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**LORD NEUBERGER OF ABBOTSBURY, MASTER OF THE ROLLS**

**JUDGES AND PROFESSORS – SHIPS PASSING IN THE NIGHT?**

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**(i) Introduction<sup>1</sup>**

1. In his poem *The Theologian's Tale* Henry Wadsworth Longfellow captured the nature of the relationship between two people while one of them awaits the other's answer to a marriage proposal. He described them, their situation and perhaps the human condition generally, in nautical terms. For him they were,

*'Ships that pass in the night, and speak each other in passing,  
Only a signal shown and a distant voice in the darkness;  
So on the ocean of life we pass and speak one another,  
Only a look and a voice, then darkness again and a silence.'*<sup>2</sup>

2. For a long time the relationship between judges and academics in England and Wales (which, for convenience and out of no disrespect for the Welsh, I shall refer to as 'England') was that of ships passing in the night; ships that merely

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<sup>1</sup> I wish to thank John Sorabji for all his help in preparing this lecture. I would also like to thank Dr Walter Doralt for bringing to light the two articles by Alexandra Braun which have informed aspects of this lecture.

<sup>2</sup> H. W. Longfellow, *The Theologian's Tale: Elizabeth in Tales of a Wayside Inn* at IV.

occasionally spoke to each other, with distant voices, before returning to silence. In this we have traditionally differed from the approach taken by most other jurisdictions, a point remarked on by the late and lamented UK Supreme Court judge, Lord Rodger in 2010, when he observed how

*'In German-speaking countries, where academics are king, the judges often quote extensively from literature. Indeed, it sometimes looks as if they cannot write a clause, far less a whole sentence, without inserting some citation in brackets. Such judgments [he went on to say] are criticised by both practitioners and – perhaps rather churlishly – by academics themselves. The criticism is that judgments of that kind do not appear to be giving a clear and authoritative statement of the court's own view of the law.'*<sup>3</sup>

No fleeting look or voice over a cold sea there. The relationship is altogether closer and seemingly far more deferential, at least on the judges' side, than has historically been the case in England, or as Lord Rodger also observed, in Italy where judges are subject to a statutory prohibition on referring to academic works in their judgments<sup>4</sup>.

3. In this paper I would like to examine the nature of the relationship between judge and academic in England. In particular I want to focus on the way in which that relationship has changed over time, and how now judge and academic may no longer be seen as ships passing in the night. In examining this relationship I want to begin by examining the past, before moving on to the present, and I will then turn to a possible future.

## **(ii) The traditional common law convention**

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<sup>3</sup> A. Rodger, *Judges and Academics in the United Kingdom*, (2010) University of Queensland Law Review 29 at 32.

<sup>4</sup> A. Rodger, *ibid* at 32.

The relationship between judge and scholar in England was, historically, anything but close. It was very much a case of signals shown and distant voices in the dark. It was nowhere better exemplified than through the common law's sceptical approach to the citation of academic works in the courts. This approach had two aspects<sup>5</sup>. First, by convention, it barred citation of such works while their authors were still alive. Secondly, even if an author was dead, his book had to have achieved a degree of respectability before it could be cited as authority. However, these rules were increasingly breached with the passage of time.

4. The first aspect has been described as the '*better read when dead*<sup>6</sup>' approach. The first recorded instance of its operation appears to be in *Taylor v Curtis* (1816). Gibbs CJ, sitting in the Court of Common Pleas, refused to take note of '*two books of high estimation*' on the grounds that the author of each book was alive: once the author was dead, his book could be cited, at least if it was accepted as authoritative by the courts. This may well have been the first reported reference to the convention, but it is clear from the report of counsel's submissions in the case that the convention was well-established by then.
5. The convention also applied in the courts of equity, as is clear from a judgment three years later, given by one of my predecessors as Master of the Rolls, Sir Thomas Plumer in *Turner v Reynard* (1819). He said this,

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<sup>5</sup> For a discussion see, B. Komar, *Text-Books as Authority in Anglo-American Law*, (1923) 11 California Law Review 397; A. Braun, *Burying the Living? The Citation of Legal Writings in English Courts*, (2010) The American Journal of Comparative Law [Vol. 58] 27; A. Braun, *Judges and Academics: Features of a Partnership*, in J Lee (ed), *From House of Lords to Supreme Court. Judges, Jurists and the Process of Judging* (Hart Publishing, Oxford 2010).

<sup>6</sup> N. Duxbury, *Jurists and Judges: An Essay on Influence*, (Hart) (2001) at 78.

*'I called for authorities in support of [a point], but in all the books on the duties of executors, and in all the cases on the subject, not a solitary instance is to be found. There is indeed a hint in general terms in the work of a living writer (Toller on Executors, 426); but it is no authority.'*<sup>7</sup>

Sir Samuel Toller fell foul of the prohibition on the living. History does not seem to record whether any judge accepted that he obtained authoritative status when he died two years later.

