

THE COMMON LAW CONSTITUTION

For the 2013 Hamlyn Lectures, Sir Jon Laws explored the constitutional balance between law and government in the United Kingdom. He argues that the unifying principle on the constitution is the common law and that its distinctive method has endowed the British State with profoundly beneficial effects, before examining two contemporary threats to the constitutional balance: extremism and the effect of Europe-made laws on the domestic English system.

SIR JOHN LAWS has served in the Court of Appeal and Privy Council since 1999. He has been responsible for a large number of important cases, including *Thoburn v. Sunderland City Council* which confronted the twin powers of Westminster and Brussels. Sir John is also a constitutional jurist of note, having written several extra-judicial contributions that underline the importance of the rule of law and the courts in a democracy so that sovereignty is founded in the constitution, not just parliament.

Cambridge University Press

978-1-107-07772-0 - The Common Law Constitution

Sir John Laws

Frontmatter

[More information](#)

Cambridge University Press
978-1-107-07772-0 - The Common Law Constitution
Sir John Laws
Frontmatter
[More information](#)

THE COMMON LAW CONSTITUTION

SIR JOHN LAWS



Cambridge University Press
978-1-107-07772-0 - The Common Law Constitution
Sir John Laws
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107077720

© John Laws 2014

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2014

Printed in the United Kingdom by Clays, St Ives plc

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Laws, John, 1945– author.

The common law constitution / John Laws.

pages cm – (The Hamlyn lectures)

Includes bibliographical references and index.

ISBN 978-1-107-07772-0 (Hardback)

1. Common law – Great Britain. 2. Constitutional law – Great Britain. 3. Common law – Philosophy. I. Title.

KD671.L395 2014

342.42–dc23

2014013706

ISBN 978-1-107-07772-0 Hardback

ISBN 978-1-107-43465-3 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-1-107-07772-0 - The Common Law Constitution
Sir John Laws
Frontmatter
[More information](#)

CONTENTS

The Hamlyn Trust page vi

The Hamlyn Lectures ix

Preface and acknowledgements xiii

The Common Law Constitution, *Hamlyn Lectures 2013* 1

Lecture I The Common Law and State Power 3

Lecture II The Common Law and Extremism 31

Lecture III The Common Law and Europe 57

Index 87

THE HAMLYN TRUST

The Hamlyn Trust owes its existence today to the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor and Justice of the Peace for many years, and it seems likely that Miss Hamlyn founded the trust in his memory. Emma Hamlyn was a woman of strong character, intelligent and cultured, well-versed in literature, music and art, and a lover of her country. She travelled extensively in Europe and Egypt, and apparently took considerable interest in the law and ethnology of the countries and cultures that she visited. An account of Miss Hamlyn by Prof. Chantal Stebbings of the University of Exeter may be found, under the title ‘The Hamlyn Legacy’, in volume 42 of the published Lectures.

Miss Hamlyn bequeathed the residue of her estate on trust in terms which it seems were her own. The wording was thought to be vague, and the will was taken to the Chancery Division of the High Court, which in November 1948 approved a Scheme for the administration of the trust. Paragraph 3 of the Scheme, which follows Miss Hamlyn’s own wording, is as follows:

The object of the charity is the furtherance by lectures or otherwise among the Common People of the United

THE HAMLYN TRUST

Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

The Trustees are to include the Vice-Chancellor of the University of Exeter, representatives of the Universities of London, Leeds, Glasgow, Belfast and Wales and persons co-opted. At present there are eight Trustees:

Prof. N. Burrows, University of Glasgow;
Prof. I. R. Davies, Swansea University;
Ms Clare Dyer;
Prof. K.M. Economides (representing the Vice-Chancellor of the University of Exeter) (Chairman);
Prof. R. Halson, University of Leeds;
Prof. J. Morison, Queen's University, Belfast;
The Rt Hon. Lord Justice Sedley;
Prof. A. Sherr, University of London;
Clerk: Ms Sarah Roberts, University of Exeter.

From the outset it was decided that the objects of the Trust could be best achieved by means of an annual course of public lectures of outstanding interest and quality by eminent lecturers, and by their subsequent publication and distribution to a wider audience. The first of the Lectures were delivered by

THE HAMLYN TRUST

the Rt Hon. Lord Justice Denning (as he then was) in 1949. Since then there has been an unbroken series of annual Lectures published until 2005 by Sweet & Maxwell, and from 2006 by Cambridge University Press. A complete list of the Lectures may be found on pp. ix to xii. In 2005 the Trustees decided to supplement the Lectures with an annual Hamlyn Seminar, normally held at the Institute of Advanced Legal Studies in the University of London, to mark the publication of the Lectures in printed book form. The Trustees have also, from time to time, provided financial support for a variety of projects which, in various ways, have disseminated knowledge or have promoted to a wider public understanding of the law.

