UNIVERSITY OF BIRMINGHAM

Birmingham Law School

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THE SOCIETY OF LEGAL SCHOLARS

SOCIETY OF LEGAL SCHOLARS ANNUAL SEMINAR 2009

"Judges and Jurists: Reflections on the House of Lords"

Thursday 5th and Friday 6th November 2009

The Law Society's Hall
113 Chancery Lane
London
WC2A 1PL

Birmingham Law School is proud to announce the Society of Legal Scholars Annual Seminar for 2009. In his 1997 FA Mann Lecture, "The Academic and the Practitioner",[1] the late Professor Birks remarked:

> "The last century has seen a total transformation of our law library. That transformation reflects the emergence of a new branch of the legal profession, namely the university jurist. Equally, it reflects the necessity of sharing between judge and jurist the task of interpretative development of the law. That partnership, alien to the common law as it grew up, responds to the much heavier burdens borne by the law in modern conditions, in particular the greater difficulty of sustaining its rational legitimation under the constant searchlight of critical examination. A system which bears these greater burdens must turn out lawyers who are intellectually equipped to understand and manage its complexity. Law has become infinitely more difficult. It has to be taken more seriously. Our attitudes to law schools and legal education must reflect these facts."[2]

We shall explore the nature of the partnership between judge and jurist which Prof Birks identifies. The Seminar takes two events in 2009 as its inspiration: the Centenary of the Society of Legal Scholars, and the transition from the House of

[1] (1998) 18(4) LS 397
[2] Ibid., at 413

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Lords to the new Supreme Court. These two events provide an opportunity for reflection on judicial reasoning and the interaction between judges, academics and the professions over a century of transformation. The Seminar gathers leading authorities on the House of Lords in its judicial capacity with academics whose specialisms lie in particular fields of law. The relationship between judge and jurist will, therefore, be investigated from a variety of perspectives, as the list of participants demonstrates. There are speakers from each of the jurisdictions within the United Kingdom and Ireland, representing the Society's constituency. There will be a real focus on cases, as the aim is to take the jurisprudence of the House of Lords seriously. In so doing, we shall reflect on our shared task of interpretative development of the law.

The relationship between academic and practising lawyers has been a theme of the Society since its inception. At the first Annual General Meeting, Prof Goudy explained the importance of the nascent Society of Public Teachers of Law:

> "Upon us rests, in considerable measure, responsibility for the future competency of our judges and barristers and solicitors, and to some extent also of our legislators, statesmen and administrators…[F]uture reform of the laws, and consequent amelioration of the social and political conditions in this country, may largely depend upon the knowledge we impart to, and the ideas we instil into, the minds of our pupils."[3]

It is also true that, to a significant extent, the *present* competency of judges and barristers and solicitors rests on legal scholars. In his 1924 Address as President of the Society, Prof William Serle Holdsworth identified four questions facing the profession of academic teachers of law, the last of which was the profession's "usefulness to the State":[4]

> "[Academic] lawyers are, in the first place, needed by the Judicature. Modern research into the history of our law has banished many old fables from the law, and has taught judges to go behind the authorities which satisfied their ancestors; the improved literature of our law, which has come with its academic teaching, has helped judges as well as students."[5]

While recognising, with Prof Holdsworth, that jurists are useful to the State in other ways, we shall address the relationship between jurists and the Judicature.

The Seminar is organised by the Birmingham Law School, which in 2008-9 has celebrated its own anniversary, of eighty years since its foundation. The first volume of the *Journal of the Society of Public Teachers of Law* records the establishment of the Birmingham School of Law,[6] representing as it did an expansion both in the provision of public teaching of law, and in legal scholarship to the provinces. The very inauguration of the Society was inspired by the expansion in the provision of law teaching and by a recognition that law teachers had common interests that

[3] Quoted by W. Holdsworth, "The Vocation of a Public Teacher of Law" (1925) 2 JSPTL 1 at 11
[4] W. Holdsworth, "The Vocation of a Public Teacher of Law" (1925) 2 JSPTL 1 at 1
[5] Ibid., at 10
[6] C. Grant Robinson (1924) JSPTL 22

spanned institutional divides and prejudices,[7] and the Society has flourished to the point where there are over 3,100 members, in the United Kingdom, the Republic of Ireland and overseas. C. Grant Robertson labelled the establishment of Birmingham Law School as an "experiment",[8] as was that first meeting of the Society in 1908. Both those experiments have proved to be unqualified successes. In the Seminar, we shall examine the prospects of success for a third experiment: the transition from the House of Lords to the United Kingdom Supreme Court.

