Teaching Statutory Interpretation: Citings of NESSSI in Scotland

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Abstract:

Ideally, the methods of statutory interpretation would be an intrinsic part of university legal education. In practice, however, although statute in everyday law has become ever more central, teaching of statutory interpretation has not developed alongside. Teaching staff in universities typically have to cover the topic in one or two lectures and the format does not encourage students to think the subject is important. This article describes an experiment in teaching statutory interpretation differently. It introduces Francis Bennion's NESSSI method and shows how students were encouraged to use this to see a complex and political House of Lords decision in an unexpected light.

One of the signal difficulties in teaching statutory interpretation to new law students is convincing them that it has any real value for their studies or their career. If this sounds an extraordinary statement to make, consider what it is that most law students are taught about statutory interpretation. Almost certainly, they will be taught the three "rules" (literal, golden and mischief) and perhaps some mention of the teleological approach of the pan-European courts. A good course may briefly introduce Cross's unified contextual approach. Students may be asked to analyse a case or two, identifying which rule the judges (apparently guided by little other than judicial fashion or personal preference) could be said to have applied.

It is unlikely that they will be taught much else, though they may be given some useful tips from the Interpretation Acts, such as to read singular as including plural and vice versa. They may however then be given a case in which this did not happen, leading the more savvy students to conclude that even a tip as simple as this will not really help them work out the meaning of an actual provision of a statute. A demanding course may cover the case law on s 3 of the Human Rights Act 1998 and ask them to find a thread of consistency in it – but it is more likely that this, being a technique which academics have accepted is of some value to legal studies, will be placed elsewhere and within the topic of human rights rather than statutory interpretation.

What does this tell the intelligent and inquiring student? Such a student, with the wit to sift out what is useful from what is on the syllabus because the lecturing staff have been told it should be there, will conclude that statutory interpretation is a vague and simplistic rationalisation after the event. Nothing about the exercise will have demonstrated to the astute individual that statutory interpretation can be a practical and efficient set of techniques to learn. It will not have encouraged such a student to appreciate that while statutory interpretation techniques do not always provide an answer, they do expedite the task of looking for the answer. It is very unlikely to dawn on the audience that because most UK statutes are drafted by professional drafters who apply the many criteria of statutory interpretation when designing a statute, those criteria are a shorthand way of working out what Parliament intended. Furthermore, as Francis Bennion says-

> "The clue that should not be missed is that statutory interpretation keys into the whole system of law; indeed that whole system is subject to the relevant scheme

of interpretation and in turn feeds into it. This means that statutory interpretation, when treated comprehensively as it is in the present work, forms perhaps the best modern introduction to a country's entire legal system"[1].

The problem of course is what else the overworked academic with an overfilled syllabus can reasonably be expected to do. Francis Bennion's fourth edition of *Statutory Interpretation* comes in at around 1300 pages, and his *Understanding Common Law Legislation* is still a book-length treatment of a topic which tutors hope to cover in a lecture or two. Bennion and I have elsewhere written about how this element of law-text analysis should be embedded in a curriculum rather than treated as a discrete and implicitly esoteric topic,[2] but this requires a law school, not merely a single tutor, to adopt a specific approach throughout the delivery of the law degree. Nevertheless, without making any very dramatic changes it is possible to present a cursory treatment of the topic in a way which at least emphasises its potential value rather than communicates an unspoken (whether or not unintended) message that it is worthless.

I describe here first Bennion's NESSSI method which shows how statutory interpretation can be applied in practice. I then discuss the structuring of a single class exercise at Glasgow University School of Law in which students were not taught statutory interpretation in depth. Rather they were introduced to a practical application of NESSSI, with the aim that they appreciate how useful it might be to them. The purpose of the class was simply to introduce the students to the omnipresent three

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[1] F A R Bennion, *Statutory Interpretation* (LexisNexis Butterworths, 4th edition, 2002) 3.

[2] Francis Bennion and Kay Goodall, "A new skill: law-text analysis?" [2006] 3 *Web JCLI*. http://webjcli.ncl.ac.uk/2006/issue3/bennion-goodall3.html

rules and the better scholarship in statutory interpretation, while also showing them that there are a set of criteria out there which could make their working lives easier in a world where parliaments produce new statutes every month.

