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A New Skill? Law-Text Analysis

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Summary

It is our thesis that there are intellectual techniques, at present underdeveloped and neglected, for the proper handling of law texts (those which constitute law or are authoritative texts from which laws can be derived). These techniques we collectively refer to as "law-text analysis". They grow from disciplines such as statutory interpretation and precedent, but they are more than that. Together they can be defined as the general intellectual skill of identifying the legal issues involved, formulating the relevant rules(s) and reaching the actual or arguable legal result of applying the rule(s) to the facts. These are not mere mechanical rules, but neither are they simply fictions to conceal caprice. They are an undervalued means of ensuring that decision-makers act constitutionally. These techniques are not given the emphasis they should have in legal education and there is a tendency to believe that other skills such as research can replace them. We describe some of the key components of law-text analysis and argue that it should be taught not as a separate subject, crammed into already overcrowded curricula, but as a running topic central to the intellectual discipline of law.

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Introduction

In this article we announce the forthcoming publication of a book we are working on together. It is about a new skill, or perhaps a reworking of an old, scarcely-recognised skill, which we call law-text analysis. This is a necessary skill for practising lawyers, which is developed from disciplines such as statutory interpretation and the doctrine of precedent and is a product of that “middle path” urged by HLA Hart in *The Concept of Law* (Hart 1994, p 147), and much ignored. It needs to be that because it is intended for practical use, though employing academic disciplines for its development and exposition.

To begin with, we stress that in order to benefit from this article and our forthcoming book it is necessary for the reader to pay close attention to the way we use words, and to their intended meaning. That is because the book is dealing with language, that of law texts, which itself has been very carefully put together by judges, legislative drafters, and other experts in the linguistics of law. The user of law texts needs to match their care and precision with the like qualities in order to extract the intended meaning.

By a law text we mean a text which either itself constitutes a law or laws, such as a state constitution, Act of Parliament or EU directive, or is an authoritative text from which a law or laws may derive, such as a court judgment or a treaty. It is necessary to distinguish law texts in this sense from other legal texts, such as explanatory notes to a statute, Law Commission reports, or scholarly books and articles. These may be helpful in analysing a law text, but they are not in themselves law. It is important to recognise this vital distinction, and bear it always in mind when dealing with the subject.

By law-text analysis we mean the process of analysing a law text so as to arrive, so far as necessary for the case in hand, at its *legal meaning*, that is the meaning that gives effect to the *legislative intention*. These are both technical terms of considerable

complexity, so much so that they will each require a chapter of the book to explain fully.

In practice an instance of law-text analysing may, and usually does, apply to a part only of a law text, such as a single *enactment* (another technical term). For a particular case a lawyer may need to analyse two or more such texts in conjunction (perhaps from different Acts). The skill of law-text analysis differs in detail according to the nature of the particular text. We look first at texts constituting parliamentary legislation under a common-law system.

The nature of law-text analysis

To give an idea of the treatment at the outset, we take the common case of the law-text analysis needed where a lawyer has to deal with a particular enactment and feels doubtful about its meaning. Here we make use of three technical terms, *real doubt* as to the *legal meaning* of an *enactment*.

A doubt about the meaning of legislation is “real”, that is one the law will recognise, only if it is substantial, and not merely conjectural or fanciful (*Swain v Hillman and another* [2001] 1 All ER 91 at 92; *R (on the application of P) v West London Youth Court* [2005] EWHC 2583 (Admin), [2006] 1 All ER 477, at [17]). It is not substantial where it arises merely because the enactment calls for the exercise of *judgment* or *discretion* by an official or court (two more technical terms, discussed below) and the outcome cannot be known until that is exercised. The phenomenon of *differential readings* (another technical term, to be examined in our book) also needs to be borne in mind.

In relation to doubt, interpreters must beware of plausible advocates. As Lord Cave LC said, “no form of words has ever yet been framed . . . with regard to which some ingenious counsel could not suggest a difficulty” (*Pratt v South Eastern Rly Co* [1897] 1 QB 718 at 721). Buckley LJ said that the ingenuity of counsel “can almost always produce anomalies in either direction” (*Pearson v IRC* [1980] Ch 1 at 12). Lord Diplock said: “Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities . . .” (*Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at 157). Lord Reid said that presumptions such as that in favour of construing penal Acts strictly apply only where “after full inquiry and consideration one is left in real doubt” (*DPP v Ottewell* [1970] AC 642 at 649).

