Sarah Worthington

On making sense of law in business.

Sarah Worthington, QC (Hon), is Downing Professor of the Laws of England at the University of Cambridge, and a sitting Deputy High Court Judge in the Chancery Division. She was elected a Fellow of the British Academy in 2009, and has been its Treasurer since 2015.

Talk about your childhood background.

It was all very sunny, quite literally. Although I was born in Yorkshire, my parents moved almost immediately to East Africa, first to Uganda very briefly, and then to Kenya where I spent my first eight years. When they moved again, it was to Australia. My father was a civil engineer, working on water projects, and my mother is still a very keen gardener. These are passions that have lasted throughout their lives. My parents gave me a great sense of independence, fun and adventure, but also of working hard – it was important to 'use your talents'.

At the time my childhood in Africa seemed perfectly ordinary. It was only later that I realised how colourful it had been. By the time I was eight, I had seen African and African Indian cultures at close hand, I'd been to Venice, and London and Lancashire (to meet my grandparents), and then on a slow boat to Australia. Those early escapades inevitably coloured my approach to life.

You studied science at university.

Yes. No doubt I acquired a practical bent from both my parents. But more importantly I was of the generation that if you could do science, then you did it. At school I had the benefit of a very broad school curriculum and some inspirational teachers, but at university I studied physics, chemistry and lots of maths, all with the goal of doing cancer research. The motivation for that was probably romantic – I wanted to make a difference – and I was two years into a PhD in that area before I finally switched to law.

Why the switch? Part of it was the nature of cancer research. At that stage the processes were pretty primitive. Almost everything we did manually is now done automatically. The endeavour had its own fun for all that, with a wonderful professor directing the research programme, but the repetition was certainly tedious. More fundamentally, however, I realised quite early on that I preferred working in words, not equations. Law looked fascinating, because it was about language and logic, people and rules.

That initial fascination hasn't abated, but I don't regret my scientific loop. In at least two respects

it changed my life: I met my future husband, and I discovered I loved to teach. The second was probably more surprising than the first, given my one certainty in life was that I would never teach. But in my honours year it was mandatory, and I simply loved it.

Have you brought any residual science perspectives to your study of law?

I probably brought with me the constraints of a number of bad habits as well as the advantages of some good ones. The bad habits included a realisation that science students rarely train their memories. I'm still better at dealing with model facts, and recounting arguments and principles, rather than remembering that *Smith v Jones* is a contract case (an imaginary one!), and *Peter v Paul* a company one.

Case names aside, the law is usually quite logical, and logic is something that scientists are trained in. My legal research reflects a preference for principle and logic. In some areas, legal outcomes seem intuitive: the goodies win and the baddies lose, even if the detail is carefully nuanced. But in other areas, it is not like that. Take insolvency law. The bankrupt's funds are insufficient to pay everyone, so the losses have to be shared by innocent creditors. It is difficult to settle on a rule that is fair. But once that rule is chosen, it is vital that it is applied in predictable and replicable ways, so people can be certain of their rights. I like these knotty problems, whether attacked from the policy end or the doctrinal end.

What are the areas of law in which you are particularly interested?

I am a commercial lawyer. That means I focus on the law relating to businesses and their dealings with each other.

These rules include deals between individuals, but most businesses are incorporated as companies, ranging from small start-ups to international conglomerates, and dealing in anything from bags of nails to financial derivatives. Right from the start I was interested in every aspect of these operations, and I've managed to maintain that breadth throughout my academic life. I have written about how companies operate internally, how they engage in the real world and are made liable for their engagements, and what happens when they collapse. I have also written extensively about the different assets that are traded in these deals. English property law is

The Cambridge Private Law Centre, of which Professor Sarah Worthington FBA is Director, operates from the Cambridge University Faculty of Law building.

All these legal rules need to fit together coherently to deliver a sensible commercial law regime by which businesses can run their operations.

much more subtle and intricate than the equivalent laws of our civilian counterparts. That greater flexibility has always been one of its major attractions to commercial traders.

