# The Lionel Cohen Lecture 2021

# Judges and Academics, and the Endless Road to Unattainable Perfection

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Towards the end of his leading speech in the House of Lords in *Spiliada Maritime Corp v Cansulex Ltd*,[1] Lord Goff explained how useful he had found the work of academics in deciding that case (which was about forum non conveniens in private international law). He concluded with these wonderful words:[2]

"For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding."

In this lecture, I want to explore three main themes within an overall examination of the relationship between judges and academics.[3]

First, I want to outline the change that took place towards the end of the last century in relation to the influence of academics on judges in England and Wales.

Secondly, I want to examine how the work of academics can help appellate judges. And here I will be putting forward a plea for the importance of what I have termed "practical legal scholarship".

Thirdly, drawing on my own recent experience, I would like to consider how being a judge on the UK Supreme Court differs from being an academic.

## 1. The increased influence of academics on judges towards the end of the 20th century

For much of the 20th century legal academics in England and Wales had a low status and a correspondingly limited influence on judges. Until the late 1960s, there were relatively few university law courses and relatively few legal academics. The majority of the legal profession, especially the Bar and hence the judiciary, had not studied law at university. Moreover, while there were some exceptions (eg the writings of Sir Frederick Pollock and Arthur Goodhart were influential in the judicial development of tort law),[4] the general convention among judges and practitioners was that the work of academics was "better read when dead".[5] As Peter Birks explained of his time as a law student in the 1960s:[6]

"[W]e 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."

Jack Beatson summed up the position as follows:

"Although a few individuals had some influence, in general until the mid-1960s British academic lawyers lacked status and prestige [compared] with practitioners and judges and with academics in other disciplines."[7]

As a clear illustration of this, Neil Duxbury in his short book, *Jurists and Judges: An Essay on Influence*[8] sets out in some detail the various views expressed by Sir Robert Megarry. Those views carry particular weight because Megarry was not only an excellent judge but also an impressive author and, indeed, he was the President in 1965-66 of the Society of Public Teachers of Law (now known as the Society of Legal Scholars). Duxbury suggests that, looking at several instances of Megarry's writings on academic lawyers, the impression conveyed by Megarry (and others like him) of academic lawyers (although one may have doubts whether this was really Megarry's intention), was as follows:

"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 their influence on counsel, should they ever have any, ought to be deemed undeserving of acknowledgement."[9]

As Duxbury concludes, at the end of that section of his book:

"Small wonder that English academic lawyers in the past have, with regard to the courts, seemed somewhat attention-starved and blighted by a sense of inferiority."[10]

The position appears to have long been different elsewhere. For example, as I have often heard it said, "In Germany, the professor is God: in England, the judge is God."[11]

But over the last five decades, the position in England and Wales has changed dramatically. The biggest single driver of change was the expansion of universities, and hence law schools, in the 1960s. This produced a corresponding increase in the number of law degrees and law students and, along with the acceptance of the Ormrod Committee's 1971 recommendation[12] that law should be a graduate career, this has meant that it has become the norm, with some notable exceptions, for judges to have law degrees and sometimes postgraduate law degrees.

Another influential factor was the creation of the Law Commission in 1965. This successful, and highly respected body, advises the government on legislative law reform and is made up of five Law Commissioners, supported by government lawyers. Significantly those five commissioners have almost invariably comprised a judge as Chair, one barrister, one solicitor and two legal academics.

A high profile and major academic triumph came in the mid-1980s when, following stinging criticism by Glanville Williams[13] of the House of Lords' decision in *Anderton v Ryan*,[14] on attempting the impossible in criminal law, the House of Lords quickly reversed that decision in *R v Shivpuri*[15] relying on that article by Williams despite what Lord Bridge referred to as "language … that is not conspicuous for its moderation."[16] By the late 1980s academic work was regularly being cited in the House of Lords and, according to research recently carried out at my request, the number of citations increased steadily throughout the 1990s and the first few years of the 2000s before levelling off at roughly the present citation level.[17]

In addition, judges and academics now commonly share platforms at legal conferences and seminars, judges often contribute, alongside academics, to published collections of essays, and academics, judges and practitioners have occasionally worked together on projects and working groups.

Two individuals in particular may be singled out as propelling this move towards a closer working relationship between academics and judges.