Judgment and discretion

As just mentioned, uncertainty arising because an exercise of judgment or discretion is awaited does not rank as “real doubt” (this is the mistake made by the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, which it is submitted requires the decision to be treated as arrived at *per incuriam* (Bennion 2006, p 167)). This sort of uncertainty is inevitable where an enactment leaves a question to the decision of an official or judge. The posing of such questions is an essential part of legislative functioning, since Parliament cannot itself give a decisive answer for every case. That such questions arise in the application of the legislation does not mean that it is ambiguous or obscure, or that its drafting is deficient.

In relation to the judicial function, the relative ingredients of judgment and discretion are difficult to pin down. Judgment involves judicial assessment of a fact-based situation, while discretion involves judicial selection from a range of two or more available options. With judgment there is notionally only one “right” answer, and the judge has conscientiously to work out what in his or her opinion that is. With discretion on the other hand there are always two or more “right” answers and the judge is required to choose between them on proper grounds. In neither case does “right” mean that any competent judge would arrive at the same answer. Rather it means that, while “right” answers may differ with different judges, a given answer is acceptable as “right” only if it lies within what is the permitted range in the instant case, that is the range which an appellate or reviewing court would allow as legitimate. Many lawyers, including judges, have failed to understand the respective natures of judgment and discretion, and the differences between them. This is unfortunate, since the distinction can have important legal consequences. Since the distinction is fundamental to a grasp of how to resolve legislative doubt it is dealt with in detail in our book.

The enactment

Statutory interpretation usually concerns the legal meaning of an “enactment”. This is a proposition laid down in a legislative text usually having the effect that when the significant facts of a case come within an area, called the *factual outline*, which is delineated in that proposition then consequences known as the *legal thrust* arise (these again are law-text analysis technical terms which will be described in the book). The proposition constituting an enactment includes implied as well as express statements. It may be embodied in a single sentence of the text or require to be collected from two or more sentences, whether or not consecutive.

Sometimes what amounts to a single enactment may be contained in two or more different texts, as when the original enactment has been amended by a later provision. (Bentham said that a law is either a proposition or an assemblage of propositions (1928 p 76).) A single enactment is unlikely to contain the whole of the relevant law, but needs to be read along with other legal texts to get the whole picture. The relevance of the single enactment to our discussion is that in most cases a source of legislative doubt resides in one enactment alone, that is in one part of the story. The rest of the relevant law may be clear, or may embrace other points of doubt needing to be investigated separately.

The nature of an enactment was recognised by Parliament in a passage contained in the Interpretation Act 1889 (repealed) section 35(1) (it is not reproduced in the Interpretation Act 1978, which replaced the 1889 Act). This said that “any enactment may be cited by reference to the section or subsection of the Act in which the enactment is contained”. Earlier section 2 (repealed) of Lord Brougham’s Act ((1850) 13 & 14 Vict. c. 21) had said that “all Acts shall be divided into Sections, if there be more Enactments than One, which Sections shall be deemed to be substantive Enactments”. Usually an enactment consists either of the whole or a part of a single sentence. One sentence may thus contain two or more enactments.

The legal meaning

The true meaning of an enactment, when one has to be found on a particular point, is the meaning the legislature indicated that it intended by its choice of the verbal formula it used. This is known as the legal meaning. It is found by a court – ultimately by the constitutional organ of last resort or supreme judicial authority. HLA Hart said (p 141):

“A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was “wrong” has no consequences within the system: no one’s rights or duties are thereby altered.”

Here Hart quoted Bishop Hoadly: “Nay whoever hath an absolute authority to interpret any written or spoken laws it is he who is the lawgiver to all intents and purposes and not the person who first wrote or spake them”. Bishop Hoadly’s view is akin to that of some rule-sceptic strands of jurisprudence, but it is fundamentally mistaken. It is rather like saying that a translator is truly the author of the piece he or she translates. But a conscientious translator, like a conscientious judge, strives to give effect to the intention of the real author.