The Society of Legal Scholars Annual Seminar 2009 will celebrate, continue and contribute to the fine traditions of Birmingham Law School, the House of Lords and the Society of Legal Scholars.

VENUE

As noted, the Seminar will take place under the auspices of the Birmingham Law School. However, the venue is **The Law Society's Hall in London**, which was the setting for the first meeting of the SLS in December 1908. The Law Society is also an appropriate venue because it will acknowledge the instrumental role played by Dr Edward Jenks in the Society's creation.

PROFESSIONAL ACCREDITATION

The SLS Seminar is accredited for **12 CPD Hours** by both the Solicitors Regulation Authority and the Bar Standards Board.

COST

Booking for the Seminar is available online at: http://www.law.bham.ac.uk/news/2009events/sls2009.shtml.

The registration fee covers attendance at the two-day Seminar, including lunch and refreshments on each day. The regular rates are as follows:

Practitioner	**£140**
Academic	**£120**
Student	**£80**

Discount: For those booking before 11:59pm on Friday 18th September 2009, an early booking discount will apply:

Practitioner	**£120**
Academic	**£100**
Student	**£70**

[7] "Note on the Foundation of the Society in 1908" (1947) 1 JSPTL (NS) 193-5
[8] Supra, note 4, at 24

ACCOMODATION

For those wishing to stay in London for the Seminar, we have arranged a number of rooms at the Strand Palace Hotel (www.strandpalacehotel.co.uk) at the special rates of £96.60 for a Standard Single, £106.95 for a Club Single and £136.85 for a Double. Please contact the convenor for details.

CONTACT DETAILS

Should you have any queries, please do not hesitate to contact the convenor:

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SEMINAR PROGRAMME*

Thursday 5th November 2009

9:00-9:30 **Registration**

9:30-9:45 **Welcome and Introductory Remarks**

9:45-10:45 **Opening Address**

The Hon Michael Kirby AC CMG, former Justice of the High Court of Australia

Chair: Emeritus Professor Nick Wikeley, Judge of the Upper Tribunal and President of the Society of Legal Scholars 2009/10

10:45-11:00 **Tea and Coffee**

11:00-13:00 ***Judges and the Process of Judging***

Professor Brice Dickson, Professor of International and Comparative Law, Queen's University Belfast:

"Close Calls: What Recent Narrow Majority Decisions Reveal About Their Lordships"

> This paper offers an analysis of decisions by the House of Lords during the past 10 years or so in which the outcome has been determined by just one vote. I will aim to show that such decisions reveal (a) flaws in the working practices of the House, (b) the predictable mindsets of particular judges, and (c) defects in judicial reasoning more generally.

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* Please note that all speakers are confirmed to attend and participate in the Seminar, but in the case of unavoidable circumstances, it may be necessary for there to be minor alterations to the programme.

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Professor Adrian Briggs, Professor of Private International Law, University of Oxford, Fellow of St Edmund Hall and Barrister, Blackstone Chambers:

"Being right and being obviously right: reasoning cases in private international law"

> The general and major aim of the paper will be to look at the search for principle underpinning cases on common law private international law, at the distinction between a good decision and a persuasive decision, at the relationship between recent cases on private international law and on other parts of the common law, and at what the role of the final court of appeal in such cases really ought to be. The minor aim will be to ask whether rules for the recognition of judgments made in foreign proceedings should reinterpret what it understands as encompassed by the 'doctrine of obligation' which justifies and explains the limits on the recognition of foreign judgments.

Prof Alan Paterson, Professor of Law, University of Strathclyde:

"Does Advocacy matter in the Lords?"

> This paper analyses the dialogue between Law Lords and counsel in cases coming before the Lords and compares the dialogue today with that 35 years ago in the era of Lord Reid. The aim is to cast light on the decision-making processes in the Lords, including judicial changes of mind, the influence of the merits on the House, the similarities and differences between advocacy by counsel and that by the Law Lords and whether what is considered to be "good advocacy" in the Lords has changed over the years.