The first was Lord Goff. His career took him from being a law don at Lincoln College Oxford to the commercial Bar and then up the various rungs of the judicial ladder before he became senior law lord (the equivalent of the President of the Supreme Court) in 1996. Famously he was the joint author, with Gareth Jones, of the wonderful and innovative *The Law of Restitution*, the first edition of which was published in 1966. However, particularly important for my theme this evening is the Maccabean Lecture in Jurisprudence he gave in 1983 entitled *The Search for Principle* in which he set out, with characteristic clarity, the different but complementary roles that judge and jurist play. As he explained:

"Judge and jurist adopt a very different attitude to their work. For the [judge], the overwhelming influence is the facts of the particular case; for the [jurist], it is the idea… [But] different though judge and jurist may be, their work is complementary; and…today it is the fusion of their work which begets the tough, adaptable system which is called the common law."[18]

The other particularly influential figure, this time from academia, was Peter Birks. His brand of scholarship – in which he presented rational and clear pictures of the law – appealed greatly to many judges. Equally important were his many years of service as Honorary Secretary of the SLS. Birks used this role to push forward the view that legal academia was a third branch of the legal profession alongside solicitors and barristers and his brilliant mind, charismatic personality, and infectious enthusiasm for all matters legal, helped significantly to raise the status and profile of the legal academic in the UK.

Several other senior judges in the 1990s and early 2000s made clear their respect for the work of academic lawyers, among them Lord Steyn, Lord Nicholls, Lord Bingham and Lord Millett. Indeed it was Steyn LJ, as he then was, in the Court of Appeal in *White v Jones*,[19] a case on solicitor's negligence following the earlier

similar case of *Ross v Caunters*,[20] who made clear that he wanted counsel, in their submissions, to refer him to relevant academic material. He said this:

"The question decided in *Ross v Caunters* was a difficult one. …. It is therefore not altogether surprising that the appeal in the present case lasted three days, and that we were referred to about 40 decisions of English and foreign courts. Pages and pages were read from some of the judgments. But we were not referred to a single piece of academic writing on *Ross v Caunters*. … [T]raditionally counsel make very little use of academic materials other than standard textbooks. In a difficult case it is helpful to consider academic comment on the point… [I]t is arguments that influence decisions rather than the reading of pages upon pages from judgments. … [Academic] material, properly used, can sometimes help to give one a better insight into the substantive arguments. I acknowledge that in preparing this short judgment the arguments for and against the ruling in *Ross v Caunters* were clarified for me by academic writings."

It is perhaps also of relevance to the change in influence of academics on judges in the UK that several judges of the modern era had themselves been academics. In addition to Lord Goff one thinks of, for example, Lord Hoffmann, Lord Rodger, Lord Justice Kay, Lord Justice Beatson, Sir Ross Cranston, and especially influential, not least given her ultimate position as President of the Supreme Court, Lady Hale who, like Jack Beatson and Ross Cranston, had been a full-time academic for decades before becoming a High Court judge.

My own perception is that, over my 40 years as an academic lawyer, any inferiority that academics once felt in relation to judges has largely disappeared. Similarly, I believe that, at least in general, judges no longer look down on the work of academics. Rather on both sides there is a healthy respect for the work of the other.

As Lord Neuberger elegantly expressed it in a lecture in 2012:[21]

"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."

This leads on to my second theme.

## 2. How can academic work help judges?

In understanding the complementary role that academics and judges play, it is clear that, crucially, the writings of academics can help to place a particular dispute into a larger context and can thereby assist the proper judicial development of principle. Practitioners and judges, by training, have had to deal with cases by spending a great deal of time focussing on the facts. In contrast, academics generally take the facts as a given and are primarily interested in the law and its application to the given

facts. The academic therefore approaches a case not bottom-up from the facts but top-down from the law. In simple terms, what the academic can bring to the appellate judge is the big picture of the law. He or she can provide the judge with how it is that the particular case fits or may fit within the larger coherent whole that comprises the common law. The academic is also well-placed to explain relevant policies[22] and to offer critiques of past decisions.

