness. He suggested that, rather than viewing Wednesbury and Coughlan standards as a dichotomy, the court should see them and as being on a sliding scale of review. John said this:

“*Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another. It is now established that the Wednesbury principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake…*”.[[19]](#footnote-19)

1. He then explained the effect of his analysis in these terms:

“…*The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant’s stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare Wednesbury basis …*

*In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players… In such a case the court’s condemnation of what is done as an abuse of power, justifiable … only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.*

*There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court’s supervision. ….* .”[[20]](#footnote-20)

1. The contribution of this judgment to public law lay both in the high quality of the intellectual analysis and in the practical, albeit not over-prescriptive, guidance given for judges trying future cases. The soundness of John’s refinement of the doctrine of legitimate expectation over the analysis in Coughlan is highlighted by the fact that Stephen Sedley, who had been party to the earlier decision, expressly agreed with it[[21]](#footnote-21).
2. John developed his thoughts further in Abdi and Nadarajah, where he said[[22]](#footnote-22) in a characteristic passage, that it was “*superficial*” to suggest that “*for a legitimate expectation to bite there must be something more than failure to honour the promise in question, and then to list a range of possible additional factors which might make the difference*”, explaining that it was “*superficial because in truth it reveals no principle*”. He then went on to say that, although abuse of power may be the root concept governing principles of public law, it does not tell you “*what is lawful and what is not*”.
3. John then examined legitimate expectation in the context of public law, proposing a “*good administration*” justification for the protection of legitimate expectation.[[23]](#footnote-23). He observed that “*the principle behind this proposition?”* was “*said to be grounded in fairness, and no doubt in general terms that is so*”. However, he said that he “*would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public*.”, which he described as “*a legal standard which … takes its place alongside such rights as fair trial, and no punishment without law.*” And he explained that “*the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response … having regard to a legitimate aim pursued by the public body in the public interest*.”
4. In these words, John introduced the notion of “proportionality” which had previously not been an established test within English public law, suggesting that it was the appropriate test to protect the values which he said lay at the centre of legitimate expectation. Proportionality had formally entered English law with the enactment of the HRA, as it was (and remains) one of the fundamental yardsticks, perhaps the fundamental yardstick, by reference to which the justifiability of a measure impinging on human rights is to be assessed according to constant Strasbourg court jurisprudence. There had been a number of cases in the UK courts where the difference between the Convention test of proportionality and the traditional JR test of Wednesbury rationality had been judicially discussed[[24]](#footnote-24), but this was perhaps the first time that a judge had held in terms that proportionality should be introduced into the field of domestic JR.
5. And the implications were revolutionary. John was apparently suggesting that proportionality may form a single basis for all instances of legitimate expectation claims, regardless of whether such expectation was procedural or substantive. Carried to its logical conclusion, it could be said to lead to the replacement of Wednesburyunreasonableness, irrationality, Lord Greene’s tablet of stone which has stood since before 1950, with new the new, human rights-based notion of proportionality. Not only is proportionality a different and less rigid and formalistic test than irrationality, but it involves the court often investigating the merits of a decision or action of the executive, indeed often carrying out a balancing exercise – contrary to the proposition which John had expressed in the Fewings case[[25]](#footnote-25) five years earlier. So far, the Supreme Court has flirted with this idea, admitting its attractions and accepting that it at least justifies saying that irrationality is more flexible than had been previously thought; however, the Supreme Court has not formally changed the law – at least not yet[[26]](#footnote-26). Nonetheless, I think there is considerable force in the notion that the tides are moving in the John Laws direction, and by 2025, it may very well transpire that John was twenty years ahead of his time.
6. In taking this course, John was doing something which was characteristically typical and inspired. I have already described it as revolutionary, but it was also, paradoxically, in the best traditions of the common law, whose unique combination of practicality, adaptability and principle has ensured that it continues to flourish in many jurisdictions as well as dominating the international commercial world. One does not have to go back to the Norman Conquest or the Ecclesiastic Courts to see how the common law adopted ideas and concepts from other systems. Many of the innovations which served to justify the great Lord Mansfield’s reputation as *“the founder of commercial law of this country*”[[27]](#footnote-27), were based on mainland European civilian law, the lex mercatoria[[28]](#footnote-28).
7. In the 2008 Bhatt Murphy case, having reiterated the important role of proportionality in legitimate expectation cases[[29]](#footnote-29), John said that a legitimate expectation claim would only succeed if it could be shown that public body was proposing “*to act so unfairly as to perpetrate an abuse of power*”.[[30]](#footnote-30) Accordingly, he made it clear that the principle could not apply in every case where a public authority changed tack[[31]](#footnote-31), a view which was subsequently quoted with approval by the Supreme Court[[32]](#footnote-32). Similarly, John’s proposition in that case that “*the promise or practice…must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy’s continuance is assured*”[[33]](#footnote-33) was endorsed by the Supreme Court[[34]](#footnote-34).
8. Shortly after he became a Judge, John had raised the notion that the common law could be informed by human rights law as developed by the Strasbourg court, in a 1993 article In Public Law[[35]](#footnote-35). He suggested that if the common law was more receptive in this way, there would be no need to incorporate the Convention into UK law as was done five years later through the HRA. In that article, he referred to proportionality as “*a ready-made tool in our hands*” for use in public law. However, when the HRA came into force, no judge was more impressive than John when it came to explaining the principles of the Convention and incorporating them into domestic law.
9. Thus, in the 2007 Al Rawi case[[36]](#footnote-36), John said this:

“*Reasonableness and proportionality are not formal legal standards. They are substantive virtues, upon which, it may be thought, lawyers do not have the only voice: nor necessarily the wisest. Accordingly, the ascertainment of the weight to be given to the primary decision-maker's view (very often that of central government) can be elusive and problematic… The courts have a special responsibility in the field of human rights. It arises in part from the impetus of the [HRA], in part from the common law's jealousy in seeing that intrusive state power is always strictly justified. The elected government has a special responsibility in what may be called strategic fields of policy, such as the conduct of foreign relations and matters of national security. It arises in part from considerations of competence, in part from the constitutional imperative of electoral accountability… The court's role is to see that the Government strictly complies with all formal requirements, and rationally considers the matters it has to confront. Here, because of the subject matter, the law accords to the executive an especially broad margin of discretion*.”

These observations were quoted in full and said to have “*much wisdom* by Lord Sumption giving the leading judgement of the Supreme Court in the Lord Carlile case[[37]](#footnote-37).

1. In a dissenting judgment in the 2009 Wood case[[38]](#footnote-38), which concerned the reach of the privacy right in Article 8 of the Convention, John described the subject-matter of that right as “*the personal autonomy of every individual*”, which he said:

“*marches with the presumption of liberty enjoyed in a free polity: a* *presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the article 8 jurisprudence, this presumption means that, subject to [certain] qualifications …, an individual's personal autonomy makes him … master of all those facts about his own identity, such as is name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the ‘zone of interaction’ between himself and others …*

*This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think that there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's autonomy must … attain ‘a certain level of seriousness’. Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys on the facts a ‘reasonable expectation of privacy’ … . Thirdly, the breadth of article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8(2).”*

1. Six years later, in the Supreme Court J 38 case[[39]](#footnote-39), in separate judgments, Lord Toulson and Lord Clarke (with both of whom Lord Hodge agreed) not only cited[[40]](#footnote-40) John’s dissenting judgment, but agreed with it. Indeed, Lord Toulson set out an extensive passage from John’s judgment, including the passage I have just quoted, saying that he had done so “*because I agree with it and cannot improve on it*”[[41]](#footnote-41).
2. It is interesting to note that John’s thinking in these JR and human rights judgments were presaged in an article[[42]](#footnote-42) he wrote in 1997 on Abuse of Power. In that article, he referred to the control of abuse of power as being not only a thread which runs through public law, but also one pervades private law, given the need to subject private power to judicial control. He stated that “*the prevention of abuse of power is nowadays a preferred, or at least popular, categorisation of the nature and aims to the public law jurisdiction*”. Reflecting also human rights, John also referred to “*the Kantian ideal of sovereignty of the individual…[where] any interference with another’s liberty stands in need of justification*”. After referring to employment law cases, he extracted a single principle, namely, that “*the common law will not permit the abuse of power*”, and characteristically referred to this as “*a form of benign bias*” and “*a means of making sense of sometimes conflicting values*”. He also elegantly explained that “*behind [the abuse of power] lies the true difference between private and public law; whereas for the private individual everything is permitted that is not forbidden, for the public body, all its actions must be justified by positive law*”.
3. I turn now to John’s contributions to constitutional law, which are at least as remarkable as his contributions to JR and human rights. Before turning to John’s judicial decisions on constitutional issues, it is only right to refer to his illuminating extra-judicial writings on the constitution in general and the role of judges in particular. These extra-judicial writings and lectures almost vibrate with ideas and intellect.
4. Not long after he became a Judge, John produced a paper on “Law and Democracy”[[43]](#footnote-43), in which he wrote:

“*Though our constitution is unwritten, it can and must be articulated. Though it changes, the principles by which it goes can and must be elaborated. They are not silent; they represent the aspirations of a free people. They must be spoken and explained and, indeed, argued over. Politicians, lawyers, scholars, and many others have to do this. Constitutional theory has, perhaps, occupied too modest a place here in Britain, so that the colour and reach of public power has not been exposed to a glare that is fierce enough. … The imperatives of democracy and fundamental rights do not only demand acceptance; they demand a vindication that survives any test of intellectual rigour. There must always be voices to speak for them, in and out of the law. By their very nature, these imperatives require also that their enemies be given full rein to express their views. It means that the defence of these values cannot be assumed, but must always be asserted. There is no point at which there is nothing more to say; there is no moment at which they are indefensible, no imaginable circumstances in which to consign them to silence…”*.

1. In 2013, John gave the 2013 Hamlyn Lectures under the title The Common Law Constitution[[44]](#footnote-44), in which he discussed the constitutional balance between the rule of law and democratic government in the United Kingdom. His basic point was that the common law was the unifying principle of the UK constitution, and that this distinctive characteristic has endowed the state with profoundly beneficial effects. In the course of his typically erudite, but entertaining, lectures, he examined what he regarded as two contemporary threats to the constitutional balance: extremism and the effect of EU laws. He described the judicial role in developing the common law as involving a “*fourfold method*”[[45]](#footnote-45), namely evolution, experiment, history, and distillation.
2. In the same passage[[46]](#footnote-46), John’s view of the nature and function of the practice of law was brilliantly expressed in these terms:

“*The law is not a science, for its purpose is not to find out natural facts. It is an art as architecture is an art: its function is practical, but it is enhanced by such qualities as elegance, economy and clarity. The law has two practical purposes: first, to require, forbid or penalise forms of conduct between citizen and citizen, and citizen and State; secondly, to provide formal rules for classes of human activity whose fulfilment would otherwise be confused, uncertain or ineffective. Laws in the former category include every provision for a remedy*”.

1. Three years later, in a paper on Judicial Activism[[47]](#footnote-47), based on a speech he gave at the 2016 ALBA Summer conference, John characterised the judiciary as “*the guardians of constitutional principle*”, and suggested that when construing statutes which touch the constitution, judges make law by insisting on the vindication of constitutional principle. Having said that, he acknowledged the need for judicial restraint where decision-making moves into areas of policy. Thus, while a balance must be struck between public and private interests, he suggested that judges, as guardians of constitutional principle, have a duty to ensure that competing interests are considered by the primary decision-maker, but that “*it is quite another [thing] to require the court to strike the balance itself*”. He rejected the idea that judicial law-making was an “*affront to democratic sensitivity*”, pointing out that democracy was premised upon reason, fairness, freedom and legal certainty, and it is within these limits that the constitutional balance is struck, the Courts being “*invitees on a territory that is not their own*”. He concluded this paper stating “*the legislature is by nature given to experiment. The common law is by nature given to conversation. Judges do, and must, make law; but they do it, not by re-inventing the wheel, but only by making new lamps from old*”.
2. This view that judges can and should make the law is controversial and has been characterised by some writers as being both brilliant and wrong. I think that this characterisation is half-right: John was quite correctly described by Christopher Forsyth as writing “*whether on or off the bench, with brilliance and brio*”, but Professor Foryth was, wrong in my view when he described John’s argument as “*unorthodox and potentially dangerous*”. The notion that John’s view was inconsistent with the notion of Parliamentary supremacy seems to me to ignore, for instance, John’s reference to the courts being “*invitees*”. The idea that judges can challenge the legislature seems positively healthy, and is not inconsistent that, ultimately, the legislature can overrule the judges.
3. In the 1998 Witham case[[48]](#footnote-48), John said that:

“*In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose* *vires in main legislation specifically confers the power to abrogate*.”