Obviously, all these legal rules need to fit together coherently to deliver a sensible commercial law regime by which businesses can run their operations. But because we increasingly work in silos, there are disjunctions. My special passion is examining these disjunctions and trying to suggest a principled resolution, so that the rules make sense across the broader legal landscape. Without this there will inevitably be problems, many of which end up in the Supreme Court.

All legal academics probably hope their work will change the law. I've not moved mountains, but there are areas where I've had an influence, and occasions where courts have adopted the reasoning I have suggested, and that has changed how the law is understood.

How do academic lawyers help explain what the law is?

Academics do this in different ways, sometimes by systematising a broad range of material, sometimes by unravelling and exposing the workings of particular parts. The first is especially important in common law systems, where the law is developed case by case. A particular fact scenario is presented in court, and a decision is made. When the next scenario comes along, typically a bit different, there may be a different decision. Without any intervention, we would simply have an accumulation of undifferentiated cases. It was in the mid-1700s that William Blackstone started writing his *Commentaries on the Laws of England* – going through all the cases and trying to impose a structure on them, so that they would be intelligible to those who followed after.

When academics write law textbooks, they are engaging in exactly the same practice – imposing a structure on a mass of cases. In my area, most of the sophisticated and controversial aspects of the law are found in the common law, not in statute. I have always loved the process of extracting the key principles from a mass of cases. But the same process is also needed in areas dominated by legislation. Consider all the litigation still needed to implement the Insolvency Act 1986 or the Human Rights Act 1998: decades later, we still need judges to reach decisions and textbook writers to characterise and categorise the outputs.

Textbooks are used by both students and practitioners. Together with Professor Paul Davies FBA, I edit *Gower's Principles of Modern Company Law*. 'Jim' Gower FBA, a deservedly famous company lawyer, wrote the first edition of this book in the 1950s. Only after his death was his work fully recognised as an authoritative text, now widely cited by practitioners and judges. Editing such a book brings with it an implicit responsibility for maintaining its reputation for objectivity and reliability.

I also edit *Sealy and Worthington's Text, Cases and Materials in Company Law*, which presents students with a collection of the most important cases, with sufficient commentary to set out this large and complex area of law in a concise and clearly structured way. Len Sealy, who was my PhD supervisor, produced the first edition in the early 1970s. Since I took over, I have tried to remain true to his goal of teaching students how to think like lawyers. The book deliberately uses long extracts and pointed questions to encourage students to unpick the underlying logic, and the competing arguments and distinctions that led to the outcome.

The broad ambition of both these books – and really of almost everything I write – is to expose the reasoning that leads to a conclusion. I want to know whether the underpinnings for a rule are robust enough for us to feel confident in the approach, and also whether the resulting legal landscape is one that will serve English commercial law and its parties well.

We want companies to behave well – not just a whisker above the minimum acceptable standard. That creates a difficult legal problem.

Have there been developments in business practice that the law has had to catch up with?

Yes. Indeed, this is the main driver for the law's continuous development – the law typically lags a little behind the activities of business and the demands of practice. For example, international trade brings with it inevitable disputes about which country's laws should govern the agreed deal and its disputes. This problem has existed since people were trading in sailing ships, although it is now far more prevalent, and the rules have become correspondingly more sophisticated.

But sometimes problems that appear novel are not. Take the way that business can be done through 'smart contracts' – these are contracts that can be made or executed by a computer. When Lehman Brothers went into administration, all its trading in securities was supposed to stop. One story has it that, at some point, one of the administrators looked around the room and asked, 'What is that flashing light?' – it was a computer, still running, executing thousands of securities transactions a day because the dealing was automated. However, the fact that contract terms are embedded in a computer code, or that a trade is automatically executed according to an agreed process, does not change the fact that the underlying deal is still a perfectly ordinary contract of the type that lawyers have long been familiar with.