Lord Goff in his Maccabean lecture explained the complementary roles in this way:

"Jurists…do not share the fragmented approach of the judges. They adopt a much broader approach, concerned not so much with the decision of a particular case, but rather with the place of each decision in the law as a whole."[23]

However, at this point, I need immediately to ring alarm bells. The sad truth is that the sort of practical legal scholarship that I am describing – that can directly help a judge in deciding a case – is now regarded by many in academia as old-fashioned and dull. The trend is towards providing deeper theories of the law, whether based on economic analysis, or sociology or philosophy. Plainly deep theory has a part to play in understanding the law. But it is a long way from what courts find helpful in deciding cases. It follows that, in my view, the pursuit of theory should not be at the expense of traditional doctrinal scholarship which can assist the law in action in its most direct form in the courts.[24] The courts want the academic analysis of the law in language and at a level which they can understand and use in their judgments. They want legal reasoning – designed to produce practical justice - and not reasoning from another discipline.

As Lord Rodger wrote:

"[O]ne has to wonder whether it is altogether satisfactory for academic writers to go direct to the more theoretical aspects of a subject without ever really engaging with the nitty-gritty of how it actually operates in practice."[25]

In other words, studying law first and foremost requires that one truly knows and understands the details of the law; and one acquires that knowledge and understanding by doctrinal analysis and practical legal reasoning. As Lady Hale has said:[26]

"traditional doctrinal scholarship … is the proper basis of all legal scholarship. It is that sort of scholarship which leads to meaningful dialogue with the judges…"

Harry T Edwards, an American appellate judge, famously denounced the disjunction between some United States law schools and practice in the courts, and called for a return to practical legal scholarship that was comprehensible by, and useful to, judges and practitioners.[27] Certainly, it is disappointing to find that, from the 1970s onwards, the number of articles in the top United States law journals that would excite an English doctrinal lawyer can be counted on the fingers of two hands.

Unfortunately, the disjunction that Edwards described in the USA is in danger of also becoming an accurate description of the relationship between law schools and the courts in England and Wales. We are hovering on the brink. From what I have already said, it can be seen that this turnabout has been remarkably swift. From having had relatively little influence on the courts until the late 1960s, legal academia appears to have enjoyed a golden age of influence for some 40 years but now looks as if it may be intent on throwing away the baby with the bathwater by giving the impression that what goes on in the courts, as a matter of legal reasoning and argument, is rather too dull and straightforward for high academic minds.

Admittedly important figures have recently stood up for practical legal scholarship. I shall refer to just two. Professor Jane Stapleton, in her Clarendon Law Lectures at Oxford in 2018, *Three Essays on Torts* made a plea for young legal scholars not to reject what she termed "reflexive tort scholarship". In her words:

"A core feature of this type of scholarship is that it takes the judicial role very seriously. It places at centre stage what judges do, how they understand their role, the reasons they give in justification of their decisions, and the vital constitutional responsibility they bear to identify and articulate developments in the common law. … It is because of its tight focus on judicial reasoning that reflexive tort scholarship is so well placed to assist judges, and indeed to collaborate with them in the process of the identification and articulation of the common law…. [T]his is at least as thrilling a prospect for a young legal scholar as any offered by grand…theories."[28]

Similarly, the Hon Chief Justice Susan Kiefel AC of the High Court of Australia, in her recent article, "The Academy and the Courts: What do they Mean to Each Other Today?"[29] said this:

"Today, there are pressures on the academy which may have the effect of limiting the kind of research and writing which is useful to judges and professional lawyers. Funding may divert academic resources away from doctrinal law. It would be a great pity if judge-directed academic writing were substantially to decline. I say that not only from the point of view of judges, but also from that of the academy, and in particular young academics who may never experience what can be a kind of collaboration with the courts. It is my purpose here to encourage the continuance of that collaboration."

In my relatively short time as a Supreme Court judge, it has been abundantly clear to me how useful practical legal scholarship can be in helping to decide a case. So, for example, I drew heavily on the work of academic lawyers in drafting my judgment in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*[30] on the question of the proper law of an arbitration agreement. Similarly, I gained very significant help from the work of academic lawyers in my judgments in *Manchester Building Society v Grant Thornton UK LLP*[31] and *Khan v Meadows*[32] concerned with what English lawyers refer to as the scope of the duty of care, or the *SAAMCO* issue, in the tort of negligence.

