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**THE UNITY OF LAW - OR THE DANGERS OF OVER-SPECIALISATION**

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I am honoured to be invited to deliver this year's Centenary lecture. At the start of my career I was briefly an academic lawyer and was a member of the Society of Public Teachers of Law, as this society was then known. So it is a particular pleasure to be here this evening.

Many of you will know the story, said to originate in India, about the three blind men who were asked to describe an elephant. The first man was able to touch only the side of the elephant and said that an elephant is shaped like a wall. The second man could only touch a leg and said that an elephant was like a pillar. The third man could only handle the tail and said that an elephant was like a rope. Each was doing his best and none was inaccurate about what he could describe.

This brings me to the theme of my lecture, which is to suggest that we need as lawyers to be able to see the bigger picture, to keep any eye on the overall unity of law, a bird's eye view as it were. One of the ways in which we can do that is to integrate so far as possible the academic discipline of law and legal practice.

Let me make clear at the outset what I am not saying. I am not calling for an end to specialisation in the law. There is obvious value in specialisation both in academia and in practice. One of the notable trends in legal teaching, it seems to me, compared to when I was briefly an academic in the 1980s, is that there are many more courses for students to take, sometimes in very specialised areas of law. This is even truer at the postgraduate stage than at the undergraduate stage. I regard these as healthy developments: they enrich the experience of students and their teachers and play an important part in improving the quality of lawyers later in practice too.

However, I also think that there are dangers in over-specialisation and that it remains important to keep an eye on the bigger picture. I will try to illustrate this by reference to the different stages of my own experience in the law, at university, in practice at the Bar and now on the bench.

I want to start with the present day and outline the different kinds of work that I have to do as a judge of the Queen's Bench Division. One of the attractions of applying to become a judge (at least for me) was the variety of the work that is done. A brief look at my diary for the last year shows that I have done several criminal trials, including murder cases. I have sat in the Court of Appeal (Criminal Division), when one is usually a member of a three judge panel, hearing appeals against conviction and appeals against sentence. I have sat in the Queen's Bench Division itself, hearing common law claims. One particular aspect of that duty is to sit in what is now called Court 37, where a judge hears interim applications, often urgent applications for injunctions which may well be heard without notice.

A week spent in Court 37 itself can cover a wide range of subjects, from commercial arbitration to a dispute about the ownership of a dog (I recall his name was Billy) and typically includes applications for freezing orders and search orders and for injunctions restraining a former employee from breaching restrictive covenants in a contract of employment.

I have also sat in the Divisional Court, where you sit with one or two other judges, usually with a Lord or Lady Justice of Appeal. Again there can be a wide variety of cases that can come before the Divisional Court: some of the most important public law cases will be heard there but there will often be appeals from the Magistrates' Court and appeals in regulatory contexts, such as the discipline of solicitors.

That is the sort of work that all judges of the Queen's Bench Division have to do. In addition some judges sit in one or more specialist jurisdictions. I sit in the Administrative Court and the Employment Appeal Tribunal. Some of my colleagues sit in the Commercial and Admiralty Courts or in the Technology and Construction Court. Other colleagues sit in one or more of the chambers of the Upper Tribunal. I do not think it would be right to describe a judge of the Queen's Bench Division as a "generalist." However, I do think that one needs to be a versatile specialist.

You may think that what I have described is a daunting array of different areas of legal work, some of it highly specialised. And you may wonder how one person is supposed to be able to do that range of work. The answer, as often, may simply lie in the fact that that is the system we have inherited and it seems to work in practice, tried and tested as it has been over a long time. But it seems to me that two things can help.

The first is legal education and training. What is not always appreciated in this country is that judges, both full-time and part-time, receive regular training, now given by the Judicial College, which succeeded the Judicial Studies Board. They usually start as Recorders or

Deputy District Judges and in practice will be expected to have sat for a number of years before they are appointed full-time, as District Judges, Circuit Judges or High Court judges. When they are first appointed, judges have to go on an intensive induction course: for example, a new Recorder of the Crown Court will not be permitted to hear their first case by themselves until they have gone through a training programme comprising a four day residential course, which includes a mock trial, sitting in court with experienced judges and going on prison visits. No judge, even a High Court judge, is permitted to try cases involving serious sex offences without going on a specialist residential course. The same is true of homicide cases. Most judges are required to refresh their training by attending continuing education courses every year. The more senior judges from the High Court upwards are not required to do so but in practice do; and there is a regular series of shorter seminars run for them at the Royal Courts of Justice on topics of practical importance.

