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BOOK REVIEWS

The Constitutional Balance. By JOHN LAWS. [Oxford: Hart Publishing, 2020. xx + 144 pp. Hardback £30.00. ISBN 978-1-50993-545-1.]

I was privileged to work for more than 40 years with John Laws as bar adversary, judicial colleague and friend. As observed in the illuminating preface by David Feldman and Nigel Pleming: "It is unusual to be able to trace an explicit and developing political and moral philosophy through a judge's judgments and extra-judicial writing" (p. xix). From many occasions reading John's judgments, and sitting with him in the Court of Appeal, I always admired his combination of a very practical and uncomplicated approach to the matter in hand, and an ability – even determination – to set it where possible in a wider theoretical and philosophical context. The present work is a typically ambitious project, and can be seen as the culmination of that process. His objective, as he says in his introduction, is a "wise accommodation" between the claims of the Rule of Law and the claims of democracy, to be struck "on an anvil of principle" (p. 1). For this he requires, we are told, "a wide canvas" (p. 1):

> the themes of this book describe the contours of fundamental rights and freedoms: the constitutional pillars of reason, fairness, and the presumption of liberty, and their relation to the Rule of Law; the virtue and vice of democracy; the contrasting moralities of law and politics; the dilemmas of legislative sovereignty and the fictitious notion (as I shall claim) of Parliamentary intent; the imperative of free thought and speech.

A key theme, explained in the first chapter, is to define the Rule of Law. He rejects on the one hand the "thin theory" ("a very weak soup indeed" (p. 15)) which requires no more than that state power be exercised in accordance with established laws, even if they violate basic principles of civilised life. He is almost equally critical of the "thick theory", as espoused by such as Lord Bingham, which incorporates protection of human rights and other "virtues of a decent state", and in effect "collapses the Rule of Law into whatever set of socio-political norms … is favoured by any theorist who thinks about the matter" (p. 15). His solution is to link the process of impartial and independent adjudication with his "core standards" of reason, fairness and the presumption of liberty.

These core standards, later described as the "foundational principles of the common law", run through the whole book. As explained in Chapter 3, they are seen as key also to achieving a balance between the competing moralities: the "Kantian" morality of law centred "on the autonomy of every individual", and the "utilitarian" morality of government centred "on the interests or well-being of the people as a whole" (p. 38). The three principles are developed more fully in Chapter 5, which seeks to relate them to the established case law. We learn for example that "reason" includes the concept of *Wednesbury* reasonableness, which receives a perhaps surprisingly strong defence (at least in its more flexible form as found in some later cases). Fairness is extended to encompass legitimate expectation, a concept with which John had struggled judicially on several occasions (learning which I later attempted not very successfully to unravel in a Privy Council judgment: *United Policyholders Group & Ors v The Attorney General of Trinidad and Tobago* [2016] UKPC 17). We learn that he has moved away from "abuse of power" as the

"root concept" (as expressed by him in *Ex parte Begbie* [2000] 1 W.L.R. 1115), to a preference to articulation by reference to his three core principles.

The presumption of liberty is taken as encompassing the ideas that for individual citizens everything that is not forbidden is allowed, while for public bodies, everything that is not allowed is forbidden. Here, as on several occasions in the book, John prefers to rely on his own earlier judicial statements, rather than higher authority. In this case the reference is to a first instance judgment (*Ex parte Fewings* [1995] 1 All E.R. 513), noting modestly that "(t)he case went to the Court of Appeal, but this passage was not I think disapproved" (p. 81). That note of uncertainty is understandable. Having appeared for the successful applicant in that case, I recall thinking that John's masterly exposition of the principle deserved to have been more explicitly endorsed than appeared from the arguably weaker judgments of the higher court.

Finally we learn in a characteristically powerful summation that the three foundational principles are "the means by which the common law, through the judicial review jurisdiction, finds the edge of political or governmental power". That process is "honed and refined by the fourfold method of the common law: precedent, experiment, history and distillation". They are "the tools that translate the high level of generality of our foundational principles into effective case law" and so give life to the Rule of Law, as represented by the judicial arm in the scales of the constitutional balance (p. 83).