My colleagues, Lords Reed and Hodge, giving the leading judgment in *Test Claimants in the FII Group Litigation v HMRC (No 2)*[33] have recently recognised the important contribution of academics to the development of the law when they said as follows:[34]

"Developments in judicial thinking … do not take place in a vacuum. Judgments are the culmination of an evolution of opinion within a wider legal community, to which practitioners, universities, legal journals and the judiciary all contribute."

However, there is here an important point that I would like to make to judges in all appellate courts. Some judges appear reluctant to cite academic work even if they have relied on it or found it helpful. This is unfortunate. Not only is it unfair to individual academics whose work is not being acknowledged – for example, judicial citations of their work can help with promotion and, more generally, with a whole law faculty's research assessment rating - but, perhaps more importantly, it merely serves to undermine the importance of practical legal scholarship. In the modern era, a sure way for judges to kill off the practical legal scholarship that they find helpful is for them not to acknowledge properly the help that they receive from it. In a sense the trade-off for the help given by practical legal scholars is the judicial public acknowledgement of that help.

Of course I am not suggesting that judges should cite academic work just for the sake of it, perhaps to make them appear more learned than they are, that is, as Lord Rodger put it, to demonstrate that he or she "has got the academic tee-shirt".[35] All I am saying is that, just as a judge will happily cite a past judgment, where helpful and relevant to his or her reasoning, a judge should be willing to cite academic work that has assisted in the formulation of his or her reasoning in deciding a case.

As Chief Justice Kiefel put it in her recent article:

"[I]t has been said that judges have often written by reference to legal academic material, but without acknowledgement. This has been referred to in the United Kingdom as the 'well-established tradition of 'licensed plagiarism' by both Bar and Bench'.[36] I would like to think that this is a practice of the past and that these days acknowledgement is given where it is due."[37]

I turn now to the third and final of my themes.

## 3. How does being a judge on the UK Supreme Court differ from being an academic?

Given my unusual career (as the first person to be appointed to the highest court in the UK straight from academia), it may be thought that I am in an especially good position to offer insights on the answer to this question.

Of course, there are some very obvious differences between being a judge and being an academic. On the Supreme Court, one is principally concerned with sitting as one of a panel, normally of five, to hear disputes between parties in which each

side's lawyers present oral arguments in addition to their written submissions. And having sat through and taken part in the often highly interactive hearing, which normally lasts one day but can extend over several days, a Supreme Court judge must decide the dispute by the application of the law and must write a judgment, whether jointly or alone, or, at the very least, must make comments agreeing with a judgment written by one or more colleagues. Deciding cases by legal reasoning set out in a judgment after oral argument is the central role of a Supreme Court judge. In contrast, an academic lawyer spends his or her time researching the law, writing about the law and teaching the law.

However, behind those obvious differences in role, there are a number of perhaps less obvious but important contrasts. I would like to highlight seven of these.

**(1) Academic freedom**

As an academic one is free to say what one likes about the law and one is also free to decide which areas of the law one wishes to research into. On the Supreme Court, one cannot simply choose to sit in cases in which one may be said to have expertise or that one finds particularly interesting. Rather one has to become a generalist including, in my case, sitting in public law cases even though my academic expertise was almost entirely in private law. Indeed, it is precisely the wide variety of legal problems that one faces in the Supreme Court that makes the job both fascinating and demanding in equal measure. Another aspect of the contrast in freedom is that, if giving a public lecture or talking to students about the law, a Supreme Court judge cannot just say whatever he or she likes about a decided case. For example, it would be regarded as inappropriate to criticise, by going beyond what one has said in a judgment, the views of colleagues whose reasoning has differed from one's own in deciding a case. So for example, in the recent case, on lawful act economic duress, of *Pakistan International Airlines v Times Travel*, I wrote a separate judgment from the lead judgment of Lord Hodge agreeing with the result but not with some of Lord Hodge's reasoning. I do not think it would be appropriate for me now to go beyond what I said in my judgment to comment publicly on why I consider my own view to be preferable to that of the majority. There is also a convention that, at least in general, one should not seek to reply to academic criticism of one's judgment. In addition, one clearly cannot disclose what went on behind the scenes in deciding the case, eg who said what in post-hearing deliberations. So, as a Supreme Court judge, and even though in an extra-judicial capacity, I have lost some of the previous freedom I enjoyed, as an academic, in talking about and writing about the law.