The issues might seem a bit more complicated with crypto-assets and Bitcoin, but again I think not. We have very special rules concerning the use of money as currency. Payment in Bitcoin certainly could not count as payment in 'money'. Nonetheless, it could still quite readily count as the exchange of an 'asset', provided our concept of property was flexible enough to embrace that view. I mentioned earlier the common law's very long history of innovative approaches to property. I predict that our existing rules will quite happily embrace crypto-assets as 'assets' – as property – without the need for any further stretching.

So perhaps the bigger problems lie with policy. For example, the British Academy is running a large project on the *Future of the Corporation*, headed by Professor Colin Mayer FBA. Companies were once seen as delivering public good: they enabled railways and canals to be built, when no individual could have risked such capital on a single venture. Now, however, we are worried about the moral hazard of company controllers lining their own pockets at society's expense. We want companies to behave *well* – not just a whisker above the minimum acceptable standard. That creates a difficult legal problem. It is hard to justify a law that penalises people – including companies – merely because they fail to meet an aspirational objective.

Our earliest approach simply required public disclosure, and then left matters to the market on the basis that 'sunlight is the best disinfectant'. But in the last two decades, England has led the way with another quite different mechanism. This newer focus is on corporate processes, not outcomes. Over the decades an increasingly refined set of 'best practices' has been drawn up, and every listed company is now obliged to disclose whether they comply with these best practices, or explain why they do not. This 'comply or explain' model is now used worldwide as a tool for delivering better corporate behaviour. But you can see the weaknesses. This mechanism doesn't address egregious outcomes, nor does it demand the exclusive pursuit of particularly attractive purposes or endeavours, which is where some modern energies are now focused. But this is difficult. It remains quite tough, legally and politically, to demand saintliness.

I believe that 'abuse of power' is another legal topic that you are looking at as a future project.

Abuse of power has suddenly become a hot topic, and not just amongst lawyers, thanks to *Miller 2* – the Brexit

case. We now all know that if a public official or public entity exercises powers, their decisions may be subject to judicial review.

I have long been exercised by the fact that similar rules ought to apply in private law, in person to person dealings. We already have such rules constraining the exercise of power by particular types of individuals – solicitors, trustees, company directors, business partners. But other cases are far less clear. For example, groups of shareholders may take decisions by majority vote, dragging along the dissenting minority, who must simply live with the unwelcome outcome. Over the decades, courts and commentators have struggled to articulate a coherent rationale to explain when intervention is warranted and when it is not. The 2008 financial crisis saw the same issues emerging in majority voting decisions taken by creditors and bondholders. More troubling still are simple bilateral contracts, where one party is given power to adjust interest rates, or rent charges, or rights of access, either 'reasonably' or even in their 'absolute discretion'. Think of all the times you have pressed 'OK' on your phone authorising such intermediation.

What limits should there be to all these powers? So far, my research suggests that all these powers are subject to exactly the same constraint: they can only be used for the purpose for which they were given. That was the public law rule applied in *Miller 2*; it is also the private law rule applied to fiduciaries. The obvious difficulty, however, is in defining proper purposes. Narrow purposes give judicial review a clear basis, whereas wide purposes make judicial intervention unlikely – but never impossible, I would suggest.

This will be the subject of my next book. I had initially wanted to tackle the project alone, but my current plan is for a broader collaborative venture, on the same model as a number of other recent publications I've been involved in, all emerging from the Cambridge Private Law Centre.

Another longer-standing concern of yours is about 'equity'. Can you explain what the issue is there?

Perhaps oddly, at least to non-lawyers, we have a dual system of law: we have common law and equity. Equity emerged as a separate court jurisdiction to deal with difficult cases. When the outcomes delivered by the common law's general rules appeared not quite apt in the circumstances, appeals could be made to the equity judges (known as 'Chancery' judges, sitting in a different location from the common law judges in the King's Bench). These equity judges might intervene, showing mercy and delivering equity by providing different and more discriminating resolutions than those of the common law courts. For example, a contract might be binding at common law, but unravelled and reversed in the equity courts on the grounds of some misrepresentation inducing its formation. These resolutions left the common law's general rules intact, to continue to be applied in the common law courts, but qualified them in the equity courts by providing for a different approach in defined circumstances.

