Better read when dead?

by Neil Duxbury

The English convention opposing the citation of living authors in court withered away some time ago. But why did it ever evolve in the first place? In an article based on a chapter from his forthcoming book, Neil Duxbury looks for answers.

My academic career began at the London School of Economics in 1987. During that year, there appeared in *Public Law* a book review by one of my colleagues in which he reported how the House of Lords' citation of an article by another colleague had prompted a circular from the LSE's Convenor drawing attention to the matter. This would not be the last time that I would learn of academic lawyers celebrating citation by the judiciary. And for a long time I was puzzled. English academic lawyers, especially when compared with their American counterparts, seem fairly uninterested in citations to one another. To be cited by a judge, however, is an entirely different matter. Why should English academic lawyers consider judicial acknowledgment of their work to be noteworthy?

The answer to this question is perhaps that academic lawyers have traditionally felt starved of attention from those whose acknowledgment they most crave. The value of academic work is something the judiciary has often appeared determined not to acknowledge. It seems highly unlikely, indeed would be near ludicrous to suggest, that English judges endeavoured in the past to develop a strategy for demoralizing legal academics. Yet that nebulous convention against the citation of living authors in English courts could hardly have been better designed to undermine the status and self-confidence of the academic lawyer.

CONVENTION AGAINST CITING LIVING AUTHORS

It seems inappropriate to refer to a distinct *rule* against the citation of living authors in court, since nothing more than a convention appears ever to have existed. In *Ion's Case* (1852), counsel claimed – and the presiding judges did not dispute – that there 'is no doubt a rule that a writer on law is not to be considered an authority in his lifetime'. Yet the footnote to this remark elaborates that '[t]his rule seems "more honoured in the breach than in the observance."' Kekewich J endeavoured to reinforce the 'rule' in 1887 when, having observed that counsel's argument in the case before him had 'almost entirely rested upon one passage in the work of Lord Justice *Fry* on Specific Performance', he commented that:

'It is to my mind much to be regretted, and it is a regret which I believe every Judge on the bench shares, that text-books are more and more quoted in Court – I mean of course text-books by living authors – and some Judges have gone so far as to say that they shall not be quoted.'

Note that Kekewich re-stated the rule because barristers were ever more persistently breaking it. The convention appeared to be in retreat. Yet although, by the middle of the twentieth century, explicit judicial support for the convention against citation was diminishing, many judges continued to adhere to it. 'In the 1950s', Alan Paterson has claimed, 'barristers by and large seem to have felt unable to breach the non-citation rule in arguments before the Lords.' Recalling his days as a law student in the early 1960s, Peter Birks remarked that 'we still took in the message that it was only exceptionally that a living author might be cited in court, something which I accepted without question as part of the natural order'. Even as late as 1980 – by which point appeal court judgments containing references to living authors were regularly being handed down – it is possible to find concern being expressed in the House of Lords over:

'the dangers, well perceived by our predecessors but tending to be neglected in modern times, of placing reliance on textbook authority for an analysis of judicial decisions' (Johnson v Agnew [1980] A.C. 367, 395, per Lord Wilberforce).

REASONS FOR THE CONVENTION

More interesting than the convention against citation itself are the reasons which might be offered in support of it. At least eight possible reasons might be identified.

First, the growth of law reporting after Blackstone's era and the resulting accessible store of common law principles ensured that it was no longer necessary to rely on textbooks for second-hand renderings of cases. Second, the declaratory theory of law – a theory which was subscribed to by many English judges certainly until the mid-twentieth century – seemed to preclude the possibility of treating textbooks as legal authorities. In 1892, Lord Esher explained the declaratory theory thus:

'[t]here is in fact no such thing as judge-made law, for the judges do not make the law, though they frequently have to apply

existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable.'

Acceptance of the declaratory theory appears to mean treating all extra-judicial opinion as not authoritative. For anyone who accepts the declaratory theory, the occasions on which any academic commentary might appropriately be cited in court are rare, since the jurist is little, if anything, more than a helpful expositor of the law.

FEAR OF CAUSING OFFENCE

A third possible reason for the convention against the citation of living authors is the fear of causing offence. A judge might oppose citation of the work of living jurist *X* in court out of a concern that such citation may offend other living jurists who consider their own opinions to be just as authoritative and relevant as those of *X*. Judges reduce opportunities for juristic *Sturm und Drang* where they condone the citation only of those commentators who are no longer alive: those who see their work passed over in silence can console themselves, after all, with the thought that they might have been treated differently were they dead.

Fourth, the convention may have been favoured in order to prevent or reduce judicial citation of immature or unreflective commentary. '[T]he passage of years and the activities of those who edit the books of the departed', R E Megarry has argued, 'tend to produce criticism and sometimes the elimination of frailties, and so give greater confidence in what remains.'

A fifth reason for the convention is that whereas the American style of judicial opinion-writing is conducive to inordinate citation, the English style pushes in the other direction. Being essentially an oral tradition, the English adjudicative process is less conducive to the more expansive citation practices found in some civil law countries and in the US.