**(2) Working collegiately**

While some academics choose to do so, there is no requirement for an academic to act in a collegiate way when writing about the law. That is, one does not have to take into account the views of others. One can write as an individual expressing purely one's own views and expressed in the way one thinks best. Although I did

occasionally co-write, almost all of my academic books and articles were written alone.

Writing individual (substantial) judgments used to be the predominant position in the House of Lords (although there were periods when this was the exception). The disadvantage of multiple judgments, although fun for academics to analyse, is that it is sometimes difficult to work out the ratio of a decision where there are, let us say, five judgments reaching the same decision for different reasons. Not surprisingly, such uncertainty in what has been laid down by the highest court does not appeal to practitioners. The difficulties were brought home to me when hearing the case and writing the joint judgment (with Lord Sales) in *TW Logistics Ltd v Essex County Council*[38] which was concerned with the law on town and village greens. In so doing, it was of some importance to be clear as to the ratio of the Supreme Court decision in *R (Lewis) v Redcar and Cleveland BC (No 2)*.[39] However, that was extremely difficult to work out because of the number of different judgments and views expressed even though all the Justices came to the same conclusion. In any event, it is time-consuming and off-putting for a reader to have to wade through several judgments instead of a single definitive judgment.

On the Supreme Court, the present approach therefore is one of trying, if possible, to achieve a single judgment (whether written by one judge or, increasingly common, by two or more). Although dissenting judgments are permitted, and are not discouraged in so far as a Justice feels duty-bound to dissent, the overall effect of the trend towards single judgments is that, if asked to write or contribute to the single judgment, one has a keen eye on gaining the agreement of colleagues.

### (3) The pressure to be correct

While as an academic I was always concerned to present as accurate a view of the law as possible, and I did have sleepless nights thinking that I may have failed in that respect in an article or textbook exposition, the consequences of my being wrong about the law were not as significant as the consequences of taking the law in the wrong direction on the Supreme Court. On the Supreme Court one is very conscious of the possible detrimental consequences for people of making mistakes in laying down the law and this adds a particular pressure that I never felt as an academic. Having said that, there is the huge comfort in the Supreme Court that one is not making the decision alone; and that one's draft judgment will be read and commented on by the other justices on the panel.

### (4) Analysing one's own methodology

Lord Goff made clear in his Maccabean lecture that, in deciding a case, he felt driven by the imperative of reaching the correct legal result in the instant case. That is not something that acts as a constraint on an academic who is free to express his or her view of the law without any focus on the result in any particular case. In other words, in the formulation of legal principle, the academic does not have to accommodate the decision in the instant case. Lord Goff expressed the point in the following way:

"If I were asked what is the most potent influence upon a court in formulating a statement of legal principle, I would answer that in the generality of instances it is the desired result in the particular case before the court. But … when we talk about the desired result … we can do so at more than one level. … At [one] level, there is the gut reaction, often most influential. But there is a more sophisticated, lawyerly level, which consists of the perception of the just solution in legal terms, satisfying both the gut and the intellect. It is in the formulation, if necessary the adaptation, of legal principle to embrace that just solution that we can see not only the beneficial influence of facts upon the law, but also the useful impact of practical experience upon the work of practising lawyers in the development of legal principles."[40]

This great passage from Lord Goff is a relatively rare example of a judge in this jurisdiction articulating how it is that they decide cases. In general, judges do not articulate and, it may be, do not seriously think about their own methodology. In contrast, academics are increasingly conscious of the need to articulate the methodology that they are adopting. While plainly an academic is not concerned at all with reaching a decision in a particular case, there are several different types of methodology that may be employed in analysing the law. For example, practical legal scholarship tends to employ what is generally referred to as an "interpretative" methodology which seeks to provide the best interpretation of the content of the law applying criteria such as fit, coherence, accessibility, practical workability, and normative validity.[41]

**(5) The scope of the enquiry: the issues in the case and the parties' submissions**

A further contrast between my role as a Supreme Court judge and my previous role as an academic concerns the scope of the enquiry that one is engaged in. An academic can range as far and wide as he or she likes in looking at a particular legal problem. But a Supreme Court judge not only has to decide the instant case but is also to some extent limited by the issues raised by the parties.[42] If a judge were to rely on a particular issue in deciding a case and that issue had not been raised by the parties and the parties had not been given the opportunity to make submissions on it, the decision would be regarded as procedurally irregular and unfair.[43]

In the Supreme Court, the best-known controversy over this was in relation to *Assange v Swedish Prosecution Authority*,[44] and the ultimately unsuccessful submission by Dinah Rose QC that the Supreme Court had decided the case on an issue that she had had no opportunity to address.