This, the 65th series of Lectures, was delivered by Sir John Laws at Northumbria University, Exeter College, Oxford and Inner Temple Hall, London. The Board of Trustees would like to record its appreciation to Sir John Laws and also the three venues which generously hosted these Lectures.

AVROM SHERR
Chairman of the Trustees

THE HAMLYN LECTURES

- 1949 'Freedom under the Law' by Rt Hon. Lord Denning
1950 'The Inheritance of the Common Law' by Richard O'Sullivan
1951 'The Rational Strength of English Law' by Prof. F. H. Lawson
1952 'English Law and the Moral Law' by Prof. A. L. Goodhart
1953 'The Queen's Peace' by Sir Carleton Kemp Allen
1954 'Executive Discretion and Judicial Control' by Prof. C. J. Hamson
1955 'The Proof of Guilt' by Prof. Glanville Williams
1956 'Trial by Jury' by Rt Hon. Lord Devlin
1957 'Protection from Power under English Law' by Rt Hon. Lord MacDermott
1958 'The Sanctity of Contracts in English Law' by Prof. Sir David Hughes Parry
1959 'Judge and Jurist in the Reign of Victoria' by C. H. S. Fifoot
1960 'The Common Law in India' by M. C. Setalvad
1961 'British Justice: The Scottish Contribution' by Prof. Sir Thomas Smith
1962 'Lawyer and Litigant in England' by Rt Hon. Sir Robert Megarry
1963 'Crime and the Criminal Law' by Baroness Wootton of Abinger
1964 'Law and Lawyers in the United States' by Dean Erwin N. Griswold

THE HAMLYN LECTURES

- 1965 'New Law for a New World?' by Rt Hon. Lord Tangle
- 1966 'Other People's Law' by Rt Hon. Lord Kilbrandon
- 1967 'The Contribution of English Law to South African Law, and the Rule of Law in South Africa' by Hon. O. D. Schreiner
- 1968 'Justice in the Welfare State' by Prof. H. Street
- 1969 'The British Tradition in Canadian Law' by Hon. Bora Laskin
- 1970 'The English Judge' by Henry Cecil
- 1971 'Punishment, Prison and the Public' by Prof. Sir Rupert Cross
- 1972 'Labour and the Law' by Prof. Sir Otto Kahn-Freund
- 1973 'Maladministration and its Remedies' by Sir Kenneth Wheare
- 1974 'English Law: The New Dimension' by Rt Hon. Lord Scarman
- 1975 'The Land and the Development; or, The Turmoil and the Torment' by Sir Desmond Heap
- 1976 'The National Insurance Commissioners' by Sir Robert Micklethwait
- 1977 'The European Communities and the Rule of Law' by Lord Mackenzie Stuart
- 1978 'Liberty, Law and Justice' by Prof. Sir Norman Anderson
- 1979 'Social History and Law Reform' by Prof. Lord McGregor of Durriss
- 1980 'Constitutional Fundamentals' by Prof. Sir William Wade
- 1981 'Intolerable Inquisition? Reflections on the Law of Tax' by Hubert Monroe
- 1982 'The Quest for Security: Employees, Tenants, Wives' by Prof. Tony Honoré

THE HAMLIN LECTURES

- 1983 'Hamlyn Revisited: The British Legal System Today' by Lord Hailsham of St Marylebone
- 1984 'The Development of Consumer Law and Policy: Bold Spirits and Timorous Souls' by Sir Gordon Borrie
- 1985 'Law and Order' by Prof. Ralf Dahrendorf
- 1986 'The Fabric of English Civil Justice' by Sir Jack Jacob
- 1987 'Pragmatism and Theory in English Law' by Prof. P. S. Atiyah
- 1988 'Justification and Excuse in the Criminal Law' by Prof. J. C. Smith
- 1989 'Protection of the Public: A New Challenge' by Rt Hon. Lord Justice Woolf
- 1990 'The United Kingdom and Human Rights' by Dr Claire Palley
- 1991 'Introducing a European Legal Order' by Gordon Slynn
- 1992 'Speech and Respect' by Prof. Richard Abel
- 1993 'The Administration of Justice' by Lord Mackay of Clashfern
- 1994 'Blackstone's Tower: The English Law School' by Prof. William Twining
- 1995 'From the Test Tube to the Coffin: Choice and Regulation in Private Life' by Hon. Mrs Justice Hale
- 1996 'Turning Points of the Common Law' by Rt Hon. Lord Cooke of Thorndon
- 1997 'Commercial Law in the Next Millennium' by Prof. Roy Goode
- 1998 'Freedom, Law and Justice' by Rt Hon. Lord Justice Sedley
- 1999 'The State of Justice' by Prof. Michael Zander QC
- 2000 'Does the United Kingdom Still have a Constitution?' by Prof. Anthony King