6. By the mid-19<sup>th</sup> century the convention was well-established. It was, for instance, restated some 33 years after *Turner*, in the case of *R v Ion*, a criminal prosecution for the crime of uttering, which was the common law crime of passing off a forgery<sup>8</sup>. Counsel for the prisoner, as a defendant was then known, sought to rely on *Archbold's Criminal Pleading*, which is now the leading authority on criminal pleading, evidence and practice. At the time it was still in its infancy. Counsel started his reliance on it by attempting to charm the bench, pointing out that one of the judges in front of him had '*formerly edited Archbold* and then moved rapidly on to describe its present editor, a Mr Welsby, as someone who can be '*cited as an authority.*'
7. The immediate response from the Bench was not positive. Pollock CB brusquely responded: '*Not yet an authority.*' Counsel tried again, making the point that, '*It is no doubt a rule that a writer on law is not to be considered an authority in his lifetime. The only exception to the rule, perhaps, is the case of Justice Story.*' Coleridge J interjected '*Story is dead.*' This was perhaps a little beside the point: counsel's submission was not that Story could be cited because he was dead, but

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<sup>7</sup> (1819) 1 J & W 39, 44; 37 ER 290, 292 cited in Braun, *Burying the Living* at 30.

<sup>8</sup> See for instance Forgery Act 1861 s36.

that he had been cited during his lifetime. Cresswell J added how he was sure Mr Welsby had done a good job in abstracting the principles. A good job he might have done, but that was not sufficient. Lord Campbell CJ finished off by saying that, while his opinion of Mr Welsby was one of '*sincere respect*', that did not transform him into a citable authority. The simple fact was that Mr Welsby was still alive, and no authority<sup>9</sup>.

8. Citation of the living was perhaps most famously deprecated by Kekewich J in *Union Bank v Munster* in 1887<sup>10</sup>. He noted with much regret how the citation of textbooks by authors who were still alive was increasing, despite the rule prohibiting such citation. It was much more preferable in his view if the convention was enforced not ignored. The convention was subsequently restated in a judgment by Vaughan Williams LJ in 1913<sup>11</sup>, and once more by another of my predecessors as Master of the Rolls, Lord Hanworth, in a judgment in 1927<sup>12</sup>.
9. Judges deprecated citation of living scholars, but scholars went along with it. Thus, the great Professor Winfield noted two years prior to Lord Hanworth's judicial reassertion of the convention, how '*Counsel are not entitled to quote living writers as authorities for a proposition. . .*'<sup>13</sup> The late highpoint of the convention came a few short years later, when in *Donoghue v Stevenson*, Lord Buckmaster in the House of Lords refused to countenance citation of living writers, saying this,

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<sup>9</sup> (1852) 2 Den 475, 488; 169 ER 588, 594 cited in G. Nicholls, *Legal Periodicals and the Supreme Court of Canada*, (1950) *The Canadian Bar Review* [Vol. XXVIII] 422 at 426.

<sup>10</sup> (1887) 37 ChD 51, 54.

<sup>11</sup> *Greenlands v Wilmhurst* (1913) 29 TLR 685, 687.

<sup>12</sup> *Re Ryder & Steadman's Contract* [1927] 2 Ch 62, 74.

<sup>13</sup> P. H. Winfield, *The Chief Sources of English Legal History* (1925) at 255 – 256, cited in Nicholls (1950) at 428.

*... the work of living authors, however deservedly eminent, cannot be used as authority, though the opinions they express may demand attention.*<sup>14</sup>

10. So much for the first aspect of the convention. Its second aspect related to the citation of those who had lived. Death did not ensure that anyone was capable of citation as an authority. It might have been a necessary condition for citation in court, but it was not a sufficient one.

11. An author could be cited, and perhaps cited regularly, if he was dead provided that his work had obtained the patina of authority which great age and numerous instances of judicial approval (something of a Catch 22, one might have thought: if an author could only be cited if he had been previously approved in a judgment, how did he first get to be cited?). If you were a Bracton, Fleta, Britton, Coke or Finch you could be cited<sup>15</sup>. It, of course, helped if you had also been a judge, rather than a practitioner or academic. Indeed, the early 19<sup>th</sup> century Lord Chancellor, Lord Eldon said this in 1814, *'One who held no judicial situation could not regularly be mentioned as an authority.'*<sup>16</sup> This view was reiterated by Chief Justice Best, while explaining why Bracton could be cited as an authority,

*'Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry the Third [the 12<sup>th</sup> century], gives great authority to his writings.'*<sup>17</sup>

(Perhaps this was the answer to the Catch-22: only those who had been famous judges could be cited before their works had been approved in a judgment.)

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<sup>14</sup> [1932] AC 562, 567.

<sup>15</sup> Komar, (1923) at 399, 410.

<sup>16</sup> *Jones v Jones* (1814) 3 Dow 1, 15; 3 Eng. Rep. 969.

<sup>17</sup> *Gifford v Yarborough* (1828) 5 Bing. 163, 167; 130 Eng. Rep. 703 cited in Komar (1922) at 410.

12. It would be wrong to pretend that there was complete consistency of judicial approach to this convention. The point can be appreciated from a judgment of Plumer MR a year after he gave judgment in *Turner v Renard* (where he refused to look at Toller's book on executors, as Toller was still alive). In *Cholmondeley v Clinton* (1820) he referred, without naming it, to a famous work – the *Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* – by Lord Redesdale, the one-time Lord Chancellor of Ireland. He did so with approval, implying that, at least in the case of Lord Redesdale, there was no difference between a living author and a dead one; Lord Redesdale was very much still alive at the time. While Plumer MR did not rely on it, he noted it was authoritative<sup>18</sup>.