Therefore, in so far as an issue arises after (or during) the hearing that is regarded as important for the decision in the case which the parties have not dealt with, the normal practice is to ask the parties to make further submissions, in writing (or orally) after the hearing. As regards asking for additional written submissions, this occurs quite frequently.[45]

In one case,[46] we had a striking variation of this situation where, on one of the central issues, counsel did not run what, at least at first sight, appeared to be a clear winning point. At the end of the hearing, the parties were asked by the court to make written submissions on that point but the counsel who, at first sight, would stand to benefit chose not to do so (and counsel on the other side therefore had nothing to respond to). Although this was commented on in the judgment, it was felt to be inappropriate to decide the case on an issue that neither party had chosen to deal with. This shows starkly that, in a rare case, the Supreme Court is not deciding the case according to the correct law as it sees it but is rather constrained by the submissions of counsel.

**(6) The relevant range of materials and information**

Clearly an academic can take any material into account and is free to talk to anyone about his or her research. What about a Supreme Court judge? As I understand it, we too are entitled to take into account material that we consider helpful and there is no bar on us conducting our own research provided that, as has just been explained, if we are moving outside the issues raised by the parties, we give the parties the opportunity to deal with the new issue. Note also that, at least in general, there is no requirement to go back to the parties just because one has discovered a new and helpful case or article provided it falls within the issues raised by the parties.

Is it acceptable for Supreme Court justices to talk to academic experts on the questions of law arising in a case?[47] Wearing my academic hat, I can confirm that this interchange has happened in the past. I can see no objection to it provided the judge avoids the specifics of the case or asking the academic for his or her view on what the correct decision should be. After all, what the judge is in effect doing is seeking the oral analysis of an academic on the law rather than reading their written analysis of the law.

**(7) Written style and content**

I have elsewhere compared and contrasted the styles of writing as between a law journal article and a judgment and I will not now repeat all that I have said on that topic. However, in very general terms, one can say that the modern trend has been for the style of Supreme Court judgments to have moved some way towards the style of academic articles, in particular, by the use of headings and sub-headings. It seems surprising now that, as recently as 25 years ago, the use of headings and sub-headings in a House of Lords speech (ie judgment) was rare.

However, there are two central features of judgment-writing, in contrast to the writing of a law article, that make judgment-writing distinctive and particularly demanding.

First, a judgment has to be decisive. Depending on the level of court, a judgment has to make findings of fact, it has to decide what the relevant principles of law are, and it has to apply those legal principles to the facts as found. Unlike a law article, a judgment cannot, on the central questions, sit on the fence.

Secondly, there is the view that a judgment that is unclear or not concise may contradict the rule of law. The great Lord Bingham suggested this in his book, *The Rule of Law.*[48] Having laid down as his first concretised element of the rule of law that 'the law must be accessible' he went on as follows:

'The judges are quite ready to criticise the obscurity and complexity of legislation. But those who live in glass houses are ill-advised to throw stones. The length, elaboration and prolixity of some common law judgments… can in themselves have the effect of making the law to some extent inaccessible.' [49]

In contrast, however obfuscating an academic article is, no-one would ever suggest that the author is undermining the rule of law.

## 4. Conclusion

That legal academics and judges should each respect and appreciate the work of the other is of great benefit to the understanding and development of the law. In this sense, the present relationship between academics and judges in England and Wales is in a healthy state. Not least through the work of great figures, such as Lord Goff and Peter Birks, we have come a very long way from the bad old days of 'better read when dead'. It is incumbent on all of us in the universities and in the courts to ensure that the close working relationship, founded on practical legal scholarship, continues to thrive.

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* Justice of the Supreme Court of the United Kingdom. This lecture was given remotely (because of covid restrictions) on 25 October 2021. I would like to thank Sir Jonathan Cohen for chairing the lecture and webinar. I would also to thank him and Lord Pannick QC, as trustees of the Lionel Cohen lectureship, for inviting me to be the 2021 Lionel Cohen lecturer, which I regard as a great honour and privilege. The views I express are personal views and should not be taken to represent the views of the Supreme Court.