THE HAMLYN LECTURES

- 2001 'Human Rights, Serious Crime and Criminal Procedure' by Prof. Andrew Ashworth QC
- 2002 'Legal Conundrums in Our Brave New World' by Baroness Kennedy of the Shaws
- 2003 'Judicial Activism' by Hon. Justice Michael Kirby AC, CMG
- 2004 'Rights at Work: Global, European and British Perspectives' by Sir Bob Hepple QC, FBA
- 2005 'Can Human Rights Survive?' by Prof. Conor Gearty
- 2006 'The Sovereignty of Law: The European Way' by Sir Francis Jacobs KCMG, QC
- 2007 'The Prisoners' Dilemma' by Prof. Nicola Lacey
- 2008 'Judging Civil Justice' by Dame Hazel Genn
- 2009 'Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law' by Lord Bingham
- 2010 'Lawyers and the Public Good: Democracy in Action?' by Alan Paterson
- 2011 'The Rule of Law and the Measure of Property' by Jeremy Waldron
- 2012 'Aspects of Law Reform: An Insider's Perspective' by Jack Straw

PREFACE AND ACKNOWLEDGEMENTS

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, criminal and civil; those in the latter include all prescribed formalities and rules of procedure. All of the laws ought to be elegant, economical and clear; but it is a harder thing for the judge-made common law, which unlike statute is never a single work, but created over time.

In these Lectures I have been concerned with the first of these two purposes as it applies in the law of the constitution. In Lecture I, I describe the common law's fourfold method – evolution, experiment, history and distillation; its process of continuous self-correction, at once allowed and restrained by these four methods; and the benign implications which all this has for the means of our governance.

Lecture II confronts the challenges which our law faces in the shadow of extremism, and shows how the common law is enriched by insights from an older past: by Euthyphro's dilemma in the Platonic dialogue, rewritten thus – are laws or

PREFACE AND ACKNOWLEDGEMENTS

policies willed by the state because they are good, or are they good because they are willed by the state? – and by the petition of Aurelius Symmachus in AD 382: ‘We look on the same stars, the heaven is common to us all, the same world surrounds us. What matters it by what arts each of us seeks for truth? We cannot arrive by one and the same path at so great a secret’.

In Lecture III I consider the challenges offered to the common law constitution by the influx of law from Europe: from Luxembourg and from Strasbourg. The common law is enriched by our legal importations from Europe: proportionality, legitimate expectation, and others; but there are fears of a loss of autonomy – to a considerable extent, in the human rights field, by our own courts’ reluctance over the last few years to forge a domestic human rights jurisprudence.

The Lectures are almost as I delivered them; I have had one or two afterthoughts, and added one or two further references. I have throughout had very much in mind the purpose of the Hamlyn Trust, expressed in Miss Hamlyn’s own words:

to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

The common law is the unifying principle of our constitution under the Crown; and I am sure it is the distinction of the common law that Miss Hamlyn had in mind. If I may anticipate Lecture I:

PREFACE AND ACKNOWLEDGEMENTS

The common law is not *dirigiste*. Its principles are constantly renewed by the force of fresh examples. It is not by chance that our constitution is uncodified; it is because, being conditioned over the centuries by the changing common law, it is not and cannot be the creature of a single moment. The elusive strength of the common law of England is that it reflects and moderates the temper of the people as age succeeds age. It is especially fit for a democratic state, for it builds on the experience of ordinary struggles. It stands for no grand theory of anything, but it is endlessly creative. Although it is much older, it enshrines a cardinal principle of the Enlightenment: that people should think for themselves.

By force of these characteristics, the law's purpose to require, forbid or penalise forms of conduct between citizen and citizen, and citizen and state, is fulfilled by an enriching combination of principle and flexibility: of old roots and new growth. Those privileged to practise in the common law may therefore be involved not only in applying it, but in creating it; and in doing so they will surely always have in mind the art of the law: its enhancement by elegance, economy and clarity.

I have tried to convey something of the common law's dynamic. In over forty years in its service I have learnt that it is always and never the same; and that it knows the difference between balance and compromise, and between dogma and principle.

I owe thanks to more friends and colleagues, old and new, than I can name. To my pupil master of forty-three years ago, Bill Macpherson (Sir William Macpherson of Cluny) from whom I learnt so much, not least the good sense of the

Cambridge University Press
978-1-107-07772-0 - The Common Law Constitution
Sir John Laws
Frontmatter
[More information](#)

PREFACE AND ACKNOWLEDGEMENTS

common law; to Professor Avrom Sherr, whose warmth and encouragement has sped these Lectures on their way; to my fellow judges, for their intellectual generosity and good fellowship; and to the members of the three institutions where I was privileged to give the lectures – Northumbria University, Exeter College, Oxford and the Inner Temple, London. I hope they will all think the enterprise has been worthwhile. And last but not first, to my dear wife Sophie, *sine qua nihil*.

Cambridge University Press
978-1-107-07772-0 - The Common Law Constitution
Sir John Laws
Frontmatter
[More information](#)

The Common Law Constitution,
Hamlyn Lectures 2013

Sir John Laws