13. Lord Redesdale was not a unique case, as was noted somewhat sardonically by a Mr Denison, the case reporter, who published the decision in the utterance case of *R v Ion*. His footnote to the case report stated that the convention barring citation of the living was one '*more honoured in the breach than in the observance*.' He identified five authors, including Story (who had been a judge) who Mr Justice Coleridge understood to be dead, who had been cited during their lifetimes<sup>19</sup>. The exception was not limited to judges or former judges however. Eminent living practitioners could also come within the scope of the exception. Tidd's Practice, Sugden on Powers, as well as Redesdale's Treatise, were all cited while their authors were alive and in practice at the Bar<sup>20</sup>.

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<sup>18</sup> *Cholmondeley v Clinton* (1820) 2 Jac & W 1, 151 – 152; 37 Eng. Rep. 527, 581 – 582; Duxbury (2001) at 78 suggests that Plumer MR adopted an inconsistent approach to the convention against the living here. What might better be said is that this was an exception to the general rule, given the length of time the work had been in print and the court's long acceptance of it as authoritative due to its accuracy and merit *pace* Komar (1922) at 399ff.

<sup>19</sup> See Nicholls (1950) at 426; Braun, *Burying the Living* at 32; Komar, at 403 – 404

<sup>20</sup> Komar (1922) at 404.

14. The exception to the convention did not however assist many scholars. To fall within its scope, it appears that either one had to be an eminent judge or practitioner or one's work had to have been approved as authoritative by the legal profession and the courts. That could be said for Story and Redesdale, whose works had long been in print and had been universally approved of by bench and bar. It could not however be said of Sir Samuel Toller. He may have been an eminent practitioner in 1819 – as he was Attorney-General of Madras in India – but as Plumer MR had it he was no authority.

### **(iii) Reasons for the convention**

15. So perhaps rather than consisting of two rules, the convention ran to three: first, a general prohibition on citation of the living; secondly, a general requirement that to be cited when dead an author had to either have been a judge or practitioner and their work had to be hallowed by Time's patina of authority; and thirdly, a living judge or eminent practitioner could, exceptionally, be cited as long as their work was accepted by the court as of authoritative stature. Why did English courts keep scholarly works at a distance, as distant voices, only to be heard if the author was a judge or practitioner?

16. Duxbury in his monograph on the relationship between Judge and Jurist identified eight grounds which might be said to justify the convention<sup>21</sup>. Nicholl in a trenchant and clearly correct critique of an attempt in 1950 by the then Chief Justice of Canada to breathe new life into the convention had previously

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<sup>21</sup> Duxbury (2001) at 66ff



identified some further reasons<sup>22</sup>. Some of these reasons are more convincing than others, but none of them is entirely convincing. I want to highlight some of them.

17. Quite possibly the least credible rationale, much ridiculed by Nicholl, was put forward by Kekewich J in *Union Bank v Munster*. We might not be too surprised that Kekewich J's reasoning was not all that robust. He is often put forward as a candidate for the worst High Court judge in England in the 19<sup>th</sup> century (although North J ran him hard). He is famously known for a submission by the appellant's counsel, said to have been made when his decision in *British Motor Syndicate Ltd v J.E.H. Andrews & Co Ltd* (1889)<sup>23</sup>, was subject to appeal before the Court of Appeal. The submission was,

*'This, my Lords, is an appeal from a decision of Kekewich J. – but there are other grounds upon which my client relies.'*<sup>24</sup>

18. Kekewich J's rationale for upholding the first aspect of the convention was that it was simply not possible to ask a textbook writer for clarification. Unlike an advocate, who could be questioned about his or her submissions, the court could not do the same with the writer of a book or article. This is a hopeless reason, given that deceased authors could be cited. As Nicholl put it, *'one may be permitted to wonder whether it is easier to ask a dead than a living author what he means.'*<sup>25</sup> Perhaps Kekewich J's approach was like that of the prophetess

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<sup>22</sup> Nicholls (1950)

<sup>23</sup> (1889) 16 RPC 577

<sup>24</sup> J. Phillips, *Sir Arthur Kekewich: A Study in Intellectual Property Litigation 1886 – 1907*, [1983] EIPR 335 at 337. Kekewich J's decision in the case was, perhaps ironically given the nature of the anecdote, reversed in the Court of Appeal and upheld in the House of Lords.

<sup>25</sup> Nicholl (1950) at 429.

Deborah. Perhaps he too could sit under a palm tree and await divine inspiration on the meaning of a dead author's words as he dispensed justice<sup>26</sup>.

19. Another equally poor rationale was that the courts should be suspicious of living writers as they might write with the express desire to influence the outcome of a case<sup>27</sup>. Again, this is hopeless. If it were right, the court should not listen to the parties or their advocates. This rationale also ignores the fact that the court's role is to assess the merits of arguments. If an argument stands up to scrutiny and critical examination, the fact that it was written with an eye to influencing the court is neither here nor there. A weak case is made no stronger by adding a glittering academic name to it. *Ad Verecundiam* arguments are of as little use in court as are *ad hominem* arguments. As Nicholl put it, the real question is '*what weight is to be given*' to an argument<sup>28</sup>. That is as true of an article written by a living as a dead academic, a submission made by Counsel or a line of argument in Bracton, Coke or Dicey.