The other part of the answer is that judges quickly learn that the skills and experience which are needed to be a judge are often transferable. It is well recognised that they are different from those needed to be a successful practitioner. In particular the most successful advocate may not necessarily be suited to becoming a good judge. There may be a temptation to enter the arena and try to argue the case, no doubt better than the advocates appearing in it. That is a temptation which judges should resist. It is salutary to remind oneself of the notice which Lord Ackner is said to have kept on the bench in front of him at all times: "remember, you are paid to listen." As I have said, judges tend to learn from experience that there are certain skills which are transferable between the jurisdictions in which they sit. Those skills include the finding of facts after hearing evidence; the giving of extemporaneous judgments or rulings, often without notes and certainly without a full script; and the interpretation of legislation and understanding of case law. These are not skills which are confined to any one area of law. It should be possible to develop them by experience and, I would suggest, they can often be improved by sitting in different jurisdictions and seeing how things are done away from what may be one's comfort zone.

Nevertheless there is no doubt that the changing character of the legal profession means that there are challenges for the recruitment and training of judges. This is because of the increasing specialisation of those who practise as solicitors and barristers. As I have already said, that trend towards specialisation has brought many benefits, not least to clients. But it has a potential impact on the ability of new judges in particular to do the work required of them. For example, most judges who are appointed as District Judges or Circuit Judges find that in practice it is very unlikely that all they will do is sit in civil cases. It is most likely that they will do some family law and/or criminal law. Those are the areas where there is the greatest demand for judicial resources.

Gone are the days when legal practitioners did a bit of everything. At the Bar, the trend towards specialisation was already well-established by the time that I was called in 1989. I specialised in public law although I had a more varied practice than many of my contemporaries, including some employment law and other civil work. But even someone

of my generation did not specialise immediately. When I first started I was in a magistrates' court every day of the week. I then started doing some small cases in the County Court, the Crown Court and what was then called the industrial tribunal. I also did some planning and other inquiry work. I only started doing public law after several years in practice and, in particular, after I had been appointed to one of the Attorney General's panels of counsel (sometimes called Treasury Counsel but officially Junior Counsel to the Crown).

That brings me to an interesting aspect of legal practice: government work. When I started doing government work in 1992, there were relatively few counsel who were on the Attorney General's panels. Since that time, in particular since 1998, the numbers have increased considerably and my understanding is that counsel are expected to be specialists in particular areas of law. When I was one of the Junior Counsel to the Crown I was instructed in a wide range of cases, including contractual disputes, employment law and every type of public law, ranging from immigration to planning law. In a sense it could have been said that, if I was a specialist in anything, it was in doing Government work, rather than any particular area of law.

I was also for five years the additional Junior Counsel to the Inland Revenue and did all sorts of cases for the Revenue. This included public law and human rights work. It also included very interesting work in the Court of Justice in Luxembourg involving the impact of European Union law on direct taxation. While indirect taxation in the form of VAT is the subject of direct regulation by EU legislation, direct taxation, such as income tax and corporation tax, is in principle within the exclusive competence of Member States. Nevertheless, the fundamental freedoms in the Treaty, such as free movement of workers and free movement of capital, cannot be infringed even by rules of direct taxation, in particular if there is discrimination as between the nationals of different Member States. It was fascinating for me to appear as an advocate on behalf of the Government of the United Kingdom in such cases in Luxembourg, not only where the UK was directly a party but also in cases arising from another Member State in which the UK Government had chosen to appear as an intervener. On a lighter note it was also fascinating to observe the different robes that advocates from different Member States wore in the Court of Justice: my Italian colleagues seemed to have the most glamorous robes.

In my work for the Revenue I also appeared in straight tax appeals, at every level from the Special Commissioners to the House of Lords. This was not unusual. My understanding was that it had long been the custom of the Revenue to use as standing counsel members of the Bar who had no specialist background in tax law. Although this might seem strange at first sight, I was told that the underlying rationale was that what the Revenue was looking for was not substantive knowledge of a particular area of law but what might be called the transferable skills of an advocate, both in relation to the making of legal arguments and in the context of factual disputes. It was also the case that the Revenue had some of the best instructing solicitors that one could have hoped to work with: they usually gave counsel at least an introduction to the substantive law that was needed. From my point of view, I

comforted myself that the court I would be appearing in would often include non-specialist judges. If I, with no previous expertise in tax law, could be made to understand what the case was about, there was at least a chance that I would then be able to convey that understanding to the court. That at least was the theory – I will leave it to others to say whether I ever succeeded.