13:00-13:45 Lunch

13:45-15:15 *The Independence of the Judges*

Professor Andrew Le Sueur, Professor of Public Law, Queen Mary, University of London and Barrister, Brick Court Chambers:

"From Appellate Committee to Supreme Court: the Role of Judges, Jurists and Others"

> This paper offers a chronology of the principal events leading up to the Government's decision on 12 June 2003 to announce that the judicial business of the House of Lords would be transferred to a supreme court, the enactment of the Constitutional Reform Act 2005, and the first steps towards practical realisation of the new court provide a fascinating case study on the British constitution's 'flexible' character and the absence of strong normative

controls of the constitutional reform process (see A Le Sueur, 'From Appellate Committee to Supreme Court: A Narrative', chap 5 in L Blom-Cooper, G Drewry and B Dickson (eds), *The Judicial House of Lords*, Oxford: OUP, 2009). This presentation will explore in particular the respective roles of the judiciary and academics in the reform/anti-reform debates, reflecting on what this reveals about the changing constitutional and political position of judges and the state of British 'top court scholarship'.

Dr Aileen Kavanagh, Reader in Law, University of Oxford and Fellow of St Edmund Hall:

"From Appellate Committee to Supreme Court: Exploring the Tension between Judicial Independence and Responsiveness"

The combined effect of the growth of judicial review, the development of the EU and, most recently, the Human Rights Act 1998 and devolution has been to give the courts a more central and prominent role in the British constitution. The decision to establish a new Supreme Court for the United Kingdom is, in large part, a response to this expanded role. It gives expression to the need to defend judicial independence, even when (or perhaps especially when) judges police constitutional boundaries and decide sensitive human rights issues. We want judges to be independent and detached, but we do not want them to be out of touch with contemporary needs. This paper will explore the tension between the need for judicial independence on the one hand, and the need for judges to be aware of, and responsive to, social and political developments on the other. It will question whether the move from Appellate Committee to Supreme Court minimises or exacerbates that tension.

15:15-15:30 Tea and Coffee

15:30-17:00 *The Common Law in the Age of Human Rights*

Professor Jenny Steele, Professor of Law, University of York:

"Owning or disowning the Convention in Private Law: the House of Lords and the law of tort"

There has been a well documented tussle amongst members of the House of Lords in public law cases over the meaning of the HRA, and particularly the extent to which it might be said to create *domestic* law rights which can be freely interpreted by domestic courts. As things stand, the relative sceptics seem to have won this battle. The Convention rights are international rights interpreted chiefly in Strasbourg, and the Strasbourg interpretation sets a

'ceiling' beyond which the House of Lords will not go. The extent to which the Convention rights are adopted by English courts as their own has thus been limited.

There has been less assessment of the way in which the absorption (or not) of Convention rights into private law illuminates this general question, of whether and to what extent the 'Convention rights' set out in the HRA have been embraced as elements of domestic law. Whilst we have all become familiar with the language of 'horizontal effect' which was used at the time of enactment to predict the likely impact of the HRA on private law, the question here surrounds the extent to which the rights have become genuinely 'interwoven' into private law (to use Lord Cooke's expression), to become a part of its very fabric – and, indeed, what this would mean. Apart from variations with context and judicial point of view, there have also been changing trends over the period of time since the HRA came into force. Speaking generally, early assumptions that the law of tort would have to change to give effect to the Convention rights has subsided, and a theory has gained acceptance that instead, the law of tort should *stop* developing to protect such rights, because the new action against public authorities introduced by the HRA itself will provide a more appropriate and proportionate set of remedies. Here I explore the neglected relationship between substantive private law and broader judicial theories about the nature and reach of the HRA, and the role of domestic courts in enforcing the rights. It is suggested that this will be one of the most interesting areas to monitor in the early days of the Supreme Court.

Ms Sangeeta Shah, Lecturer in Law, University of Nottingham:

"The Impact of the Human Rights Act on the House of Lords"

This paper will present the findings of an empirical study of the impact of the Human Rights Act on the House of Lords. The paper will explore how the caseload of the House of Lords has changed since the Human Rights Act came into force and how this has impacted on the delivery of opinions by their Lordships.

Friday 6th November 2009

9:30-11:00 *Law Reform*

Professor Elizabeth Cooke, Law Commissioner for England and Wales and Professor of Law, University of Reading:

"Taking Property seriously; equitable interests, law reform and the role of consensus"

> An examination of the House of Lords' role in reforming the law relating to informally acquired property rights, with a sidelong glance at the different role played by the Law Commission.