20. Another particularly unconvincing reason rests on the claim that the growth of reputable law reporting in the 18<sup>th</sup> century reduced the need for judicial reliance on textbooks. The growth of law reporting at that time is undeniable. But that cannot logically justify the conclusion: it might explain the fact that reliance on law reports could supplant reliance on textbooks and academic commentaries but it simply cannot justify a convention barring commentary citation. It certainly cannot explain a convention barring citation of commentaries whose authors are

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<sup>26</sup> Book of Judges, 4.5, '*And she dwelt under the palm tree of Deborah, between Ramah and Bethel in mount Ephraim: and the children of Israel came up to her for judgment.*'

<sup>27</sup> Nicholl (1950) at 430.

<sup>28</sup> Nicholl (1950) at 430.

still alive. Furthermore, during the 18<sup>th</sup> century, there was a distinct growth in the publication of practitioner's texts, so one might almost just as well say that the growth of textbook writing in the 18<sup>th</sup> century should have justified banning the citation of judicial decisions.

21. Another rationale, which is a little more convincing, rests on the claim that England and Wales was a late developer in so far as academic law was concerned. The Vinerian Chair of Law in Oxford did not exist before 1758. University law faculties were the product of late Victorian development – Oxford and Cambridge only opened their law faculties in the 1870s, for instance. Our great jurists – Dicey, Anson, Maitland – were equally the product of that late Victorian flourishing. And it wasn't until the mid-20<sup>th</sup> century that academic law really flourished. As Duxbury put it, before that time it was '*a fairly moribund, amateurish profession*<sup>29</sup>.' In such circumstances, it is perhaps not altogether surprising that judges were reluctant to take notice of academic authority.

22. So the point was that as there was no historically significant, academic legal culture, (i) there was no culture of judges referring to academic treatises, and (ii) such academic texts as existed were not of sufficient age to have gained authoritative status. While there is some little force in this, there is a pretty fundamental difference between a reluctance to cite academic works on this ground and the development of a rule barring citation of works by living authors. At its highest, the lack of an academic legal culture might explain judicial wariness about permitting living academics' works to be cited, or about affording authoritative status to the works of dead academics. But wariness is a long way

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<sup>29</sup> Duxbury (2001) at 71.

from prohibition. The absence of a robust academic culture does not, on its own, explain such a development; not least as the convention did not even arise in respect of the work of academics. Works such as *Odgers on Libel, Archbold*, and *Fry on Specific Performance*<sup>30</sup>, were written by leading practitioners and judges. The convention barred their citation whilst their authors were alive. Anyway, this does not explain why death would transform works such as these into citable authorities.

23. So far as more modern academic writing is concerned, a new reason for judicial scepticism was suggested during discussions in the Max Planck Comparative Private Law Institute in Hamburg by a South African academic. It is that, compared with their mainland European counterparts, English legal scholars tend to express their conclusions relatively aggressively, and they appear to relish disagreement with each other, thereby mutually diminishing each other's credibility. This is in stark contrast with German and other civil law scholars, who tend to work co-operatively towards a common view, thereby increasing their credibility because (i) they are much closer to speaking with one voice on a particular issue, and (ii) they do not seek to undermine each other's academic credentials or reliability. This is an intriguing point, which may well merit further research. It may be that cause and effect are the converse: rather than the relatively raucous style of English academics undermining their credibility with judges, their lively style may be attributable to the fact that they have not been so closely considered by the judges, and therefore they feel the need to shout louder. It may also be that the comparatively confrontational style of many English legal

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<sup>30</sup> Nicholls (1950) at 426ff.

academics reflects the more confrontational English forensic style in court, when compared with that in the civil courts in mainland European countries.

24. An interesting contradistinction between textbook and articles, on the one hand, and judgments, on the other hand was expressed in 1968 by the former Vice-Chancellor, Sir Robert Megarry, himself a great writer of legal books on land law. It is summarised by Duxbury in this way: judges and academics live in ‘*two distinct legal worlds and are engaged in different enterprises*<sup>31</sup>. Megarry explained it in this way in his judgment in *Cordell v Second Clanfield Properties Ltd*, when disagreeing with what he had said as an author in one of his own books

*‘The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he . . . lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law.’*<sup>32</sup>

25. I do not think for a moment that Megarry intended this to be a justification for not citing books and articles in argument or judgments in court. But he has been interpreted as suggesting that academic law was, in some way, weak or flabby law, almost dilettante, and therefore not to be trusted or cited to the court. Of course, as Duxbury pointed out, this argument proves too much: it requires a prohibition on the citation of all academic works, not just those of the still living<sup>33</sup>. Flabby law is flabby whether the author is alive or dead. The only advantage death brings, if

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<sup>31</sup> Duxbury (2001) at 74.

<sup>32</sup> [1969] 2 Ch. 9, 16 – 17.