In the United Kingdom the legal meaning of an enactment, that is the meaning that correctly conveys the legislative intention, is the one a final court of appeal such as the Appellate Committee of the House of Lords (for other common law countries substitute the corresponding supreme judicial authorities) has found, *or it may be supposed would find*, if the matter came before it on appeal. It normally corresponds to the grammatical or literal meaning of the enactment. If this were never so, the legislative system would collapse. If it were always so, there would be no need for books like the one we are writing.

The courts often stress the duty to find and apply the legal meaning. As long ago as 1864 Chief Baron Pollock said “it is our duty to ascertain the true legal meaning of the words used by the legislature” (*A-G v Sillem* (1864) 2 H & C 431 at 513). A modern reference is that a word or phrase may have “a special legal meaning derived from its legislative history” (*Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304, at [29]). In a 2003 case Lord Hoffmann (*Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 4 All ER 162, at [24]) referred to-

“. . . the well-known distinction between the meaning of a word, which depends upon conventions known to the ordinary speaker of English or ascertainable from a dictionary, and the meaning which the author of an utterance appears to have intended to convey by using the word in a sentence. The latter depends not only upon the conventional meanings of the words used but also upon syntax, context and background. The meaning of an English word is not a question of law because it does not have any legal significance. It is the meaning to be ascribed to the intention of the notional legislator in using that word which is a statement of law.”

The meaning referred to in the last sentence of the above-cited passage is what is called the legal meaning. It can be troublesome to discover this with any certainty. The trouble lies in that italicised phrase used above in relation to the Appellate Committee “it may be supposed would find”. Unless we are talking about the facts of

a case which has actually been decided by the ultimate tribunal, we cannot be sure of the decision. Even if the same enactment has been before that tribunal in a different case, we cannot be certain how it would fare on the different facts of our own case. This is one reason why legal practitioners need to be skilled in law-text analysis.

The distinction between literal or grammatical meaning and legal meaning lies at the heart of the problem of statutory interpretation. An enactment consists of a verbal formula. Unless defectively worded, this has a natural meaning in terms of its wording and syntax. The unwary reader of this formula (particularly if not a lawyer) may mistakenly conclude that the natural meaning is all that is of concern. Unhappily this state of being able to rely without question on the natural meaning does not prevail in the field of statute law; nor is it likely to. In some cases the natural meaning, when applied to the facts of the instant case, proves ambiguous or otherwise uncertain. In *all* cases there needs to be brought to it due consideration of relevant matters drawn from the context (using that term in a wide sense). That truth is still not widely grasped, even among judges.

The case for law-text analysis

It is our thesis that there are intellectual techniques, at present underdeveloped and neglected, for the proper handling or management of law texts. These techniques we collectively refer to as “law-text analysis”. (Other possible terms are “law management” and “law-text handling”.) Together they can be defined as the general intellectual skill of identifying the legal issues involved, formulating the relevant rule(s) and reaching the actual or arguable legal result of applying the rule(s) to the facts. This requires intellectual manipulation of relevant materials.

We argue that these techniques should be added to academic and vocational syllabuses. With the help both of academics and practitioners, the techniques need to be further identified, analysed, refined and described. They should be presented to students as being basic “lawyering”, central to any lawyer’s function. They need, deserve, and are capable of, considerable improvement both in their practice and teaching.

It is basic to our argument that law requires to be taught and learnt from primary texts and full analyses rather than nutshells or other predigested materials, and that society needs lawyers to be educated as such in the liberal as well as the practical mode. The law will not develop as it should unless there is a sufficient academic input. This includes the *improvement* of the body of law and legal techniques. We often talk of law reform, but there are notoriously no votes in reform of “lawyers’ law”, which is the kind we are talking about. We often speak of research, but there is less discussion about the *purposes* of legal research. One purpose must surely be improvement of the corpus juris and the techniques of handling it.