A sixth possible reason for the convention concerns not so much how judges see academics but how academics have sometimes regarded themselves. Today, those who do not publish – whether through lack of drive, talent or confidence – are unlikely to survive in the law school environment, assuming they can secure an appointment in the first place. But it was not always thus. 'If academic lawyers are being honest', J W Bridge wrote in 1975, 'they will admit that there is still too little legal research being done.' Although legal academics 'have certainly progressed from being mere technicians', he concluded, they 'still do not advance their subject to the same degree as other academics advance theirs.'

History attests to this image of the academic lawyer as underachiever. '[T]he law school', wrote D. A. Winstanley in his *Early Victorian Cambridge*, 'was generally recognised to be a refuge for those who were averse to intellectual effort.' The first chair of law in England, the Vinerian chair, was not established until 1758. When, three quarters of a century later, a chair of English law was established at King's College London, its incumbent, J J Park revealed that members of the legal profession had urged him to decline the post on the basis that 'the office of a Law Professor was undesirable for a practising lawyer; for anyone, in short, but those who had nothing else to do.' Although there had been established in the 1870s faculties of law at Oxford and Cambridge, Albert Venn Dicey noted in his inaugural lecture at the former institution in 1883 that 'the non-existence till recent years of any legal professoriate' had ensured that there existed 'no history of English law as a whole deserving of the name'. In his inaugural lecture at Cambridge during the same year, Frederick Pollock sounded an even gloomier note: 'the scientific and systematic study of law,' he lamented, is 'a pursuit still followed in this land by few, scorned or deprecated by many.' Of course, the few who were following that pursuit – figures such as Anson, Bryce, Maine and Maitland (along, of course, with Dicey and Pollock themselves) – are now remembered as among the great English jurists. They constituted, however, a generation with few successors.

Academic law remained a fairly moribund, amateurish profession throughout the first half of the twentieth century. Never mind that judges were disinclined to allow citation of academic writings in court; academics, what few there were, were often disinclined to write. In his Presidential address to the Society of Public Teachers of Law (SPTL) in 1999, John Bell observed that neither of the two professors from his own institution who had previously served as SPTL Presidents would have been particularly preoccupied by research. 'Neither Professor Phillips (President 1914) nor Professor Hughes (President 1931) wrote anything significant. For them, the subjects on which they wrote were hobbies, as much as fishing at his home in North Wales was for Professor Hughes.' '[O]utside one or two posts like the Vinerian professorship', wrote Harold Laski to Holmes in 1929, 'the law teachers are a very inferior set of people who mainly teach because they cannot make a success of the bar' and who regard research 'as a merely professional by-product instead of being central to the profession and its organisation'. The English academic lawyer's tendency towards low self-esteem was noted by Laski four years earlier when, having attended a SPTL dinner, he observed that 'the judges who were the guests had, with two exceptions, a most amusing sense of infinite superiority,' while the academics exhibited 'a sense of complete inferiority.' Much the same observation is to be found in L C B Gower's inaugural lecture at the London School of Economics twenty-five years later:

'[N]othing is more nauseating than the patronising air of mock humility usually affected by one of His Majesty's judges when addressing an academic gathering. A psychiatrist will doubtless diagnose from these remarks that I am suffering from an inferiority complex. Precisely. It is my submission that English

teachers of law suffer from an acute inferiority complex and that this is a bad thing for the profession as a whole.'

The status of law in the universities, and of university lawyers, until this point makes it hardly surprising that academic commentaries were rarely being cited in court. The academic-legal profession, in so far as there was such a profession, simply lacked presence. 'By the 1950s', Bridge observes, 'there were established law schools in the universities but [t]here was no widely established practice of legal research.' Little had changed by the middle of the following decade: '[u]niversity law faculties', according to Abel-Smith and Stevens, 'still lacked prestige with other university faculties and with the profession. In general law departments were small and poorly equipped and had failed to attract a fair share of the best talent in the profession.'

Since the 1960s, nonetheless, the academic-legal profession has been developing rapidly. In 1974, the SPTL had just over 700 teaching members; in 1953 it had just over 200. Today, it has almost 2,500. Perhaps the English courts are nowadays more inclined to permit citations of, and indeed to cite, academic commentary because, like the legal academy itself, such commentary has become so much more of a presence; never before in England have there been so many academic lawyers producing so much specialist literature. Just as few barristers and judges would wish – let alone have the energy – to read all of this literature, one expects that few of them would be happy or even able to ignore it in its entirety. In the second half of the twentieth century, the academic-legal profession in England has not only grown significantly but has become much more organised, prolific, competitive, self-assured and able to provide practitioners, and to some extent judges also, with appropriate expertise and critical advice. It would be easy to treat the convention against citation as illustrative of nothing other than judicial philistinism; yet the history of English academic law, particularly during the first half of the twentieth century, forces us to confront the question why judges might ever have cared or been expected to take advice from a profession which was so underdeveloped and lacking in self-confidence.