In Chapter 6 he tackles the issue of "judicial deference". This contains an important section: "Why Should the Courts Defer to Democratic Power?" He takes issue with Lord Bingham's "conferment . . . of a democratic mantle on the courts" in *A v Secretary of State* [2004] UKHL 56, at [42] (p. 91). This falls into the trap of supposing that the legitimacy of a state institution depends on its "democratic pedigree". The courts are indeed "the very guardians of democracy's integrity", but that is because "they confine democracy – not because they are part of it" (p. 92). They do so by application of the three foundational principles: "the constitution's prophylactic against arbitrary, capricious law" (p. 92). Here again he reverts to a judgment of his own, this time a dissenting judgment in *International Transport Roth Gmbh* [2003] Q.B. 728, for his "four principles that condition the application of judicial deference". He suggests, perhaps a little optimistically, that his observations in that case were not "contradicted by the majority" (p. 93). This seems to overlook the fact that his view of appropriate deference in this case would have led to upholding a scheme which the majority regarded as "quite simply, unfair" (at [54] (Simon Brown L.J.)). One detects a possible clash with his core principles of reason and fairness.

Chapter 7 is headed "Two Mistakes: Parliamentary Intent and the *Ultra Vires* Doctrine". The refutation of these two ideas is he says "critical to the recognition and establishment of the constitutional balance" (p. 96). The first seems to be based on the idea that a group of people cannot have a single intention. We are asked to consider a somewhat far-fetched weather analogy: the contrast between the observation of a group of people that "they were all wearing the same raincoat" and that "they were all caught in the same thunderstorm" (p. 97). He suggests that the concept of parliamentary intention "pretends to be a thunderstorm" whereas "the intentions of our legislators can, at best, only be raincoats" (p. 97). It is not clear quite where this takes him. Indeed he accepts that eminent judges have found no difficulty in speaking of statutory interpretation as designed to give effect to "the intention of Parliament".

The other supposed "mistake" goes back to a long-running debate about the *ultra vires* doctrine as the ultimate source of the judicial review power. He cites a series of

learned academic papers over more than 20 years, including an article of his own, written as long ago as 1995 shortly after he became a judge ("Law and Democracy" [1995] PL 72). He singles out for criticism Professor Forsyth's suggestion that when courts turn to common law principle to guide their development of the common law they are doing no more than "what Parliament intended them to do". Again, as he almost acknowledges, the problem may be more apparent than real.

I confess that I found his emphasis on these so-called "mistakes" a little puzzling. In the end, he seems to be saying no more than that, unlike the interpretation of a private contract, interpretation of a statute has to be "within a proper constitutional framework", which again allows resort to his three core principles. The trap, it seems, is avoided if we speak of "the purpose of the statute rather than the intention of the legislature" (p. 102). Some might regard the distinction as playing with words. However, its importance to his thinking is underlined by its repetition in the following chapter, on the "Sovereignty of Parliament" (Chapter 8), where he speaks of "the very real constraints … imposed by the courts through the medium … of statutory construction" (p. 116). If legislators fail to respect the constitutional fundamentals, they may find that "the Act as interpreted by the courts integrates constitutional principle with the text". Refutation of parliamentary intent "helps remove inhibitions to the process of integration" and so reveals "the intimacy between the power of constitutional fundamentals and the power to legislate" (p. 116).

The last Chapter ("Human Rights, Free Thought and Expression"), commenting on various aspects of the case law under the Human Rights Act 1998, reads as something of an afterthought to the main debate. Most significant perhaps is his criticism of the *Ullah* doctrine (*Ullah v Special Adjudicator* [2004] 2 A.C. 323), which in his view gives decisions of the European Court of Human Rights a degree of authority not justified by the statutory requirement simply to "take (them) into account", or the fact-sensitive nature of many of the decisions. In the context of his wider argument his concern is that undue weight to Strasbourg jurisprudence may have inhibited the development of a domestic approach which paid full regard to both local conditions and "the imperative of the constitutional balance".