Ability effectively to *manage* the relevant law is central to any lawyer’s or law student’s functioning, and that is what we concentrate on here. (We write in terms of the position in Great Britain, though drawing on Commonwealth and American experience. We believe the techniques of law-text analysis to be international in scope.) It is a complex intellectual skill, to which neither academia nor the profession

has paid full attention. This neglect extends to the development and refinement of the skill both in practice and by academic research, and to its teaching. (There is an element of vicious circle here: what is little taught is not much researched.)

Almost fifty years ago, C Wright Mills wrote in the classic *The Sociological Imagination* that people need “a quality of mind that will help them to use information and to develop reason in order to achieve lucid summations of what is going on in the world and of what may be happening within themselves” (Mills 1970, p 11). Mills was writing about people’s struggle to understand their place in history and society. It is no different for the lawyer and law student. Those who work with the law need to develop a quality of mind: a legal imagination. They need to be as objectively critical of the law as they can manage to be (which requires a powerful skill for self-understanding). But to do that they also need to understand legal reasoning so profoundly that researching and interpreting the law becomes second nature. Without both of these, we will never be able to have either the best legal thinkers or the fairest and most efficient laws we need.

There have been real advances in teaching law since it first became an undergraduate degree. Students now learn philosophy, political theory, public policy and other social sciences as part of their studies. But it is a mistake to think that a smattering of these will make them good practitioners or free thinkers. Just as it was not liberating for students to memorise lists of ratios and statutory rules without the benefit of a liberal education, it creates dull minds if they merely add the memorising of theories. It benefits few if students abandon the core of their own discipline and take up little more than the rote learning of superficial introductions to other disciplines. An understanding of humanities and social sciences is essential to a well-rounded intellectual education, but it is not enough. Students will be dilettantes if they do not master their own primary discipline. That discipline is law and they need to develop their legal imagination.

Learning legal method opens doors of understanding. If students do not learn to research and reason and let go of their prejudices through exploring an argument from every party’s side, they have had only a morsel of an intellectual training. It will be a poorer education than they would have had they graduated in psychology, or philosophy, or economics, or any other degree where they would have mastered a discipline. They must learn their legal craft in depth.

Nor will they become effective citizens (or even revolutionaries) without this. Whether they want to apply the law, reform it or do away with it, they must first *understand*. In an excellent recent article on teaching private law, Beaver and Rickett wrote:

“the concern is that academic private lawyers will come to rest content with understandings of the law that are manifestly inadequate and will not attempt to improve on them, but will instead prefer to explain away the inadequacies by reference to policy, which is merely a veiled reference to other disciplines” (Beaver and Rickett 2005, p 336).

There is a professional as well as an academic requirement in the sphere of law management. In a 2004 paper for the Law Society’s Training Review, Nick Johnson

and Alison Bone stated that young lawyers were weak not in core legal knowledge and understanding, but in handling law in practice. “Some young lawyers do find difficulty in organising their nascent skills, facts, abilities to perform transactions and underlying legal knowledge into a coherent problem-solving method” (Johnson and Bone 2004, p 18). The First Report of the Lord Chancellor’s Advisory Committee on Legal Education and Conduct (ACLEC) asserted that there were three deficiencies in legal education and training: “the relative neglect of the study of legislation”, “the relative lack of attention to an understanding of the civil law systems” and a lack of legal research skills, including the ability to identify and analyse a problem (1996, paras 1.13-1.15). The Committee said:

“Although the precise nature of the changes that will occur in the market for legal services may be unpredictable, the trend which we have already noted of a growing legalisation of society is likely to continue and to be driven increasingly by the use of legislation. In this respect, our system of legal education can be said to have failed to keep pace with developments in law and society over the past half century. This is reflected in the relative neglect of the study of legislation. While students generally receive extensive education in case handling, there is much less emphasis on legislative rule handling. Most first-year law students attend courses which introduce them to statute law, but these courses are rarely sustained in later parts of the curriculum. Specialist options on legislation are rare in England and Wales. This is partly due to pressures on the curriculum to cover the prescribed “foundations of legal knowledge” (see Chapter 4). But the problem is deeper than this. Despite the provision of larger numbers of specialised options and courses, many of them dealing with new areas of statute-based law, the basic skills of statutory interpretation and handling of legislation still tend to receive insufficient attention.”