Our modern laws owe a great deal to developments that took place in the courts of equity. It was these judges who created trusts and facilitated simple but powerful security interests. It was also these judges who developed novel rules regulating the conduct of trustees and other fiduciaries, constraining their use of power and demanding loyalty and self-denial in carrying out their property management functions. Even now, none of this is replicated in quite the same flexible way in civilian jurisdictions. These are the areas of law that have invariably fuelled my research: at heart and in my bones I am an equity lawyer.

But it is not obvious that we needed a dualist system to deliver all these advances. By contrast, it is obvious that the downside of a dualist system is that it attracts problems of consistency and coherence, especially as each jurisdiction pursues its own separate and increasingly sophisticated ways of dealing with difficult issues. These problems did not disappear when the administration of the two separate court systems was fused in the late 19th century. Now any judge in any court can administer equity and the common law as appropriate. But 'as appropriate' leaves a great deal of the devil in the detail.

In my Clarendon book, *Equity*, I ranged across the landscape of equity as it exists in the modern common law world, and suggested that with the aid of rigorous and principled analysis we might successfully eliminate the existing and troubling disjunctions, and integrate these branches into a unified system. This is the book I remain most proud of having written. It is effectively a long essay on the state of the law in this rather difficult area, and a plea for its careful evolution rather than clinging to the status quo. But the issues are complex and remain hotly contested.

Professor Sir Roy Goode FBA, a good friend and longstanding mentor, suggested privately 'not in his lifetime', and I suspect Lord Millett might think it should not happen at all, although he wrote an wonderfully generous foreword to the first edition, which still fuels my optimism. And in that vein, I suspect we may finally be moving, although slowly – there have been some welcome signals from the Supreme Court in the past five years.

Baroness (Brenda) Hale, President of the Supreme Court of the United Kingdom, is a role model for women in the legal profession. She was elected an Honorary Fellow of the British Academy in 2004.

You are now a Deputy High Court Judge in the Chancery Division. As an academic, you have spent your time looking at other people's judgments. What new perspectives do you have now that you are handing down judgments which you know other academics may be looking at?

It was an enormous honour to be appointed as a Deputy, and it brings new challenges and a new responsibility. It was also quite a surprise – although a lovely one – given my lack of court experience. That meant I hit the ground quite cold, and had to learn very quickly. That continues. Interestingly, my experience in academic and administrative roles prepared me in ways I hadn't expected – in terms of managing the court with due decorum, making people feel comfortable, and gathering the necessary information from them.

The role of a judge might seem superficially similar to that of an academic, in that both need to understand the law and apply it in given situations. But academics invariably take the facts as given. By contrast, at least in the High Court, a large part of a judge's role is weighing the evidence and determining the facts, trying to do so objectively, guarding against bias and influence, including from compelling advocates. Which law should apply, and how, depends greatly on how you classify the problem and its particular facts.

I've also found that the human element adds a particular sensitivity to every single case. Commercial cases are often seen as exclusively about money, whereas family and immigration cases tug at the heartstrings. But behind the claims for money are individuals dealing with partnership breakdowns, professionals at risk of losing their ability to practise, or businesses losing their hard-won start-up capital or intellectual property.

And one side is inevitably going to lose. So, I write every judgment – as most judges do – with the losing party in mind, trying to explain as clearly as possible why the case went against them.

So back to your question – all that means that I now know from very personal experience just how much effort judges put into getting things right, applying the law carefully, aiming for predictable and replicable rules. And academics only write about cases with which they disagree; they never write congratulatory articles saying, 'Wonderful judgment, perfect in every way.' I have always tried to deliver my criticisms sensitively, but now I certainly write with new empathy. But I do still write …

It is a real privilege to be doing this, and it is perhaps the most challenging thing I have done. I enjoy it tremendously.