<sup>33</sup> Duxbury (2001) at 74.

it can be put that way, is that the scope for the author's mind to change is lost. But as the law, and even the Supreme Court, can change its mind it is not entirely clear what advantage this really brings.

26. Such an argument falls down for another reason; a reason which leads me from the past to the present, where the prohibition no longer stands. We have moved to a new relationship between judge and academic, one where academic views, whether from the living or the dead, are not merely signals shown across a dark sea or distant voices sent across the darkness to unhearing judicial ears.

#### **(iv) The disappearance of the convention**

27. There were, it seems to me, two principle reasons, which perhaps overlap, why the judicial view of academic writings changed, which it started to do from the end of the 19<sup>th</sup> century.

28. First, judges and lawyers began to appreciate that the convention which operated to keep academics at a distance from the courts was not all that it seemed. While academic texts could be cited not as authorities, they could be relied on as evidence to show whether a legal principle contended for by one of the parties had been accepted as such. As Sir George Jessel MR put it in *Henty v Wrey* (1882)

*'There is only one other point to be considered – what do the text books say? It is always very important when you want to know whether a rule of law, however erroneous, has been established, to see whether it has been accepted by the profession, and although the text books do not make law they shew [sic] more or less whether a principle has been generally accepted.'*<sup>34</sup>

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<sup>34</sup> (1882) 21 ChD 332, 348, and see Nicholl (1950) at 427.

This approach does not strictly engage the conventional prohibition. It does not enable books and articles to be cited as authorities. They are simply referred to as form of secondary source material, in order to ascertain what the state of the authorities is understood to be. They do not establish or undermine the correctness of an argument put to the court. They enable the court to see how the law has been understood amongst the legal community. This was of course a limited role, but one which brought the judicial and academic worlds closer together.

29. Secondly, the conventional prohibition on relying on academic writings began to be routinely evaded. I say 'began to be', but I strongly suspect that this means of evasion had long been practised by barristers. But, as time wore on was, it would seem that the courts openly accepted, even embraced, the evasion.

30. The manner in which this occurred can be extrapolated from Megarry J's judgment in *Cordell* in 1968. Expanding on his theme that argued law was tough law he said this,

*'[It is as true today] as it was in 1409 when Hankford J said "Just as a man would not know the quality of a bell without ringing it thoroughly, so too it is said that by good disputing shall the law be well know" ... . I would, therefore give credit to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilisers of thought, and as conveniently expressing the fruits of research in print, often in apt and persuasive language. But I would do no more than that; and in particular I would expose those views to the testing and refining process of argument.'*<sup>35</sup>

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<sup>35</sup> [1969] 2 Ch. 9, 16 – 17.

Megarry J's position in the 1960s was thus by no means absolutist, as some have (wrongly) chosen to interpret it. In effect, his view was not that opinions expressed in academic works may not be viewed as authoritative, in that they were subject to the conventional prohibition on citation, but that they were capable of being considered, and tested in the process of argument.

31. It appears that academic views had been put before the court in this way well before 1968. Courts had been hinting that counsel could rely on academic works in the course of their submissions for some considerable time. To give one example, in the proceedings in 1913, mentioned earlier, in which Vaughan Williams LJ admonished counsel for attempting to cite the still living Odgers' work on Libel, he went on to say this,

*'No doubt Mr Odgers's book is a most admirable work, which we all use, but I think we ought in this Court still to maintain the old idea that counsel are not entitled to quote living authors as authorities for a proposition they are putting forward, but they may adopt the author's statements as part of their argument.'*

The position therefore had moved so that there was formal adherence to the convention, but the courts were finding ways round it. As long as no claim was made as to authoritative status, a writer's views could be put before a judge. Courts could thus assess the force of a point by considering it against the fruits of research. The point could, as Megarry J said, be tested and refined in the process of argument. By something of a sleight of hand, then, academic views could be placed before the court, and in some cases adopted by the court as authoritative, but only as long as the source was not mentioned, or, if mentioned, it was not treated an authority.



32. Once one sees where the judicial approach to the citation of legal articles and textbooks had got to by 1970, it is unsurprising that the convention did not survive the rigours of the 20<sup>th</sup> century. The beginning of the end of the convention came in the 1930s. In 1932, it will be recalled that the convention had been reasserted by Lord Buckmaster in the House of Lords in *Donoghue v Stevenson*. Four years later, in 1936, in another House of Lords case, *Nicholls v Ely Beet Sugar Factory*, counsel tried to rely on Sir Frederick Pollock's *The Law of Torts*, but Pollock was alive. Lord Wright commented with his tongue firmly in his cheek that he could not do so because it was '*fortunately not a work of authority*'.<sup>36</sup> If the convention was being openly mocked, particularly by a Law Lord in a judgment, it is a good sign that it was losing its authority. (A coda to this point is that the Law Reports misreported Lord Wright's comments, turning 'fortunately' into a claim that it was '*unfortunate*' that it was not a work of authority<sup>37</sup>.)