Yet many academics are dismissive of the need to develop these, or other law management skills. William Twining complains of “a tendency among academic lawyers to treat concern with “skills” or clinical legal education as anti-intellectual” (Twining 1998, p 9 n 32). Beever & Rickett fear that academic private lawyers are abandoning “the primary task of the academic lawyer, which is to treat the law as an academic discipline”. They add that this “is not speculation; it has already occurred in some areas, and it appears to be spreading to others” (Beever and Rickett 2005, p 336). There is no reason to suppose that this is any less common in the other branches of the legal academy. We argue here that law management is not a minor skill and most certainly not anti-intellectual. It is at the heart of that discipline which gives students the gift of a legal imagination.

Rules, democracy and constitutions

There is a democratic and constitutional element to this. Courts are the final arbiters of the meaning of a statute, at least until it is revisited by Parliament. This is no mere mechanical exercise of rule-following; we all accept that the judges’ role is also creative. But room for creativity does not equate to unlimited discretion. And it is Parliament which is supreme in the UK constitution: it is the task of the judges to uphold its legislative supremacy. Excepting those sceptics who believe that the whole edifice of law management is a façade concealing judicial caprice, anyone engaged in

making law work better must surely wish to monitor what it is that judges do. (For responses to the sceptics, see for instance Greenawalt (1992) or Weinrib (1995)). It is not often appreciated that statutory interpretation and the principles of precedent have a constitutional significance, but they do.

Indeed, it is this constitutional element which justifies the whole process of statutory interpretation and reasoning from precedent. Rule-following, after all, is a poor substitute for reaching the fairest decision in each particular case. If we consider rules in their broadest sense, as encompassing also principles, we can see this. Frederick Schauer (1991) has commented on rules' failure to represent perfectly the justifications which lie behind them. He asks why we continue to rely on rule-bound decision-making when it seems to fail in its purpose. Schauer points out that rules cannot be anything other than sub-optimal as a means of reaching the best result in a particular case (the best result being defined by the justification which lies behind the rule). A rule can never produce a result which is superior to the one which would have been produced by relying on the background justification directly - but sometimes a rule will, just because of its restrictive nature, give an inferior result. Rules do not even treat like cases alike: it is only particularistic justice which could achieve this.

It is only when we look at rules from a democratic and constitutional perspective that we see that there are many reasons for favouring rule-based decision-making over a more particularistic approach. Central here are the kinds of beliefs that are familiar when we cast them in their legal form. Institutions choose to depend upon rule-based decision-making because it permits them to delegate decision-making without losing all control of how decisions are made. Rules are said to promote certainty and predictability and to allow those governed by the institution to rely upon settled practice. Rules are also thought to discourage arbitrariness and caprice. Summers notes also the legitimacy which the rule of law confers on those who make decisions (Summers, 1993). This can be true also of rules in general. But in the UK the law is interpreted not by a supreme democratically-elected body but by the judiciary. In such circumstances it is essential that judges adhere to the rules of statutory interpretation and precedent, and that others become so thoroughly familiar with those rules that they can monitor the judges.

It is these rules, principles and criteria which restrict the power of the judiciary and allow elected representatives to retain influence over the administration of justice. Without them, critics of the law have lost the greater part of their weapons. If all that law graduates are equipped to do is to criticize statutory innovations and judicial decisions on the grounds of policy, they would have been far better taking, say, a politics or sociology degree. Understanding social policy, after all, is just as intellectually demanding as understanding law. It is an insult to both sorts of disciplines to argue that they can be acquired through a few lectures and seminars along the way. Both social sciences and law deserve greater respect.