Yet again, John had the unusual accolade of having this first instance judgment of his cited in the UK top court as representing the law – remarkably in no fewer than six subsequent House of Lords/Supreme Court cases[[49]](#footnote-49). But more to the specific present point, in this passage, John clearly acknowledged the “*legislative supremacy*” of Parliament, and its ultimate ability to trump any “*constitutional right*”.

1. John’s judgment in the 2002 Divisional Court Thoburn case[[50]](#footnote-50), also known as the Metric Martyrs case, included a master class explaining the way in which EU law interacts with domestic law, and the constitutional basis for that interaction. Given that Brexit is around the corner, it would not perhaps be sensible to discuss that aspect of the judgment in any detail. However, what is very much worth discussing and will outlast the reverberations of Brexit, is John’s innovative conception of a new categorisation of statutes. In that connection, he said this[[51]](#footnote-51):

“*In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental… . And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are of necessity closely related: it is difficult to think of an instance of (a) that is not also an instance of (b). The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998.”*

1. Of course, being John, he did not vouchsafe this insight and then walk away: he went on to explain the consequences. As to the constitutional implications[[52]](#footnote-52):

“*It gives us most of the benefits of a written constitution, in which fundamental rights are accorded special respect. But it preserves the sovereignty of the legislature and the flexibility of our uncodified constitution. It accepts the relation between legislative supremacy and fundamental rights is not fixed or brittle: rather the courts (in interpreting statutes, and now, applying the HRA) will pay more or less deference to the legislature, or other public decision-maker, according to the subject in hand*”.

1. As to the practical consequences, John described them in these terms[[53]](#footnote-53):

“*Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's actual – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes*”.

1. This development of the conception and consequences of the notion of constitutional and ordinary statutes has been cited with approval in three Supreme Court cases[[54]](#footnote-54), in one of which Lord Mance and I in a joint judgment paid tribute to John’s “penetrating analysis”[[55]](#footnote-55).
2. I mentioned earlier John’s strong sense of principle, and in that connection it is right to refer to another aspect of his contribution to the law, namely in relation to the connection between law and religion. John was a strong Anglican, and a very active member of the Ecclesiastical Law Society, and sat on the editorial board of its Journal and frequently contributed to it as a book reviewer. But he was firmly of the view that church and state were to be kept separate. In the 2010 McFarlane case[[56]](#footnote-56), he put the nub of the point very elegantly:

“*In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and [the Convention] offer vigorous protection of the Christian’s right and every other person’s right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society. … . The Judeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy, and the liturgy and practice of the established church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since, in the eye of everyone save the believer, religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may, of course, be true, but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer who is alone bound by it; no one else is or can be so bound, unless by his own free choice he accepts its claims.*”

1. Let me end my tribute to this remarkable judicial figure by addressing something of a metaphorical elephant in this virtual room. I have referred more than once to the very high quality of John’s judgments, both in contents and in style. I have also referred more than once to the very unusual degree of enthusiastic approval which John’s judgments received from the Supreme Court. The question to which this inevitably gives rise is: Why did this remarkable figure not get there in person? To my knowledge, various explanations have been advanced, but I am unpersuaded that any of them is justified. I have no satisfactory answer to the question, other than to say that, as I suggested earlier, luck or chance has substantial influence on all events and issues in life – a much greater influence than most of us like to admit. I am afraid that Shakespeare’s *slings and arrows of outrageous fortune*[[57]](#footnote-57) play a significant part in judicial careers just as in all other areas of life. While disappointed, John accepted his undeserved non-promotion with all the graciousness and good humour that anyone who knew him would have predicted. He would I hope have consoled himself with the thought that, both in terms of quantity and quality, he made as great a contribution from the Court of Appeal to English public and constitutional law as Lord Denning made to English private law in the previous judicial generation.

