

JUDGES' SCHOLARLY WRITING AS A SOURCE OF COMMON LAW

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I INTRODUCTION

The sunset of Lord Sumption's judicial career, and the new dawn of his life in the academe, is a reminder of the relationship between judicial writing and legal scholarship. Although Lord Neuberger has suggested that judges and professors are 'ships passing in the night', who only occasionally speak to one another,¹ many judges engage in the kind of academic or 'scholarly' extrajudicial writing more familiar to law professors. Some have had past lives within law faculties; others may write as a public service;² others, because it is their passion. What is the status of that commentary? May it be treated as a source of law?

Once upon a time, a professor's scholarship could not be cited at all unless the author held some judicial appointment.³ International law took a different and more continental path. Legal scholarship is explicitly recognised as a source of public international law, for example, in article 38(1)(d) of the *Statute of the International Court of Justice*, which provides that the International Court of Justice ('ICJ') shall apply 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. (Nonetheless, it has been reported that the ICJ appears to be reluctant to invoke scholarly writings as a source of law).⁴

Common law courts are of course different. They do not doll out advisory opinions. But the common link between the ICJ's method and that of the common law is the need to adapt the law to new circumstances. In hard cases, scholarly writing may ameliorate the difficulty of selecting the appropriate

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1 Lord Neuberger, 'Judges and Professors – Ships Passing in the Night?' (Speech delivered at Max Planck Institute, Hamburg, 9 July 2012) 1 <<https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-hamburg-lecture-09072012.pdf>>.

2 Justice Kunc recently observed that there is an expectation that judges take on extra-curial duties, including academic engagement: 'A Judiciary under Stress' (2018) 92 *Australian Law Journal* 855, 856. For a picture of how Australian judges have historically engaged in scholarship, see Russell Smyth, 'Judges and Academic Scholarship: An Empirical Study of the Academic Publication Patterns of Federal Court and High Court Judges' (2002) 2 *Queensland University of Technology Law and Justice Journal* 198.

3 See, eg, *Johnes v Johnes* (1814) 3 ER 969.

4 Michael Peil, 'Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice' (2012) 1(3) *Cambridge Journal of International and Comparative Law* 136, 151.

leeway of choice.⁵ Where the scholarship is authored by a person of sufficient calibre to warrant appointment to a court, it may be thought that the persuasive force of that writing is enhanced.

II CONSIDERATION BY PHANG AND SUMPTION

The matter was recently addressed by Phang JA in his Honour's judgment for the Singapore Court of Appeal in *Bom v Bok*.⁶ His Honour is known for his compelling extrajudicial legal writing.⁷ For decades he was affiliated with the National University of Singapore, and later, Singapore Management University.

The appeal dealt with issues of undue influence in equity and the relationships between the doctrines of duress, undue influence and unconscionability. The primary judge had cited⁸ Phang JA's academic writing on point.⁹ What was the status of that writing? According to Phang JA:

Undoubtedly, the article concerned would not be binding on this Court; it would not even be influential by dint of its provenance alone, save to the extent that it contained persuasive arguments that might be of assistance to the court.¹⁰

In reaching that position, his Honour invoked¹¹ the views of Lord Sumption in response to essays on his Lordship's extrajudicial lectures.¹² The judge, it was said, is not there to expound his or her own opinion, but to say what the law is. Academic or scholarly writing is distinguishably luxurious, for the author is free to critique or commend the state of the law.

But where the court in question is at the apex of a judicial hierarchy – like the Court of Appeal of the Republic of Singapore – does it matter? If the court may override itself, shouldn't every obiter dictum be considered an exposition of not only what the law is, but what the law ought to be? According to Lord Sumption: no. There is a meaningful difference between his (extrajudicial) opinion on the law and his (judicial) exposition of the law: '[t]he personal opinions of the judges in the Supreme Court are only one element in the complex process of decision-making, and not necessarily the most important one'.¹³

5 See generally William Gummow, 'The Selection of the Major Premise' (2013) 1(2) *Cambridge Journal of International and Comparative Law* 47.

6 [2018] SGCA 83.

7 In a study published in 2012, his Honour was one of the few non-Australians identified among the leading contributors to Australia's top journals: see Russell Smyth, 'Who Publishes in Australia's Top Law Journals?' (2012) 35(1) *University of New South Wales Law Journal* 201, 212, 234, 236.