33. By the mid-20<sup>th</sup> century, the convention was being ignored by the courts and sidestepped by counsel with the court's connivance. A convention treated in this way has ceased to be a convention. It is not surprising then that from the 1950s relations between judge and professor had taken on an entirely different, more honest, sensible and constructive, complexion. Academic works were being openly cited. The trail blazed by Pollock and, for instance, Goodhart<sup>38</sup> saw the development of serious and highly respected academic journals, such as the Law Quarterly Review, the Cambridge Law Journal and the Modern Law Review, and treatises play a much more prominent and open influence on judicial decision-

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<sup>36</sup> [1936] Ch 343, 349

<sup>37</sup> Duxbury (2001) at 65.

<sup>38</sup> Duxbury (2001) at 84ff.

making. As Longmore LJ recently put it, '*nowadays judges read academic articles as part of their ordinary judicial activity*'.<sup>39</sup> Articles are openly cited by advocates in argument, and openly looked at by judges. They are openly relied on in judgments, criticised or, in some cases maybe, added for reasons of vanity – to give seeming credence to an element of a judgment.

34. A genuine dialogue now exists through the medium of judgments and academic articles between judges and scholars. In developing in this way the relationship has not gone so far as to enable me to suggest that the English courts adopt the German approach: academic writings are still not viewed as authorities in the same way as judgments, although they may well set out the state of the authorities as well as argue how the authorities ought, in their view, to develop. In this regard I agree, as I usually do, with Lord Rodger: it remains the case that statute and judicial precedent remain our primary sources of authority<sup>40</sup>.

#### **(v) A wider view of the convention**

35. The marked contrast between the traditional approaches of judges to academic works in England and Germany is attributable, in large part, to our different legal traditions, common law as against civil law. Civil law is, if you like, a top down system, whereas common law is a bottom up system. Civil law is based on a code which is founded on principles, theory and logic, which are combined into a comprehensive coherent system of legal rules, and that system is then applied by judges to individual sets of facts in particular cases. Common law involves the judges developing the law on a case by case basis, and fashioning legal rules, not so much by reference to an overarching principle or set of principles, but by

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<sup>39</sup> *Re OT* [2004] EWCA Civ 653 at [43]

<sup>40</sup> Rodger (2010) at 32.

reference to the experience and the requirements of justice as assessed in the context of the facts of a particular case, albeit viewed by reference to the law built up by judges in previous cases. Although in this respect it is perhaps worth noting that, for instance, the civil law's approach to the development of contract law, in Germany at least, does not perhaps differ all that much from the English approach, notwithstanding the provisions of the Bürgerliches Gesetzbuch (BGB).

36. The difference between the common law and civil law systems can be seen in historical and philosophical terms. In epistemology, the theory of knowledge, there has been a continuing controversy between the empiricists and the rationalists. The empiricists relate ideas, meaning, and indeed truth, to experience, whereas the rationalists relate such concepts to reason. It is no surprise that the major empiricists were British – Hobbes, Locke, Berkeley, Hume – whereas the leading rationalists were from mainland Europe – Descartes, Spinoza, Leibnitz. Francis Bacon, one of the British empiricists suggested that empiricists were “like ants”, in that “they collect and put to use”, whereas the rationalists, he said, were “like spiders; they spin threads out of themselves”.

37. It is scarcely surprising in these circumstances that English judges have historically had so much less regard for academic lawyers than their German counterparts. The academics have a substantial, presumably in many cases a predominant, input into the civil code on which judgments in a civil system are based. On the other hand, at least in theory, there is no academic input into the formulation of the common law: it is built up by the judges. The lifeblood of civil law is principle and logic, whereas the driving force of the common law is

experience and common sense. Scholars have a far greater role to play in relation to principle and logic, as opposed to experience and common sense. (That is not to say that scholars have no expertise when it comes to experience or common sense – perish the thought.)

38. The advantages and disadvantages of the common law model may be seen through the lens of the career of perhaps its greatest judge, Lord Mansfield, Lord Chief Justice between 1756 and 1788. When he came into office, he found an ossified, outdated, rather unprincipled system of court procedure and of commercial law, both badly lagging behind their European counterparts. Much of this can be attributed to the fact that lack of academic input and rigour, as well, I am afraid, as judicial complacency, had taken their toll over the past 150 years. However, over the first fifteen years of his tenure, Mansfield showed what could be done in a case-based judicially driven system by an innovative, committed and practical judge. One of the most prized jewels of our system over the past two centuries has been its commercial law, and Lord Mansfield almost single-handedly brought it from a fairly hopelessly impractical state to being fit for purpose in fifteen years. Indeed, he introduced a spirit into the common law which encouraged judges to ensure that the common law remained tuned into contemporary social and business needs and practices.

39. Interestingly, in modernising the common law, Mansfield drew a lot on mainland European concepts such as *uberrima fides*<sup>41</sup>, thereby drawing the English ants into the mainland European spider's web. With the European Communities Act 1972, pursuant to which the United Kingdom joined the EU, and the Human

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<sup>41</sup> *Carter v Boehm* (1766) 3 Burr 1905

Rights Act 1998, which rendered the European Convention on Human Rights enforceable in UK law, the English courts have had to become more accustomed to coping with that web. In my view, this has not only affected judges when deciding points of EU or human rights law: it has affected our thinking more broadly, making it more principle-based and rather less precedent-based. This has given an added impetus to the undermining of the already crumbling resistance of the English judiciary to the citation of academic books and articles in court, and their refusal to treat such books and articles as authoritative.