David Neuberger

July 2020

1. Sir Stephen Sedley, The Lion Beneath the Throne: Law as History, the 16th Annual Sir David Williams Lecture, Faculty of Law, University of Cambridge (5 March 2016) [↑](#footnote-ref-1)
2. R (on the Application of Leech) v Parkhurst Prison [1988] UKHL 16, [1988] AC 533 [↑](#footnote-ref-2)
3. Reg, v. Board of Visitors of Hull Prison, *ex parte* St. Germain [1978] Q.B. 678 [↑](#footnote-ref-3)
4. *Ibid* [↑](#footnote-ref-4)
5. Laws v Florinplace Ltd[1981] 1 All ER 659, subsequently described (i) by the Law Lords (via the authority relied on, Thompson-Schwab v.Costaki [1956] 1 W.L.R. 335) as a type of case which was “relatively rare” in Hunter and Others v. Canary Wharf Ltd [1997] AC 65, and (ii) as “borderline” and “tricky” in other books – eg by Donal Nolan in The Essence of Private Nuisance in Modern Studies in Property Law, ed Ben McFarlane and Sinead Agnew, Vol 10, p 77 [↑](#footnote-ref-5)
6. R (on the application of Cart) v The Upper Tribunal [2010] EWCA Civ 859, [2011] QB 120, paragraphs 43-51 [↑](#footnote-ref-6)
7. Cart v The Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663, paragraph 31 [↑](#footnote-ref-7)
8. *Ibid*, paragraph 37 [↑](#footnote-ref-8)
9. R (on the application of Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22 , [2019] 2 WLR 1219, paragraph 31 [↑](#footnote-ref-9)
10. See Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 [↑](#footnote-ref-10)
11. R v Somerset County Council, *ex parte* Fewings [1995] 1 All ER 513, 515 [↑](#footnote-ref-11)
12. Re Findlay [1985] AC 318, 325, and see also R v Home Secretary *ex parte* Ruddock [1987] 1 WLR 1482 [↑](#footnote-ref-12)
13. R v Secretary of State for Transport, *ex parte* Richmond-upon-Thames LBC [1994] 1 WLR 74, 92-93 [↑](#footnote-ref-13)
14. R v North and East Devon Health Authority, *ex parte* Coughlan [1999] EWCA Civ 1871; [2001] QB 213 [↑](#footnote-ref-14)
15. *Ibid*, para 16 [↑](#footnote-ref-15)
16. R v Education Secretary, *ex parte* Begbie [1999] EWCA Civ 2100; [2000] 1 WLR 1115  [↑](#footnote-ref-16)
17. See Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 [↑](#footnote-ref-17)
18. Begbie, para 76 [↑](#footnote-ref-18)
19. *Ibid*, paragraph 78 [↑](#footnote-ref-19)
20. *Ibid*, paragraphs 80-82 [↑](#footnote-ref-20)
21. *Ibid*, para 86 [↑](#footnote-ref-21)
22. R (Abdi and Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363, paragraph 67 [↑](#footnote-ref-22)
23. *Ibid*. paragraph 68 [↑](#footnote-ref-23)
24. See eg per Lord Steyn in R v Secretary of State For The Home Department, *ex parte* Daly [2001] 2 AC 532,

[2001] UKHL 26, paragraph 26 [↑](#footnote-ref-24)
25. See footnote 11 [↑](#footnote-ref-25)
26. See eg,  Mandalia v Secretary of State for the Home Department [2015] 1 WLR 4546 [2015] UKSC 59, paragraph 29 and Re Finucane’s Application for Judicial Review [2019] NI 292, [2019] UKSC 7, paragraph 59, Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69, [2016] AC 1355, paras 131-134, Kennedy v Charity Commission  [2015] AC 435, [2014] UKSC 20, paragraph 51, and Pham v Secretary of