At a British Academy event in the summer, you talked to the Rt Hon. Baroness (Brenda) Hale – who is an Honorary Fellow of the British Academy – about the glass ceiling in the legal profession. She was very much in the public eye in September 2019, delivering the Supreme Court judgment in the case about the prorogation of Parliament.

It was a real treat to interview Lady Hale, and typically generous of her to accept the Academy's invitation.

Students around the country idolise her. They would describe her as completely unassuming and eminently approachable, despite her role as President of the Supreme Court. But she is also known for her sharp intellect – that was evident in her interview – and I am quite sure that counsel appearing before her are not quite as relaxed in her presence as the students who seek her out. Since *Miller 2*, if not before, she has become a national icon in a way that is simply unprecedented for a UK judge.

Lady Hale's list of firsts – with her roles at the Law Commission and in the House of Lords and the Supreme Court being only the most obvious of them – provide ample evidence of her breaking the glass ceiling. More than that, she is a vocal and passionate advocate for women, indeed for diversity more generally, encouraging women to do more, and do it in greater numbers. She's generous in her support. But perhaps her greatest contribution is simply as a role model, providing tangible evidence that these things can be done, and can be done with an individual style that does not need to conform to past stereotypes.

In that regard, Lady Hale is an encouragement to all of us. Given my early life in science laboratories, I am probably too used to being in groups dominated by men. But teaching science in an all-girls' school gave me an early, forceful understanding of the power of role models. I try to repeat that with my colleagues and students when they need it. Interestingly, they seem to find it just as important that I am married and have children than that I can offer career advice – options and role models yet again, I suppose.

You have been involved in the administration of many academic, professional and charitable bodies – including now being the Treasurer of the British Academy.

I have been lucky with opportunities, and have always enjoyed the thrill (mostly) of a role outside teaching and research. Teaching is rewarding because you can see when you have had an impact; research is more solitary, and I enjoy that too. But I also value a wider engagement, and being part of a larger endeavour. Quite early on in my time at the LSE, I was given opportunities to participate in plans for change – something more than simply keeping the ship afloat – and that has become a defining feature of almost every role I have had since then. I find that an intellectual challenge, but I also like getting people to work together, to do something new and different from what has been done before.

When I was first asked if I would be interested in becoming the Treasurer of the British Academy, Lord (Nicholas) Stern was President. I knew him from the LSE, and knew that he would want to make a difference. And so he did. The current President, Sir David Cannadine, is similarly motivated, powerfully so, and I have loved being part of a team with such a focus.

What is your vision for the future of the British Academy?

I can put that very simply. The British Academy has enormous intellectual heft, and we should use at least some of that for the public good.

An obvious priority is to do more to bring on the next generation of scholars, and I'm especially interested in playing a role in that. But we should also be doing much more to inform and educate the general public, making our expertise more widely available and accessible to them. Especially in the current climate, we could do a lot to raise the intellectual level of public debate. I feel quite passionate about that. There is probably no other organisation with greater capacity to do this.

Similarly, we could do more to put our expertise to work in the policy arena. Obviously, we cannot be formulating policy plans for governments and other organisations, but we should be able to harness our expertise to describe the crucial issues in play and the concerns that need to be addressed. Reasonable minds might then differ in selecting the preferable approach. But with better inputs we might expect better and more robust outputs.

The British Academy receives some very welcome government funding to do these things, and much more to fund researchers. I think we use this money wisely, but we could do so much more. As Treasurer, I'm acutely aware of the need to diversify our resources in order to do this, and to increase our independence.

Sarah Worthington was interviewed by James Rivington.

Further reading

Some of Sarah Worthington's books mentioned in the interview

2016 book: *Sealy and Worthington's Text, Cases and Materials in Company Law*, 11th edition (12th edition in preparation)

2016 book, jointly edited with P.L. Davies: *Gower's Principles of Modern Company Law*, 10th edition (11th edition in preparation).

2003 book (2nd edition, 2006): *Equity*.