The point I have already mentioned about the transferable skills of an advocate deserves emphasis. Even in the time that I was at the Bar my perception was that the profession became more specialised, to the point of perhaps becoming too narrow in some cases. One stark example of this is that it is conceivable that a barrister may be very good, and may attain silk (i.e. become Queen's Counsel) and yet never have cross-examined a witness. This could happen in particular if a barrister specialises only in judicial review proceedings, where it is rare for evidence to be taken from live witnesses and for there to be cross-examination. Yet those rare cases do arise when cross-examination is necessary. The way in which many chambers try to address this kind of problem is to ensure that their junior members have access to more general work, so they can gain experience of all relevant skills that an advocate needs, not just being a brilliant lawyer. Some commercial chambers have formal arrangements with criminal sets so that their pupils or junior members can obtain some advocacy experience in the criminal courts.

Speaking for myself, I can see advantages if similar arrangements could be in place throughout a barrister's career, although I accept that this becomes more difficult the more senior and specialist an advocate becomes. What I advise advocates to do if they can spare the time is to go and sit at the back of a court where they do not normally practise, so they can learn how things are done by their counterparts in another jurisdiction. For example, every day in the Royal Courts of Justice in the same corridor there will be courts which are hearing Administrative Court cases and other courts which are hearing cases in the Court of Appeal (Criminal Division). I think it would be beneficial to advocates in both courts if occasionally they could go and sit in one of the other courts and see how legal arguments are presented there. I think that the civil practitioners might appreciate the importance of getting your points across succinctly, in a very limited amount of time. And criminal practitioners might see that points of law can arise in the criminal field on which light may be shed by civil law. Points of law are points of law and their resolution depends on the conventional skills of legal reasoning, like the interpretation of statutes and the analysis of precedents. Unusual points of law can pop up in any jurisdiction. One example which I recall from the Court of Appeal (Criminal Division) earlier this year was when we had to consider an appeal against sentence in a case of burglary. The issue of construction which arose in the case was whether a houseboat could constitute a "building." We decided that it could. The interpretation of a word like "building" can often arise in the context of civil law, for example in planning law, although the answer may not be the same, as it always depends on the context.

I want to turn to an important development in our law which has taken place in recent times, particularly noticeably in the last decade. This is the increasing relevance of public international law in domestic public law cases. Many examples could be given. I hope that two will suffice for now.

The first example is the well-known case of A v Secretary of State for the Home Department (often referred to as the “Belmarsh” case)<sup>1</sup>, which was decided by the House of Lords in 2004. That case concerned the compatibility of Part 4 of the Anti-terrorism, Crime and Security Act 2001 (which had been enacted shortly after 9/11) with the Convention rights, as set out in Sch. 1 to the Human Rights Act 1998. In order to enact that legislation the United Kingdom had lodged a derogation with the Council of Europe from Article 5 of the European Convention on Human Rights. The House of Lords issued a declaration of incompatibility under section 4 of the Human Rights Act. One of the interesting features of the case was that the domestic courts had to consider the application of the derogation provision in Article 15 of the European Convention. That provision is not itself incorporated into domestic law; it is not set out in Schedule 1 to the Human Rights Act. However, it was conceded by the Attorney General on behalf of the Secretary of State that, if the United Kingdom’s derogation from Article 5 did not comply with the requirements of Article 15, then not only would that derogation be ineffective in international law, it would render the domestic legislation incompatible with the Convention rights too. The House of Lords held that the derogation did not comply with the rigorous requirements of Article 15 and, accordingly, the domestic legislation was incompatible.

My other example is the case of Al-Skeini, decided by the House of Lords in 2007<sup>2</sup> and the Grand Chamber of the European Court of Human Rights in 2011.<sup>3</sup> That case, which concerned the actions of British forces in Iraq, arose in the domestic courts under the Human Rights Act. In turn it required the courts to interpret and apply the provisions of Article 1 of the European Convention, in particular the concept of “jurisdiction.” That in turn required the courts of this country to engage in extensive and difficult analysis of the meaning of “jurisdiction” in international law, in particular the extent to which a state can be said to exercise jurisdiction when acting outside its own territory.

I want to turn to a more general point about the relevance of international law in domestic law. It has long been established that customary international law is a source of the common law. This has been recognised since 1737 in Barbuit’s case.<sup>4</sup> It used to be said that customary international law is a part of the common law. In a more recent case R v Jones (Margaret) in 2006<sup>5</sup>, Lord Bingham preferred to say that it is a source of the common law. In any event, the important point for present purposes is that customary international law,

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<sup>1</sup> [2005] 2 AC 68.