NESSSI stands for "New Scientific System of Statutory Interpretation" and was developed by Francis Bennion from the method and criteria set out in his *Statutory Interpretation*. Its initial purpose was to assist practitioners but it is also useful to students who wish to break down the task of statutory interpretation into a set of instructions and simpler steps. Bennion summarises the NESSSI approach in this way:

> "The first step is always to find out and set down the exact wording of a doubtful enactment, stripping it of unnecessary words. Then the opposing constructions of the enactment which need to be put forward by either side are worked out. The construction favoured by the client needs to be supported by all relevant interpretative criteria. These consist of (1) rules of interpretation; (2) principles derived from legal policy; (3) presumptions based on the nature of legislation; and (4) linguistic canons of construction.)"[3]

A fuller exposition of the approach can be found by reading together Appendices A and B of Bennion's *Statutory Interpretation* (see either the current fourth edition or the forthcoming fifth edition, due late in 2007). The two appendices to the fourth edition are also available online.[4]

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[3] http://www.francisbennion.com/2007/004.htm
[4] http://www.francisbennion.com/2002/003/apa.htm and http://www.francisbennion.com/2002/003/apb.htm

The class exercise taught at Glasgow University was introduced into a pre-existing course, Sources and Institutions of Scots Law. This course provides an introduction to legal system and public law. It has a distinctive pedagogy centred around student learning rather than lecture-based teaching. The course is delivered in a predominantly seminar format. Students prepare independently for a two-hour seminar each week (allocating around ten hours of study for each seminar). A typical seminar is led by a tutor but contains a range of exercises intended to draw the students into discussion which is supported, rather than dictated, by the tutor. The seminar is usually reinforced by a single introductory lecture given the week before.

The NESSSI exercise was designed to occupy about half of the seminar time (around one hour). The rest of the seminar involved an analysis of two cases, one of which was a human rights case, applying some of the simpler or more familiar criteria of statutory interpretation. The students were given (a) a prior lecture on statutory interpretation (b) a few pages of materials written by several of the teaching staff which gave a summary introduction to statutory interpretation (c) Francis Bennion "The Real IRA is Proscribed After All" 168 JPN 694[5] and Lord Bingham's speech in *R* v. *Z (Attorney General for Northern Ireland's Reference)* [2005] 2 AC 645, [2005] UKHL 35. The students were also expected to have read (for the other exercise) short extracts from Bennion's *Understanding Common Law Legislation*. All these set materials were provided physically in a course pack with copyright permission obtained for the published materials.

[5] Also available online at http://www.francisbennion.com/2004/020.htm

Bennion's JP article is an example of NESSSI in practice, using clear headings to distinguish the process by which he comes to argue that a member of a proscribed organisation should not be punished for membership under s 3(1) the Terrorism Act 2000, because a close reading of the legislation should lead the reader to conclude that the legislation in fact failed to proscribe it. The article is an easy one for students to read, because Bennion sets out all his arguments in a list with headings.

The case Bennion discusses is an intriguing one for many students. Those with an interest in activist politics may be aware that the Terrorism Act 2000 has been heavily criticised for creating what many see as very broad, and somewhat vague, definitions of terrorist activity. Some of the Glasgow students might have picked up that one of their Level 2 tutors, Adam Tomkins, had deplored this development on the ground that the 2000 Act has been used in practice to silence rather than prosecute, which encourages human rights abuses.[6] This was also briefly mentioned to the students in the lecture on statutory interpretation which preceded the exercise.

It is rather ironic, then, that the case came to the House of Lords in the context of a prosecution, and a prosecution in which it will seem blindingly obvious to the students that Parliament intended the accused to be convicted. They had further been told that Z was a member of the Real IRA, which had claimed responsibility for some monstrous acts of violence, including the bombing of Omagh in 1998 in which 29 people were killed – possibly the worst atrocity carried out by a Northern Irish terrorist body. Had the Lords found in favour of Z, it would have been widely said that he was released "on a technicality". Why then, the students were asked, would an

[6] 'Readings of A v Secretary of State for the Home Department' [2005] *Public Law* 259, 265.

experienced legislative drafter - with no Irish Republican sympathies - argue that Z should be found not guilty?