State for the Home Department [2015] 1 WLR 1591,  [2015] UKSC 19, paragraphs 60, 94-96, 113-119 [↑](#footnote-ref-26)
27. Buller J in Lickbarrow v. Mason (1787) 2 TR 63, 73, [↑](#footnote-ref-27)
28. See e.g. Luke v Lyde (1759) 2 Burr 882 at 887, cited by Scrutton, General Survey of the History of the Law Merchant in Select essays in Anglo-American Legal History, (Boston, 1909) vol 3, and by Bradlee, History of the Law Merchant (Boston 1929) [↑](#footnote-ref-28)
29. R (on the application of Bhatt Murphy (a firm)) v Independent Assessor [2008] EWCA Civ 755, paragraph 51 [↑](#footnote-ref-29)
30. *Ibid* paragraph 50 [↑](#footnote-ref-30)
31. *Ibid*, paragraph 68 [↑](#footnote-ref-31)
32. Re Finucane’s Application for Judicial Review [2019] UKSC 7, [2019] 2 All ER 191, paragraph 60 [↑](#footnote-ref-32)
33. Bhatt Murphy,paragraph 43 [↑](#footnote-ref-33)
34. R (on the application of Davies) v Revenue and Customs [2011] 1 WLR 2625, [2011] UKSC 47, paragraph 49 [↑](#footnote-ref-34)
35. Is the High Court the Guardian of Fundamental Constitutional Rights? [1993] Public Law 59 [↑](#footnote-ref-35)
36. R (Al Rawi) v Secretary of State for Foreign and Commonwealth Affairs [2006] EWCA Civ 1279, [2008] QB 289, paras 146-148 [↑](#footnote-ref-36)
37. R (on the application of Lord Carlile of Berriew QC) v Secretary of State for the Home Department [2014] UKSC 60, [2015] 1 AC 945, paragraph 33 [↑](#footnote-ref-37)
38. R (Wood) v Commissioner of Police of the Metropolis [2009] EWCA Civ 414, [2010] 1 WLR 123 [↑](#footnote-ref-38)
39. Re J38 Application for Judicial Review (Northern Ireland) [2015] UKSC 42, [2016] AC 1131 [↑](#footnote-ref-39)
40. J38, paragraphs 85-86 and 105 [↑](#footnote-ref-40)
41. J38, paragraphs 85-86 [↑](#footnote-ref-41)
42. John Laws, Public Law and Employment Law: Abuse of Power [1997] Public Law 455 [↑](#footnote-ref-42)
43. John Laws Law and Democracy [1995] Public Law 72 [↑](#footnote-ref-43)
44. Sir John Laws, The Common Law Constitution, Hamlyn Lectures 2013 [↑](#footnote-ref-44)
45. *Ibid*, preface, page xiii [↑](#footnote-ref-45)
46. *Ibid* [↑](#footnote-ref-46)
47. John Laws Judicial Activism <http://judicialpowerproject.org.uk/wp-content/uploads/2016/12/Laws-text-final.pdf> [↑](#footnote-ref-47)
48. R v Lord Chancellor, *ex parte* Witham [1998] QB 575, 581 [↑](#footnote-ref-48)
49. Most notably Cullen v. Chief Constable of the Royal Ulster Constabulary [2003] UKHL 39, [2003] 1 WLR 1763, paragraphs 18 (Lord Bingham), 45 (Lord Hutton), and 87 (Lord Rodger); but also in Watkins v Home Office [2006] UKHL 17, [2006] 2 AC 395, paragraphs 24 and 58, R v Secretary of State for the Home Department, *ex parte* Pierson [1997] UKHL 37; [1998] AC 539, HM Treasury v Ahmed [2010] UKSC 2 ( [2010] 4 All ER 829, paragraph 240, R (on the application of Gujra) v Crown Prosecution Service [2012] UKSC 52, [2013] 1 AC 484, paragraph 107, and R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51, [2017] 3 WLR 409, paragraphs 83-84 [↑](#footnote-ref-49)
50. Thoburn v Sunderland City Council [2003] QB 151, [2002] EWHC 195 (Admin), [↑](#footnote-ref-50)
51. *Ibid*, paragraph 62 [↑](#footnote-ref-51)
52. *Ibid*, paragraph 64 [↑](#footnote-ref-52)
53. *Ibid*, paragraph 63 [↑](#footnote-ref-53)
54. R (on the application of HS2 Action Alliance Ltd) v The Secretary of State for Transport [2014] UKSC 3, [2014] WLR 324, paragraphs 207-208 , R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5, [2018] AC 61, paragraph 67, Privacy International, paragraph 120. [↑](#footnote-ref-54)
55. HS2 Alliance, paragraph 208 [↑](#footnote-ref-55)
56. McFarlane v Relate Avon Ltd [2010] EWCA Civ 880, [2010] IRLR 872, paragraph 21 [↑](#footnote-ref-56)
57. Hamlet, Act III, Scene 1 [↑](#footnote-ref-57)