[1] [1987] AC 460

[2] Ibid at 488.

[3] For general examinations of this topic, see, eg, Lord Goff, *The Search for Principle* Maccabean Lecture 1983, reprinted in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (eds Swadling and Jones, 1999) 313; Birks, "Adjudication and Interpretation in the Common Law: A Century of Change" (1994) 14 Legal Studies 156; Lord Rodger, 'Judges and Academics in the United Kingdom' (2010) 29 *University of Queensland LJ* 29; Braun, "Judges and Academics: Features of a Partnership" in *Judges, Jurists and the Process of Judging* (ed Lee, 2011) ch 11; Lord Neuberger, "Judges and academics – ships passing in the night?" (Hamburg Lecture, 9 July 2012); Beatson, "Legal Academics: Forgotten Players or Interlopers?" in *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (eds Burrows, Johnston and Zimmermann, 2013) 523; Lord Reed, "Theory and Practice" in *Defences in Unjust Enrichment* (eds Dyson, Goudkamp and Wilmot-Smith, 2016) ch 13 (and see also his similar lecture "Triremes and Steamships: Scholars, Judges, and the Use of the Past" at www.supremecourt.uk/docs/speech-151030.pdf) ; Duxbury, *Jurists and Judges: An Essay on Influence* (2001).

[4] See Duxbury, *Jurists and Judges: An Essay on Influence* (2001) 84-101.

[5] For examples of this being applied, see *Union Bank v Munster* (1887) 37 Ch D 51, 54 Kekewich J); *Donoghue v Stevenson* [1932] AC 562, 567 (per Lord Buckmaster). As regards the former, Kekewich J is often put forward as

the worst English judge of the 19th century: hence the submission of counsel to the Court of Appeal in relation to *British Motor Syndicate Ltd v JEH Andrews & Co Ltd* (1889) 16 RPC 577: 'This, my Lords, is an appeal from a decision of Kekewich J – but there are other grounds upon which my client relies.'

[6] "Adjudication and Interpretation in the Common Law: A Century of Change" (1994) 14 Legal Studies 156, 165.

[7] "Legal Academics: Forgotten Players or Interlopers?" in *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (eds Burrows, Johnston and Zimmermann, 2013) 523, 528.

[8] (2001)

[9] Ibid at 77.

[10] Ibid.

[11] See Lord Goff, *The Search for Principle* Maccabean Lecture 1983, reprinted in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (eds Swadling and Jones, 1999) 313, 327.

[12] Report of the Committee on Legal Education (Cmnd 4595, 1971).

[13] "The Lords and Impossible Attempts, or Quis Custodiet Ipsos Custodes?" [1986] CLJ 33.

[14] [1985] AC 560.

[15] [1987] AC 1.

[16] Ibid at 23.

[17] I am very grateful to my judicial assistant, Oliver Jackson, for carrying out this research. Although avowedly very rough and ready, his research shows that the number of unique citations (ie citations of different books or articles) each year in the House of Lords increased significantly from 1987 before levelling off after 2003 at an average (in the House of Lords/Supreme Court) of 30-35 unique citations. The most cited law journal by some distance has been, and continues to be, the LQR. The most cited textbook is now *Bennion on Statutory Interpretation*. For another statistical survey, but not one that presented the number of citations, see Stanton, "Use of Scholarship by the House of Lords in tort cases" in *From House of Lords to Supreme Court – Judges, Jurists and the Process of Judging"* (ed Lee, 2011) ch 10. This looked at the 104 tort cases decided by the House of Lords between 1990 and 2009 and examined which judges cited the most writings and which writings were most cited.

[18] *The Search for Principle* Maccabean Lecture 1983, reprinted in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (eds Swadling and Jones, 1999) 313, 314-315.

[19] [1995] 2 AC 207, 235

[20] [1980] Ch 297.

[21] "Judges and academics – ships passing in the night?" (Hamburg Lecture, 9 July 2012).

[22] Although outside doctrinal scholarship (and not necessarily carried out by academics let alone legal academics), there is one form of research that may sometimes directly assist the judiciary in relation to policies and that is empirical research. For this sort of research being referred to by the Supreme Court, see, eg, *Osborn v The Parole Board* [2013] UKSC 61, [2014] AC 1115, at [70], [91]; *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732, at [184]-[185]; *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, at [38]-[59] and [90]-[98]. I am most grateful to Professor Maurice Sunkin for email discussion on this point.