The seventh reason for the convention against citation is, in essence, that academic commentators are exempt from stare decisis. If commentary is recognised too hastily as work of authority, there is a risk that the author will change his or her mind and so render the source of law uncertain. An American legal historian, Borris Komar, explains the judicial predicament thus:

'[A] work cannot be a better authority than its writer. Suppose the latter has changed his mind upon some points. What, then, are we to take as authority – the opinion expressed in a work or the later one of its author? What is the position of the judge upon whom a living authority is pressed? He, a judge, must base his opinion as a rule upon an authority, but a living person often not in a judicial situation need not.'

This particular argument seems to require that one makes a fuss about next to nothing. Where an author changes his or her mind on a point of law, this may simply indicate that the judge who accepted the author's original position had, like the author, made a mistake. An author's change of mind will sometimes follow a change of law, and so will suggest not that the judge has made a mistake but that the law has moved on since the time of the decision. On occasion, it might even be the case that it is the change of mind that represents the mistake and that the judge, having accepted the author's original argument, continues to subscribe to the more compelling point of view. Whatever the scenario, the argument that the integrity of the judicial process might somehow be put at risk when judges rely on viewpoints which may change seems rather feeble.

THE MOST INTERESTING REASON

The eighth reason for the convention is perhaps the most interesting reason. It might be summarized thus: judges ought to be wary of relying on the works of living commentators – indeed, it is unrealistic to believe that such commentators can be of much assistance to judges – because the two groups inhabit distinct legal worlds and are engaged in very different enterprises. If taken to its logical conclusion this argument cautions against the admission of any academic commentary into court, whether the commentator be alive or dead. Megarry puts forth the argument in his Hamlyn lectures of 1962. Rejecting the proposal that some academic lawyers might, like practising barristers, be appointed as judges, Megarry argues that whereas the barrister spends 'much of his life in the law among the facts [t]he academic lawyer escapes all this.'

'When an experienced advocate becomes a judge, he has experienced so much advocacy that he has it in his bones to make suitable discounts, to detect and check any undesirable practices, and to come as close to the truth as is likely to be possible for any human tribunal. The admission in cross-examination that was obtained in reply to a loaded question, the answer that was begotten of confusion rather than confession, the moment of truth, all these he has learned to recognise and evaluate: of all of these, and a mass of practical and procedural detail, the academic lawyer is innocent.'

To be a trial judge demands a certain nous which comes from experience in the trenches. Academic lawyers never obtain the experience and so lack the nous. In short, they are likely to be too ponderous, leisurely, genteel, impractical and unworldly to be able to carry out the work of a judge. In *Cordell v Second Clanfield Properties* ([1969] 2 Ch. 9), Megarry J – by this point elevated to the bench – adapts his general line of argument in order to explain why judges ought to be circumspect when relying on the opinions of commentators:

'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 is exposed to the peril of yielding to preconceptions, and 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. This is as true today as it was in 1409 when Hankford J. said: "Home ne scaveroit de quel metal une campane fuit, si ceo ne fuit batu, quasi diceret, le ley per bon disputacion serra bien conus" [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 known] (Y.B. 11 Hen. 4, Mich., fo. 37); and these words are none the less apt for a judge who sits, as I do, within earshot of the bells of St. Clements. I would, therefore, give credit to the words of any reputable author in book or article as expressing tenable and arguable ideas, as fertilizers 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.'

JURISTIC REASONING IS DIFFERENT FROM JUDICIAL REASONING

Juristic reasoning is different from, and invariably inferior to, judicial reasoning because it is insufficiently honed through disputation. Citation of academic commentary in court ought to arouse judicial suspicion – so the argument goes – because it tends to come wrapped in cotton wool, rarely if ever having been subjected to robust scrutiny. Just as academic lawyers themselves are likely to be temperamentally unsuited to judicial tasks, many of their arguments and theories will be too fragile for the real world of the court-room.

Megarry was probably quite right to claim that neither academics nor their arguments would often have made a favourable impression in court; he was writing, after all, during that period when the academic legal profession was still nascent and somewhat complacent. The objective here is not to dispute his claim, or, for that matter, the arguments of anyone else who expresses misgivings about academics and legal commentary finding their way into the court-room. What concerns us is the signal which this general line of reasoning sends out. If one reflects upon the convention against citation, and upon the reasons adduced to explain that convention, what impression of academic lawyers is one likely to form? The answer seems to be: that they are, variously, delicate plants, loose cannons, an uncharismatic and whimsical bunch, unable to be trusted not to change their minds on points of law and unlikely to be able to perform the role of a judge; that they are sometimes too ponderous, at other times too expeditious, in articulating legal opinions; that they have the easy life of the armchair critic, under no pressure to provide solutions quickly and accountable to no-one should their solutions prove wrongheaded; that their work ideally ought not to be treated as secondary authority, or, if it is to be treated thus, must be used with circumspection; and that their influence on counsel, should they ever have any, ought to be deemed undeserving of acknowledgement. Small wonder that English academic lawyers in the past have seemed somewhat attention-starved and blighted by a sense of inferiority.

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Neil Duxbury's *Jurists and Judges: An Essay on Influence* will be published in paperback by Hart in early 2001, price £15.00, ISBN 1-84113-204-7.