Lord Bingham's speech is selected from the House of Lords decision which was reached after Bennion wrote his article, and which comes to a conclusion different from Bennion's. The students were given only Lord Bingham's speech due to limits on time; his speech was selected on the grounds that as senior Law Lord he was the most senior judge on the panel.[7] This also helped to focus the students' minds on the disagreements between Bennion and Lord Bingham, rather than lose their attention in subtleties of differences of opinion among their Lordships.

I have mentioned that one purpose of the exercise was to interest the students in the potential of a good method of statutory interpretation. It also had a second purpose. This was to present them with an intriguing conflict on which it was hoped they would not immediately take sides. One difficulty with teaching law to enthusiastic and opinionated – or cynical – students is that they often decide early on that judicial reasoning (both statutory interpretation and the use of precedent) is nothing more than political justification in disguise. They fail to see how statutory language or precedent can restrict decision-making. While this view does reflect one strand of jurisprudential thinking which they are of course entitled to adopt as their own, it would be better if students developed their jurisprudential perspectives on the basis of some experience rather than unreasoned prejudices acquired before they have any understanding of law in practice. In the NESSSI exercise, the Glasgow students were presented with an apparently bizarre interpretation of the law which seems to make sense only as a

[7] It might be noted though that in Brice Dickson's view, this was not the most convincing speech in *R* v *Z*: see "The House of Lords and the Northern Ireland Conflict - A Sequel" (2006) *Modern Law Review* 69 (3), 383, 398.

genuine dispute about legal interpretation,[8] not as an exercise in covert political bias. (Clearly it may indicate deeper political beliefs about the role of the judge which are less incongruous or shocking, but here we are concerned with the immediate contradictions suggested to the students by the readings.)

In his speech in Z, Lord Bingham argues that statutory interpretation is not carried out in the abstract but rather directed towards particular circumstances. In this case the most important of these circumstances, he maintains, is the historical context in which the statutes proscribing Irish terrorist organisations can be shown to have a common aim of eliminating all such bodies. He concludes that Parliament plainly intended to proscribe the Real IRA and observes that identifying the precise relationship between the Real IRA and the IRA would be "an almost theological inquiry".[9] He adds that any reasonable member of the Real IRA would believe that the organisation was proscribed, so the law is in practice clear. Lord Bingham's unspoken major premise[10] appears to be that it is more important to give effect to what Parliament thought it had done in enacting an anti-terrorist statute than to consider whether in fact two organisations with shared militant words in their title are sufficiently alike that they can be fairly described for penal purposes as operating under the same name.

In his article, Bennion emphasises the rule that parliamentary intention is expressed by the words used. We may be able to divine what government intended when

[8] For an illuminating discussion of such "differential readings", see the forthcoming fifth edition of Bennion's *Statutory Interpretation* (LexisNexis Butterworths, 2007), s 20(4).
[9] *R* v. Z [2005] 2 AC 645, 657.
[10] For a clue to what may be the explanation for the difference between Bennion and Lord Bingham see Ian McLeod's discussion of the judge's personal starting point or "inarticulate major premise" in his *Legal Method* (Palgrave, 6th edition 2007), 4 and 9. As McLeod notes, the concept of the inarticulate major premise originated with Oliver Wendell Holmes "The Path of the Law" 10 *Harv L Rev* (1896-1897) 457, 466.

promoting a bill, he notes, but we cannot know what Parliament intended when legislating. The literal meaning of the words used in s 3 excludes the Real IRA: it is not reasonably foreseeable to a person reading Schedule 2 that the words "Irish Republican Army" include the Real IRA. He also disputes the conclusion that all the previous statutes proscribed the Real IRA. Justice is served when penal law is clear and certain, Bennion observes, and certainty and clarity are more important than giving effect to a flawed law. Acquittal is therefore the just outcome. Bennion's unspoken major premise appears to be that a fair legal system applies the rules and principles by which it is bound and that upholding one of its fundamental principles - that there can be no punishment without clear law - is more important than the temporary embarrassment caused by an unpopular but right decision.

The students were asked first what Bennion's arguments were (in the form of statutory interpretation criteria) for and against treating the Real IRA as a proscribed organisation under the Terrorism Act 2000. They were then asked to summarise Lord Bingham's statutory interpretation arguments and to give a reasoned explanation of which position they preferred. They were to prepare this in advance and then discuss their answers in small groups of four or five in class, before presenting the conclusions of each group to the class as a whole. A handout was then given to the class, summarising the key technical and ethical issues raised by the exercise. (The students were not told beforehand that they would be given this handout, as this might have encouraged them not to bother preparing the reading.)