[23] *The Search for Principle* Maccabean Lecture 1983, reprinted in *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (eds Swadling and Jones, 1999) 313, 326-327.

[23] [1995] 2 AC 207, 235.

[24] For an excellent description of "doctrinal analysis" (what I am calling "practical legal scholarship") see McCrudden, "Legal Research and the Social Sciences" (2006) 122 LQR 632, 633-635.

[25] "Judges and Academics in the United Kingdom" (2010) 29 *University of Queensland LJ* 29, 36. It is clear from the context that by the words, "how it actually operates in practice", Lord Rodger was referring to the work of the courts and practitioners. He was not making a veiled reference to law in its social context.

[26] "Should judges be socio-legal scholars?", speech given to the Socio-Legal Studies Association Conference 2013 (available at www.supremecourt.uk/docs/speech-130326.pdf)

[27] "The Growing Disjunction between Legal Education and the Legal Profession" (1992) 91 *Michigan Law Review* 34. Edwards' article stimulated 18 responses in a symposium in the (1993) 91 *Michigan Law Review*, of which perhaps the most important was R Posner, "The Deprofessionalization of Legal Teaching and Scholarship" (1993) 91 *Michigan Law Review* 1921.

[28] Xvii.

[29] (2020) 44 Melbourne University Law Review 1, 2.

[30] [2020] UKSC 38, [2020] 1 WLR 4117.

[31] [2021] UKSC 20, [2021] 3 WLR 81.

[32] [2021] UKSC 21, [2021] 3 WLR 147.

[33] [2020] UKSC 47, [2020] 3 WLR 1369

[34] Ibid at [178].
[35] "The Form and Language of Judicial Opinions" (2002) 118 LQR 226, 237.
[36] She was here citing from William Twining et al, "The Role of Academics in the Legal System" in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 929.
[37] At 6.
[38] [2021] UKSC 4, [2021] 2 WLR 383.
[39] [2010] UKSC 11, [2010] 2 AC 70
[40] At p 325.
[41] See my own articulation of this in *Remedies for Torts and Breach of Contract* (4th edn, 2019) p 21.
[42] There is an interesting and full discussion of this in Alan Paterson, *Final Judgment* pp 15-29 (dialogue with counsel).
[43] This was made clear, albeit in the analogous context of arbitration, in *Zermalt Holdings SA v Ni-Life Upholstery Repairs* [1985] 2 EGLR 14, 15 (per Bingham J).
[44] [2012] UKSC 22, [2012] 2 WLR 1275.
[45] For examples, see *Akers v Samba* [2017] UKSC 6, [2017] AC 424; *Evergreen Marine (UK) Ltd v Nautical Challenge Ltd* [2021] UKSC 6, [2021] 1 WLR 1436.
[46] See similarly *R (on the application of DN (Rwanda)) v Sec of State for the Home Department* [2020] UKSC 7, in which Lord Carnwath suggested that the defendant might have had a complete answer to the claim had it sought to rely on issue estoppel (or res judicata). While aware of the doubts about whether res judicata/issue estoppel applied in public law judicial review proceedings, Lord Carnwath at [44] thought those doubts were 'unjustified' and said that, subject to further argument, he would have regarded issue estoppel or res judicata as potentially providing an easy answer to the questions raised by the case. Counsel for the Secretary of State preferred not to run this argument as part of his case (even though it could only be beneficial to his case). Nevertheless, both sides were asked to make written submissions on the issue and did so. Lord Carnwath dealt in some detail with those submissions especially those of counsel for DN. Ultimately however Lord Carnwath said at [65]:
"Since the Secretary of State has not hitherto relied on the principle of res judicata or issue estoppel, it would clearly be unfair to DN for the court to introduce it at this stage as a possible reason for determining the appeal against him, whatever the position may be in future cases."
Lord Kerr at [28] agreed with that reason for not deciding the case on this basis but also because he thought the issues were difficult so that it would be unwise to express even a tentative view on them.
[47] See Paterson, *Final Judgment* at pp 213-221 (dialogue with academics).
[48] (2010).
[49] At pp 42-3.