<sup>2</sup> R (Al-Skeini & others) v Secretary of State for Defence [2008] AC 153.

<sup>3</sup> Al-Skeini & others v United Kingdom (2011) 53 EHRR 18.

<sup>4</sup> (1737) Cas temp. Talbot 281.

<sup>5</sup> [2007] 1 AC 136

unlike treaty law, does not require any Act of Parliament to incorporate it into domestic law. Although this has been a principle of English law for centuries, I doubt if this is widely known. This is perhaps unsurprising. International law is not a compulsory subject even for those who take a law degree. It is certainly not one of the core subjects, as EU law now is but was not when I was a student. I suspect that many practitioners are quite simply unaware of this doctrine. Yet it can play an important part throughout the entire range of domestic law, both criminal and civil, as cases such as Jones and A v Secretary of State for the Home Department (No. 2)<sup>6</sup> (which concerned the admissibility of evidence obtained by torture) have shown.

So far I have talked about “public law” as if it were a single area of law. It is undoubtedly an area of law that has grown in importance in practice over the course of the last generation. In 1980, when the Crown Office List was set up, there were four nominated judges who sat in that specialist jurisdiction. Today the majority of the judges of the Queen’s Bench Division (and several of the judges of the Family and Chancery Divisions) sit in the Administrative Court, as the Crown Office List became known in 2000. The number of cases which were started in the Administrative Court has increased nearly threefold since the beginning of this century. However, what has perhaps been less noticed is that even public law has increasingly become divided into distinct specialisms, so that practitioners may spend little, if any, time outside their own area of law. Immigration law and planning law are two such distinct specialisms which are large and important areas of work, each of which can easily require a practitioner to do nothing else.

Other areas would include education law, housing law, social services and community care law, tax law and the law relating to prisoners. The list could go on. Many of these areas of law have their own set of dedicated law reports. No doubt there are real advantages to the profession and to the public from this increasing specialisation. But, as I have tried to suggest in this lecture, there are dangers in over-specialisation too. In particular, there is a risk that conceptual differences may arise which turn out to be unsound in law.

One illustration of this can be found in the development of the law of legitimate expectation in public law. The term “legitimate expectation” was first used in English law by Lord Denning MR in Schmidt in 1969.<sup>7</sup> It was used in the context of the possibility that a duty to act fairly (what used to be called the rules of natural justice) might arise even where there was no legal right being taken away but only a legitimate expectation. From that time on the law developed in such a way as to recognise that the duty to act fairly could arise in such circumstances. However, “fairness” was being used in a procedural sense, in other words a duty to afford a hearing (although not necessarily an oral hearing), rather than a substantive sense. For a long time it was thought that the concept of legitimate expectation could not give rise to any substantive right. In other words it could not be used to prevent a public

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<sup>6</sup> [2006] 2 AC 221.

<sup>7</sup> Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149.

authority from doing something at all, although it might be used to require the authority to go through a fair procedure before doing it and, of course, a public authority must always act in a way which is rational.

In fact the contrary suggestion, that the concept of a substantive legitimate expectation could give rise to a duty to do more than act rationally, was described as a “heresy” by the Court of Appeal in Hargreaves,<sup>8</sup> in which Hirst LJ disapproved of what had been said by Sedley J in the first instance case of Hamble Fisheries.<sup>9</sup>

What had apparently gone unnoticed was that in the meantime, since 1985, there had emerged a line of authority in the context of tax cases, in which it was indeed recognised that fairness could have a substantive content and that the concept of legitimate expectation could give rise to substantive obligations, and not only procedural ones. This line of authority started with the decision of the House of Lords in Preston<sup>10</sup> in 1985 and included the decision of the Divisional Court in MFK Underwriting Agents<sup>11</sup> in 1990. I will return to that decision later for another reason.

A particularly important decision in this line of authority was the decision of the Court of Appeal in Unilever<sup>12</sup> in 1996. However, the importance of that decision in public law generally was not fully appreciated. This may have been because it was only reported in a specialist set of law reports, Simon’s Tax Cases. It is easy to forget today, when almost any decision is available online, whether or not it stands for any principle of law, that less than 20 years ago it could matter where a case was reported. In any event, the general importance of the line of authority in the tax context was not noticed until the decision of the Court of Appeal in Coughlan<sup>13</sup> in 1999. Perhaps unsurprisingly, it was picked up by a court which now included Sedley LJ, as he had become. Since Coughlan it is now recognised in public law generally that the concept of legitimate expectation can indeed give rise to substantive duties, and not only procedural ones; and the standard of review by the court is not confined to that of rationality.