#### **(vi) Judges and academics in 21<sup>st</sup> Century England**

40. The position we find ourselves in England today may not be one where the word of an academic is King, but rather one which, finally, sees judge and academic inhabiting the same world and influencing each other more openly and honestly than in the past, when the main way in which academic views could be sneaked into the courtroom was through advocates adopting those views. As Dr Braun has put it, judges and academics are now in a constructive partnership<sup>42</sup>.

41. This is just as well. The trouble with the conventional approach of the English judiciary to academic writing under a common law system is that the law either stultifies or it develops in an intellectually incoherent way. Common law judges risk falling into one of two traps. The first is to stick unimaginatively and unthinkingly to the principles and rule of the old cases despite great social, moral and technological changes, thereby throwing the law into disrepute as being completely out of touch and irrelevant. Alternatively, judges are tempted into

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<sup>42</sup> Braun, *Judges and Academics* (2010).

deciding cases by what they see as the fair result, thereby throwing the law into disrepute because of intellectual vacuity and practical uncertainty.

42. The problem is neatly illustrated by a decision of the House of Lords given little more than fifty years ago, just before judges truly and fully embraced academic writing as the fertile source it should be. In *Lister v Romford Ice & Cold Storage Co Ltd*<sup>43</sup>, the majority of the House of Lords managed to be castigated for both failings. In a dissenting judgment, Lord Radcliffe tartly said that ‘*Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today*<sup>44</sup>. Albeit writing 45 years later, one academic was able to say that ‘*the majority judgments*’ in decisions such as *Lister* rendered it “*difficult to understand how the House even managed to retain the respect of any serious jurist*<sup>45</sup>. However, the relationship between judges and academics was changing very quickly even in 1957 from one of ignorance to one of partnership.

43. I would like to consider some features of this new partnership. Its most obvious feature is the sheer influence which legal academics have had on the development of the legal profession, and consequently on the judges, who are drawn from that profession. The growth of university law departments over the past fifty years in England, as no doubt elsewhere, has been remarkable. The best departments play a fundamental part, not just through undergraduate law degrees but importantly through the development of masters degrees, particularly specialist ones, in influencing legal minds in their formative years. Lord Goff – as influential an academic as he was a judge – said in 1987 that it was ‘*difficult to overstate the*

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<sup>43</sup> [1957] AC 555.

<sup>44</sup> [1957] AC 555, 591-2

<sup>45</sup> Geoffrey Samuel, *King's LJ*, 22 June 2001

*influence of the jurist in England today – both in the formation of young lawyers and in the development of the law.*<sup>46</sup>

44. What was true then is at least as true today. A generation of lawyers educated under the influence of great academics such as Gareth Jones, Roy Goode and the late Peter Birks have, for instance, influenced the development of the law of restitution, of unjust enrichment, as much as, if not more than, Lord Goff did himself. What might be described as an informal partnership between bench, bar and academia helped to breathe life into an area of English law which had for too long languished under-developed and constrained by the mistakes of the past - or perhaps constrained by judicial errors of the past.

45. More generally, the growth in number, size, and quality of university law departments and the consequent influence they have had over the intellectual development of lawyers and judges since the 1950s has been immense. It has forged relationships between practitioners, judges and academics which have lasted lifetimes. This has inevitably narrowed the distance between judge and professor. This greater contact has brought with it a greater appreciation and understanding. It has also enabled informal discussion to take place on an ever-increasing basis. Such debates and discussions inevitably sharpen views, inform and educate, on both sides of the divide.

46. In the discussions in Hamburg to which I have referred, Professor Reinhard Zimmermann, who presides over the Max Planck Institute there, made the additional point that the many distinguished jurists, who fled to the United

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<sup>46</sup> R. Goff, *Judge, Jurist and Legislature*, (1987) 2 Denning Law Journal 79 at 92.

Kingdom from Germany following the rise of Hitler, contributed substantially to the quality of legal scholarship in England from the late 1930s. He should know, having been one of the two joint editors of an excellent book on the topic<sup>47</sup>. Names such as David Daube, Otto Kahn-Freund, Hersch Lauterpacht, Kurt Lipstein, Francis Mann, and Clive Schmitthoff, to name but a few, speak for themselves. There is no doubt that these were legal scholars of the first order, and their addition to the already impressive role of home-grown English legal scholars vastly improved the standing of academic lawyers in the United Kingdom. It was inevitable, and highly beneficial, that the judges, or at least the more open-minded and intelligent judges, then thought it right to pay more attention and respect to the views expressed by legal scholars.