Mr James Lee, Lecturer, University of Birmingham:

"'Inconsiderate Alterations in our Laws': Legislative Reversal of Supreme Court Decisions"

> This paper will examine legislative and Governmental responses to controversial recent judicial decisions. The decision in *Barker v Corus* [2006] UKHL 20 on causation in negligence was swiftly revised by s.3 of the Compensation Act 2006. *Rothwell v Chemical and Insulating Company Ltd; Johnston v NEI International Combustion Ltd* [2007] UKHL 39 on the recoverability of psychiatric harm has been subject to legislative reversal in Scotland but not in England. Both instances of legislative intervention have been to the detriment of the coherence of our private law. It will be argued that these examples, along with cases from other jurisdictions, throw into relief fundamental questions about the expected interaction of the Supreme Court, Parliament and the Executive, and the ways in which the issues have been approached may impact upon the process of decision-making in the Supreme Court. What is more, the future absence of the Law Lords from the Parliamentary process will be of significance. Drawing on the jurisprudential writings of Professor Ronald Dworkin and the late Professor Sir Neil MacCormick, this paper will argue that there is a need for legislative, as well as adjudicative, integrity.

11:00-11:15 Tea and Coffee

11:15-12:45 *The common law and Europe: differences of style or substance and do they matter?*

Professor Anthony Arnull, Barber Professor of Jurisprudence, University of Birmingham:

"Europe and the Lords: Swimming with the Incoming Tide"

> As the accession of the United Kingdom to the EEC drew near, there was much debate in the academic literature on whether, and if so how, the doctrine of parliamentary sovereignty could be reconciled with the notions of direct effect and the primacy of European Community law laid down by the European Court of Justice. In the event, although there has been the odd example of resistance, the English courts, led by the House of Lords, have accommodated the requirements of Community law remarkably conscientiously. The approach of the Lords contrasts strikingly with that of the supreme courts of other, supposedly more Europhile, Member States, such as France and Germany. How can this surprising turn of events be explained? Why has the House of Lords, acting in its judicial capacity, not been infected by the blight of Euroscepticism to the same extent as other parts of the British body politic?

Dr Alexandra Braun, Supernumerary Teaching Fellow in Law, St John's College, Oxford:

"Judges and Jurists in England: A Comparative View"

> This paper will consider the nature of the relationship between judges and academics in England from a comparative perspective. It will examine whether there is a real partnership between the two branches of the legal profession and how they interact with each other. It will further look at how the courts use academic writings and the different ways academics can 'assist' judges in the law-making process.

12:45-13:30 Lunch

13:30-15:30 Private Law: *Fashions in Juristic Thinking*

Professor John W G Blackie, Professor of Private Law, University of Strathclyde:

"Courts and Jurists in Scotland – The Impact of Changes of Historical Context"

> Juristic writing has been relied on by pleaders and judges in Scottish courts since at least around the start of the sixteenth century. Analysing this phenomenon over the whole period since, however, reveals that the forms of juristic writing used and the precise used made of them has constantly evolved. Changes in the forms of juristic writing published is only one among many factors that have driven this. Amongst others are changes styles of judgements, changes in the style of pleading, changing attitudes to works from the past, and changing use of material from other legal systems, particularly from the second half of the eighteenth century, England. This paper seeks to analyse just exactly how these, and other factors, have determined the ways in which juristic writing has been and is currently used in courts. It suggests consequentially that it is inappropriate to seek to develop a theory for all times and places of what is the optimum use by courts of juristic writing.

Professor Graham Virgo, Professor of English Private Law, University of Cambridge and Fellow of Downing College:

"Evolution of the law of restitution in the House of Lords: Judging the Judges"

> In the paper I intend to examine the rapid development of the law of restitution in the last 20 years with reference to a number of decisions of the House of Lords. I will critically examine the influence that jurists have had on the development of that law. I will examine the growing gulf between the approach of the judges and the criticisms of jurists as regards language used, principles developed and theoretical rationales employed. I will identify certain areas where the judges need to be more aware of what is going on in academia but also areas where jurists need to be much more pragmatic in their analyses and critique. Areas on which I will focus include, quantum meruit, the role of unconscionability, definition of fault and absence of basis.

Professor Keith Stanton, Professor of Law, University of Bristol:

"Use of academic scholarship by the House of Lords in duty of care cases"

> This paper will consider and evaluate the role that academic and other non-judicial writing has had in the development of the tort of negligence by the House of Lords in the hundred years since the creation of the Society of Public Teachers of Law. Members of the House have made far greater reference to such materials in recent years and the paper will address the issue of whether any coherent change of approach towards the use of such material in decision making can be identified.

15:45-16:45 Concluding Address

Lord Rodger of Earlsferry, Justice of the Supreme Court for the United Kingdom

"Judges and Jurists - a Judge's View"

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