I said that I would return to the case of MFK Underwriting Agents. The main judgment in that case was given by Bingham LJ. In what has become a classic passage he said that what was required for a legitimate expectation to be created was a representation which was clear, unambiguous and devoid of relevant qualification. In what was a novel and developing area of law he would appear to have drawn on his experience of commercial law when setting out those criteria. They clearly have echoes of the doctrine of promissory

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<sup>8</sup> R v Secretary of State for the Home Department, ex p. Hargreaves [1997] 1 WLR 906.

<sup>9</sup> R v Ministry of Agriculture, Fisheries and Food, ex p. Hamble Fisheries (Offshore) Ltd [1995] 2 All ER 714.

<sup>10</sup> R v Inland Revenue Commissioners, ex p. Preston [1985] AC 835.

<sup>11</sup> R v Inland Revenue Commissioners, ex p. MFK Underwriting Agents Ltd [1990] 1 WLR 1545.

<sup>12</sup> R v Inland Revenue Commissioners, ex p. Unilever plc [1996] STC 681.

<sup>13</sup> R v North and East Devon Health Authority, ex p. Coughlan [2001] QB 213.



estoppel in private law. This seems to me to illustrate the need to avoid regarding conceptual distinctions such as that between private law and public law too rigidly. However, it is also important to bear in mind the cautionary words of Lord Hoffmann in Reprotech that “it is unhelpful to introduce private law concepts of estoppel into planning law” and that “public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand on its own two feet.”<sup>14</sup>

Another related context in which, in my view, it would be helpful to bear in mind fundamental concepts of private law concerns the circumstances in which an officer of a public authority can bind that authority. It seems to me that care needs to be taken to distinguish between two questions which may become confused. The first question is whether a local authority (for example) has the power in law to bind itself as to its future conduct. It may or may not have that power: it is well established that a public authority cannot by its representations extend its own powers, so that it cannot bind itself to act in a way which would be ultra vires.<sup>15</sup> The second question is whether, even if the authority does have the power to bind itself, the particular officer who made the representation had the power to make it on behalf of the authority. Whether they did or did not have that power will depend on the principles of agency, which are familiar to private lawyers, and in particular on the concepts of actual or ostensible authority. Many of the examples to be found in the case law on agency arise from business transactions. Similar issues can arise in the field of company law, another field in which a distinction needs to be kept in mind between the powers of a company (to which the doctrine of ultra vires applies) and the powers of an officer or employee of the company (to which the principles of agency apply).

The final topic on which I want to touch in this lecture is the academic study of law and I hope it is not thought impertinent to do so in this setting. An academic friend of mine once asked me which subjects I had studied at university which had been most useful to me for my practice at the Bar. I replied jurisprudence and legal history – this was only partly tongue in cheek. It does seem to me that the most important thing I learnt at university with the benefit of hindsight was an appreciation of the general principles of law. What is of lasting value is the ability to engage in basic legal reasoning, in particular how to interpret a statute and how to analyse a case. What is also helpful is an understanding of the overall structure of the law. Everything else is detail and may turn out to be ephemeral. The specific case law I learnt about has long since become out of date but the structure and principles of law remain of lasting value.

I would tentatively suggest that the academic study of law could concentrate on the following skills.

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<sup>14</sup> R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2003] 1 WLR 348.

<sup>15</sup> Maritime Electric Co v General Dairies Ltd [1937] AC 610.

First, knowing that there is a problem and being able to identify the right questions to ask. In real life clients do not bring problems to their legal advisers which are already labelled, for example “contract” or “tort.” While it is readily understandable why legal education must divide subjects up in that way, it is helpful if a student at the end of their course appreciates that problems in practice will not come packaged in that way.

Secondly, knowing how to go about finding the answer to the question which has been identified. No lawyer can know all of the law but one of the most important transferable skills they can acquire in their legal studies is the ability to conduct legal research well.

Thirdly, a good grounding in the methods of legal reasoning, in particular the interpretation of legislation and the analysis of case law. Again this should be a transferable skill and should not depend on what particular subjects a student has chosen to study.

Fourthly, an understanding of the place of law in its historical and social setting, so that a student can appreciate how we got where we are and the way in which the law responds to social problems (whether adequately or not).

As I said at the outset of this lecture I have been fortunate to have been at different times of my life a student, an academic, a practitioner and now a judge. Each of those perspectives has led me to come to the view that, while specialisation in the law is valuable, it is also important to appreciate that we operate within one legal system, in other words the unity of law.

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