8 *Bok v Bok* [2017] SGHC 316, [131] (Thean J).

9 Andrew Phang, 'Undue Influence – Methodology, Sources and Linkages' [1995] *Journal of Business Law* 552.

10 *Bom v Bok* [2018] SGCA 83, [167] (emphasis in original).

11 *Ibid* [166]–[167].

12 Lord Sumption, 'A Response' in N W Barber, Richard Ekins and Paul Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing, 2016) 213.

13 *Ibid*.

III *STARE DECISIS* AND APPEALS TO AUTHORITY

The positions of Lord Sumption and Phang JA on these issues are consistent with the orthodox formulation of the doctrine of *stare decisis* recently re-articulated by Lord Neuberger in *Willers v Joyce (No 2)*: '[d]ecisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence, clarity and predictability'.¹⁴ The key word in that short passage is *decisions*. The authority of case law is instrumental: it serves the maxim that like cases be treated alike, which in turn, serves the ends of certainty and equality. It is thus obvious that commentary cannot have the precedential value of *rationes decidendi*, because nothing is decided in scholarly writing, whatever its authorship.

With respect, however, Phang JA's comment that a judge's extrajudicial scholarship 'would not even be influential by dint of its provenance' is questionable. While an appeal to authority is a fallacy to logicians, it is the bread and butter of common law legal systems. As Lord Neuberger explained in his speech to the Max Planck Institute,¹⁵ in the 19th century, only the works of the most esteemed legal scholars were influential enough to be cited. Today, courts regularly appeal to non-binding sources with tacit appeal to the status of the authors. In Australia, for example, courts are bound by seriously considered dicta of the High Court despite the fact that they do not decide any controversy, following *Farah Constructions Pty Ltd v Say Dee Pty Ltd*.¹⁶ Reasons for refusing special leave to appeal to the High Court are not binding, yet still treated with deference.¹⁷ The High Court refers to decisions of foreign courts with increasing frequency, although obviously it is not bound to do so.¹⁸

The extrajudicial writings of judges should be treated like other non-binding sources of law: that is, they 'are useful only to the degree of the persuasiveness of their reasoning'.¹⁹ With respect, seriously considered dicta ought to be characterised in the same way.²⁰ As Justice Rares opined extrajudicially, '[o]ne

14 [2018] AC 843, 851 [4]; Peter Mirfield, 'A Novel Theory of Privy Council Precedent' (2017) 133 *Law Quarterly Review* 1.

15 Lord Neuberger, above n 1, 3–4 [4]–[6].

16 (2007) 230 CLR 89, 150–1 [134], 159 [158] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

17 Oliver Jones, 'Are the High Court's Reasons for Refusing Special Leave Binding?' (2013) 87 *Australian Law Journal* 774; cf *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 117 [52] (French CJ, Nettle and Gordon JJ), 133 [112] (Kiefel and Keane JJ), 134 [119] (Bell and Gageler JJ). See also John Eldridge, 'Contracts: Construction – "True Rule" In *Codelfa Construction v State Rail Authority (NSW)* – No Requirement of Ambiguity Before Regard Is Had to Surrounding Circumstances' (2018) 92 *Australian Law Journal* 249, 252; John Eldridge, "'Surrounding Circumstances" in Contractual Interpretation: Where Are We Now?' (2018) 32(3) *Commercial Law Quarterly* 3, 7.

18 See Sarah Spottiswood, 'The Use of Foreign Law by the High Court of Australia' (2018) 46 *Federal Law Review* 161.

19 *Cook v Cook* (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ).

20 See also Matthew Harding and Ian Malkin, 'The High Court of Australia's Obiter Dicta and Decision-Making in the Lower Courts' (2012) 34 *Sydney Law Review* 239.

would think that most things said by judges, at least in reserved decisions, were the subject of serious consideration'.²¹

What about things said by people who would go on to be judges? In considering Lord Sumption's views on judges' scholarly writing, Phang JA observed that his Lordship was discussing scholarship he authored while serving as a judge. Those 'observations would apply, *a fortiori*, to an article written *when the author concerned was not even a judge yet*'.²² The academic work of a future judge may carry the added weight of the future brand, once the author has been appointed: see, for example, the treatment of *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*.²³ Arguably, by the fact of the standing of the author alone, the academic work of a serving judge is weightier.