The tutors were instructed to emphasise at the start of the small group discussion how surprising it was that Bennion, better known for an independent right-wing orientation

than any leftist allegiance to violent resistance movements, would want to argue that a terrorist should escape prosecution by means of what looks very much like a "technicality". The aim here was to make it clear to all the students that there was an interesting puzzle to resolve, rather than a straightforward choice which they could make quickly on the basis of their own political sympathies.

The results were encouraging, both in the three groups which I tutored and reportedly in other groups which tutors discussed with me afterwards. No formal method of evaluation was used to study student learning, so only an impressionistic summary can be offered here. More formal evaluation will be applied when a similar exercise is undertaken next year at Stirling University's law school (where I now work).

The response of the students was animated, compared to a standard exercise in applying the three rules (which Glasgow University does not now use in any of its teaching). Students expressed uncertainty over which side to take and interest in what the case meant for the rule of law, and asked questions about how statutory interpretation might work in other cases. Opinion was divided on whether to agree with Bennion or Lord Bingham, and crucially, listening to the small group discussions, it was clear to me that many students took one side or the other only after taking part in the debate.

The handout they were then given provided them with a summary of what would have been discussed and also relieved the tutors of the task of having to lead the class through a demanding exposition of all the many questions raised by the exercise. About fifteen minutes were allotted in the seminar to allow them to read it. This made

it easier to ensure that all participating students had access to a clarificatory statement of the key topics, without needing to rely on busy tutors to master a sizeable package of mostly unfamiliar materials. It should be emphasised that the team of tutors consisted almost entirely of full-time lecturing staff who had already worked together on the course in previous years, and that there were no concerns about whether an individual tutor could be trusted to prepare adequately in advance. On the other hand, fifteen minutes' reading time is insufficient for students with some reading disabilities, and a suitable alternative for them will have to be developed when the exercise is repeated.

The handout reminded the students that it is the task of a court to weigh and balance the arguments, and it gave a brief analysis of Bennion's and Lord Bingham's treatments of the issues. It noted that Bennion does not explicitly state why he prefers the arguments against treating the Real IRA as proscribed, other than to say that it is the paramount duty of the judge to promote justice. The students were asked to consider whether he was arguing that because the balance of legal principle favoured the accused (no punishment without clear law; certainty and predictability in the law; just outcome), the statute should not apply to the Real IRA.

The students were given some further contextual material, drawn from the Dickson article, which notes that Parliament can easily choose to rectify an error: following an adverse decision in another Northern Irish case, *R (Hume et al)* v. *Londonderry Justices* 1972, Parliament passed a statute changing the law the next day.[11] Hence the crucial issue for Bennion, they were asked to consider, is whether or not the law is

[11] Dickson, *op. cit.*, 398.

being followed, however obnoxious the result might be in the particular case. If judges vary how they interpret the law to suit particular outcomes in particular cases, the law is no longer predictable and it is no longer applies equally to all. It is better that the guilty go free occasionally than that the rule of law be undermined. Would the decision of the House of Lords be a classic example of the saying "hard cases make bad law"?

Finally, the handout concluded by asking the students whether they thought this was a case of a minor drafting error which a court should rectify, or a case of unclear criminal law which it is for Parliament to correct. Each class had a brief whole-class discussion to check whether the students had understood the handout and to elicit their views on the final question.

In conclusion, it seems that the exercise at the very least stimulated some discussion and questions on a topic which typically in my lecturing experience has sent students to waking resentment or sleep. While this may say more about my lecturing abilities than the topic, I suspect other academics have had similar experience when giving traditional lectures on statutory interpretation. The exercise now needs to be developed to operate more fairly for students from all backgrounds, and formally evaluated to see where it can be improved. I am happy to share materials with any lecturer or tutor who would like to see what was used for the exercise and might wish to adapt it for their own teaching: please feel free to contact me at k.e.goodall@stir.ac.uk. I would also welcome comments from any reader who might like to suggest improvements or other approaches to promoting the study of statutory interpretation among a generation of students awash in statute.