47. The relationship between judge and legal scholar has also become closer in other ways. At one time, it was virtually inconceivable that a scholar could ever become a judge or vice versa. The two roles were simply too distinct to equip the one to do the other's job. That is a thing of the past. For some considerable time now we have been drawing judges from academia. Baroness Hale, for instance, was a leading academic before her appointment as Chair of the Law Commission, High Court judge and now, of course, Justice of the UK Supreme Court. Mr Justice Beatson was a leading academic at Oxford and Cambridge Universities. Mr Justice Cranston, apart from being a former Solicitor General, was for many years a Professor at the London School of Economics. Lord Justice Maurice Kay (Vice-President of the Court of Appeal (Civil Division)) was Professor of Law at Keele University before practising at the Bar. Lords Hoffmann, Goff, Rodger, and Collins, as is well known, all had academic careers, as well as careers in practice,

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<sup>47</sup> Beatson and Zimmerman, *Jurists Uprooted* (Oxford University Press, 2004)



and another Law Lord, Lord Millett, wrote many learned articles of high scholarship before during and after his judicial career.

48. And judges have spent time on lecturing and research at academic institutes. The late lamented Lord Justice Pumfrey, for instance, spent time each year teaching at the Max Planck Institute for Intellectual Property and Competition in Munich. Such transfers enable judges to gain academic experience, which can then be drawn upon when they are back in court. It is my hope that in the future more judges can gain similar experience, as indeed is commonplace in the United States, not least in respect of their Supreme Court Justices who can often be found benefiting from teaching courses at Universities.

49. And some judges on retirement become full-time or part-time academics. Lord Hoffmann teaches and researches at Cambridge and Queen Mary's London. Sir Robin Jacob has recently given up the delights of the Court of Appeal to be Professor of Intellectual Property Law at University College, London. He has the Sir Hugh Laddie chair – named after another judge who gave up the bench for academia (and then died, sadly young). Other former judges, such as Sir Stephen Sedley, have taken part-time positions as visiting professors, and, like Sir Robin, he continues to sit as a part-time member of the Court of Appeal. In this way those of us who remain on the bench benefit indirectly, as we learn from discussions with them, drawing on their new perspectives. Equally, we gain by the added contact they inevitably facilitate between other academics and members of the judiciary. So, too, the recent development in University College London of a group of scholars who closely study the judiciary has led to an increased level of discussion and cross-fertilisation between the judiciary and academia.

50. Changes such as these inevitably, help to foster closer relations and a more fruitful exchange of ideas. While it remains the case, as noted by John Gava, that judges do not engage in open-ended academic debate whereas academics do<sup>48</sup>, the greater contact which the two have with each other is playing an important role in the development of the law. The two professions may have different roles and different pursuits – intellectual development on the one hand, justice on the other – greater contact between the two can, within proper bounds, assist both. I am sure that robust discussion with members of the judiciary helps to hone academic debate and ideas. Equally, I am sure that such discussion, whether with former colleagues on the bench who have become academics, former academics who are now on the bench, or with academics generally at conferences or symposia, helps a judge's understanding of the law, its principles, and possible routes via which it could develop.

51. Although I am not against the idea, I am not suggesting in this paper that judges now approach cases through seeking the advice of academics, although that is not unknown. What I am suggesting is that greater contact between judges and academics forms part of a legal, judicial, culture which seeks to do justice. Sir Frank Kitto, a former justice of the High Court of Australia, suggested in 1992 that judges are under an obligation actively to look for academic articles, on the ground that it was part of their duty to do justice; to ascertain true fact and apply

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<sup>48</sup> J. Gava, *Law Reviews: Good for Judges, Bad for law Schools?* [2002] Melbourne University Law Review [Vol. 26] 560 at 571.

it to true law<sup>49</sup>. Ascertaining true law requires a broad consideration of black letter law, precedent, in some cases authorities from other jurisdictions, and academic writings. It is the judge's role, with the assistance of advocates, to consider and test those sources of law, which are, in the broadest sense, authorities. If that is the case, we have come a long way from the convention which kept academic writings from the courtroom.

52. It is not for the judges to simply follow what is said in academic articles or textbooks. We have to assess the writings critically, and in the context of a system of common law precedent. In some cases such writings may justify the development of the common law in new directions. In others they will not. And in yet other cases they may appear to justify a certain development, which turns out to be precluded by precedent.

53. The important point is this: as judges we will often benefit from the perspective brought by academic experts to a particular subject and the rigorous examination which they have subjected it to. That perspective can often provoke ideas, which can be tested in court, but which would not otherwise have come to light in proceedings. In that way we improve the means by which, to borrow from Oliver Wendell Holmes, we ensure that the law develops through experience<sup>50</sup>, in this case as wider experience than would be the case if we confined ourselves to statute and strict precedent.

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<sup>49</sup> F. Kitto, *Why Write Judgments?* (1992) 66 Australian Law Journal 787 at 793. For a discussion see, Smyth, *Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-legal Periodicals in the High Court*, (1998) 17 U. Tas. L. Rev. 164 at 167ff.

<sup>50</sup> Holmes, *The Common Law, Lecture I, Early Forms of Liability* at [1]; cf Coke, *Institutes of the Laws of England*, in *The Selected Writings and Speeches of Sir Edward Coke Vol. II* (Liberty Fund, 2003) at 702.

54. In this, I believe that we English judges have come a long way from the rather sterile state of affairs where judges and professors were ships which passed each other in the night. It seems to me that we now find ourselves in a position where – to swap Longfellow for Shakespeare – there is perhaps between the two professions a marriage of true minds.<sup>51</sup>

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<sup>51</sup> W. Shakespeare, Sonnet 16.