If law journal articles are anything like the records of rock stars, then judges' academic work could grow weightier still once the author has passed on. Indeed, the old convention was that academic commentary could only be cited as authority if the author was dead.²⁴ That old convention has eroded around the common law world. You no longer need to be dead to be cited. But are dead judge-scholars cited more? That morbid thought is an opportunity for empirical interrogation elsewhere.

If there is any meaningful distinction between judges' dicta and judges' scholarly writing, perhaps it is that a judge would be more cognisant of their public function, and the need for sensitivity to the parties, in the former context. It is more appropriate to entertain an idea without accepting it, in the author's own voice, when writing extrajudicially. The author of academic writing is not necessarily wedded to the thesis, as demonstrated by the recent 'Sokal Squared' controversy in the United States involving the 'pranking' of sociology journals with faux articles.²⁵ An author may create academic legal scholarship to merely test an idea, or to engage in satire.²⁶

IV CONCLUSIONS

It should not be assumed that a judge will decide a case in a way that is consistent with his or her previous extrajudicial writing. Academic authors do not

21 Justice Steven Rares, 'The Role of the Intermediate Appellate Court after *Farah Constructions*' [2008] *Federal Judicial Scholarship* 27, [3].

22 *Bom v Bok* [2018] SGCA 83, [166] (emphasis in original).

23 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015), which was considered generally by James Edelman and Simone Degeling, 'Fusion: The Interaction of Common Law and Equity' (2004) 25 *Australian Bar Review* 195, 197.

24 *SRCL Ltd v National Health Service Commissioning Board (NHS England)* [2018] EWHC 1985 (TCC) (27 July 2018) [180] (Fraser J); Geert van Calster, 'SRCL LIMITED. Citing Academics in the Common Law.' on Geert Van Calster, *GAVC Law* (3 August 2018) <<https://gavclaw.com/2018/08/03/srcl-limited-citing-academics-in-the-common-law/>>.

25 See, eg, Alexander C Kafka, "'Sokal Squared': Is Huge Publishing Hoax "Hilarious and Delightful" or an Ugly Example of Dishonesty and Bad Faith?", *The Chronicle of Higher Education* (online), 3 October 2018 <<https://www.chronicle.com/article/Sokal-Squared-Is-Huge/244714>>.

26 For an example of kind-hearted yet scholarly satire, see Sam Beswick, 'The Decline of the Fish/Mammal Distinction?' (2017) 165 *University of Pennsylvania Law Review* 91.

have the benefit of counsel's submissions or a contest of evidence which inform the bottom-up reasoning of the common law tradition. As Dixon CJ wrote long ago, and not extrajudicially, '[e]xperience of forensic contests should confirm the truth of the common saying that one story is good until another is told'.²⁷

In some ways, however, doctrinal academic legal scholarship is very similar to the work of a court of appeal mediating between what the law is and what it ought to be. Judges' scholarly writing – like obiter dicta, and foreign authority²⁸ – may provide a cogent means for deciding a point of controversy. Judges' scholarly writing may thus serve as a non-binding source of common law; but so too might an essay (see, for example, the emotive dissent of Sotomayor J in *Utah v Strieff*),²⁹ a play,³⁰ or even a poem.³¹ Anything can climb the ladder of authority if used by the judge in such a fashion.³² The tools of the common law are diverse, and that is a good thing.

27 *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 20.

28 Lord Sumption recently opined that 'international law is not a part of but is one of the sources of the common law': *Belhaj v Straw* [2017] AC 964, 1159, [252], citing *R v Jones (Margaret)* [2007] 1 AC 136, 155 [11] (Lord Bingham), who in turn cited JL Brierly, 'International Law in England' (1935) 51 *Law Quarterly Review* 24, 31.

29 136 US 2056 (2016).

30 See, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 245 (Brennan J).

31 See, eg, *Monis v The Queen* (2013) 249 CLR 92, 179–180 [240] (Heydon J).

32 Borris M Komar, 'Text-Books as Authority in Anglo-American Law' (1923) 11(6) *California Law Review* 397, 400.