As always with John's writings, in or out of court, the language is powerful and individual. The text is also enlivened, if perhaps not always illuminated, by classical or literary allusions. When reminded of "the capacity of democracy to trample over justice in the name of a popular cause" (Chapter 3), we are asked to remember the aftermath of the battle of Arginusae (406 BC), fresh in our minds from the lively description in an earlier chapter, but perhaps unlikely to be repeated in today's Parliament. Similarly, the chapter on the Sovereignty of Parliament (Chapter 8) takes us to "a little ancient history" – a discussion of the difference between the Roman concepts of *imperium* and *auctoritas*, the latter apparently thought to imply greater respect for constitutional principle. However, few would regard the Emperor Augustus, with whom the term is normally associated, as a model democratic leader. Elsewhere colour is given to the discussion of the use of words in statutory interpretation (Chapter 4) by citation variously of Noam Chomsky ("Even the interpretation and use of words involves a process of free creation") (p. 53), T.S. Eliot ("Words … decay with imprecision, will not stay in place, will not stay still") (p. 54) and Socrates ("so it is with written words … if you question them, wishing to know about their sayings, they always say only one and the same thing") (p. 54). Only a pedant will be concerned by possible inconsistencies between the three.

There is a very happy picture of John at the start of the book, with a typically outlandish tie, and clutching a beloved cat. That is how many will remember

him. I last saw him a few months before his untimely death in 2019, when I visited his home in Pimlico to deliver a copy of the recent judgments in the case of *Privacy International* [2019] UKSC 22. My own leading judgment was in some ways a personal tribute, for which I had drawn heavily on his judgments and extra-judicial writings. But he was by then more interested in catching up with judicial gossip over lunch at his local Indian restaurant. Although I knew of his Cambridge lectures, I was not then aware that he was in the process of turning them into the present book. I would love to have been able to debate some of the themes with him in person. It is a greater public misfortune that he did not live to take part in the current debate, reflected in the recent Queen's Speech, in which the Government has promised legislation to "restore the balance of power between the executive, legislature and the courts". It is to be hoped that this study is already required reading for those seeking to advise the Lord Chancellor as to how the balance should be set.

Lord Robert Carnwath
Former Justice of the Supreme Court

Three Essays on Torts. By Jane Stapleton. [Oxford University Press, 2021. xx + 101 pp. Hardback £60.00. ISBN 978-0-192-89373-4.]

Legal monographs, at least for any scholar who takes their subject seriously, comprise a vitally important resource. But they are often, in my experience, far easier to start than to finish. Ploughing through them, from cover to cover, can all too often seem such a chore: the defence of a single, not always earth shattering thesis being hammered out in every conceivable detail. Refreshingly, Jane Stapleton's *Three Essays on Torts* is nothing like this. For one thing, it's not very long: it runs to just 101 pages! It also reads very well; and, although there is a clear theme that underscores the three substantive chapters – something she calls "reflexive tort scholarship" – they nonetheless strike me as having been assembled in much the same way that the ideal three course meal is put together. Each course is very different from the other two. And yet somehow they complement each other wonderfully well.

In the first of the three essays, the nature, aims and perceived virtues of reflexive tort scholarship are described in general terms. It is defined as a brand of scholarship that "places judges centre stage and seeks a constructive dialogue with them" (p. 2). The notion of reflexivity is employed to capture the hoped-for two-way conversation between academics on the one hand, and both Bench and Bar on the other. But there is another sense, too, in which judges are placed centre stage: what they say (together with the reasons they give for saying it) are afforded prime importance.

Now, of course, the sceptic might say, making judicial pronouncements the focal point of one's analysis is hardly novel. What then, she may persist, is so distinctive about reflexive tort scholarship? The answer is comprehensively supplied in the second half of Chapter 1 (even though the first real clue can be found in its title: "Taking the Judges Seriously v. Grand Theories"). What emerges from it is Stapleton's keenness to distance her project's ambitions and style from the in-vogue style of torts scholarship that treats tort law as being all about one thing, whether that be "all about economic efficiency, or all about the principle that no-one is in charge of their neighbour, or all about the infringement of primary rights" (pp. 25–26).