Taking an interest in these sorts of topics is often seen as conservative, even right-wing, by many academics. The skills of "lawyering" are seen as relevant only to those who want to preserve an elite domain and who want to promote a deceptively positive ideology of law. But as Cass Sunstein has pointed out, "[p]eople can often agree on what rules mean even when they agree on very little else ... [Through rules] it is often possible for people to converge on particular outcomes without resolving large-scale

issues of the right or the good” (Sunstein 1996, pp 8-9). To agree that there are interpretative criteria which help define the law, and which help all suitably qualified people to understand and predict how law will operate, is not to agree that a particular law is fair or that a legal system is the best it can be. Indeed, the more one dislikes a law or a body of laws, the more important it is that one understands their potential impact as precisely as possible. Law management is as important to niche campaigners or most leftist activists as it is to the conservative and the elite.

Exploring law-text analysis

In 1988 William Twining said that direct learning of “skills” should be made a central component of every stage of legal education and training (Twining 1988, p 4). Getting nearer the topic of this paper, Gold, Mackie and Twining pointed out a year later that “one cannot draft, persuade, interrogate, advise or manage in law without first having *intellectually manipulated the relevant materials*”. They went on: “while it is clear that much cognitive skill work is done in the teaching programmes of the universities and professional training programmes around the Commonwealth, it is characteristically done indirectly, providing no specific instructional materials” (Gold, Mackie and Twining 1989, p vi) (emphasis added).

Nine years later, Boon argued that “a coherent programme of skills at the undergraduate stage is currently lacking” (1998, p 169). However, by this time “skills” had come to mean skills in a very wide sense, including negotiation, advocacy and so on. Maughan and Webb’s popular text on lawyering skills, for instance, covers what they call the “DRAIN” skills – drafting, research, advocacy, interviewing and negotiation (2005, p 1). When Boon et al now speak encouragingly of a growth in “skills-based learning in law” (2005, p 482-483), it is these other skills which have taken hold. These are valuable, but law management is the core of a discipline, not just a skill, and we believe that it is so complex that it must be acquired by immersion over several years.

A central area where intellectual manipulation of materials is required concerns the application of a legal rule to a particular set of facts, which may be called basic lawyering. As Gold has put it, the practitioner must often need to “identify and evaluate legal issues and apply the law” (Gold 1993, p 190). Peter Birks speaks of the need for a lawyer to “spot the presence of an issue [and] predict its resolution” (Birks 1993, p 27). Elsewhere Gold characterised the skill as that required to “identify and evaluate relevant facts” and “identify and evaluate legal issues efficiently” (Gold 1983, p 251). It is also necessary to know how to work out the resolution of the issues, producing an answer to the question: What is the result of applying the law to these facts? As Gold says,

“The development of refined, analytical skills is clearly at the root of effective lawyering. Given a fact pattern, a lawyer must know what legal propositions might apply. He must be able to pursue lines of questioning in order to determine other relevant facts not yet laid bare. [It is necessary to] know how to push back that which lies on the surface in order to uncover both legal and factual material which lies below ... Legal rules guide, direct and ultimately determine the results in particular cases; nevertheless, they always exist for some reason, however vague and unclear. A lawyer is therefore called upon to

determine the intent, purpose and goal of legal rules. Underlying rules there may be specific principles or policies to which an adjudicator will give effect. Oftentimes rules form part of an over-arching theory ... Knowledge required of the lawyer is therefore the well orchestrated co-ordination of information and intellectual skill ... [Training materials] must specify in clear, concrete terms the specific analytical skills required to *manage* legal information in as proficient a manner as is possible..."(*Ibid.* at 248. Emphasis added.)

Yet remarkably, educational materials in use today do *not* spell out this information. For example the excellent 1993 book by Guy Holborn entitled *Butterworths Legal Research Guide*, the most comprehensive treatment yet published in Britain on this topic, conspicuously failed to say *how* research should be used to answer problems. What was described as a worked example of "full-scale statute law research", running to nearly six pages (116-122), said nothing about how the reader should use and apply the information the detailed and painstaking research will have revealed. Since then, the second edition has dropped the worked examples entirely. We do not mean to criticise the author for this omission, because it is clearly not his intention to proceed that far. But someone needs to do it.

There seems to be no accepted name for this overall skill, vital though it is. (The omission may be significant: what is not perceived to exist is not named.) Picking up Gold's term "manage" in the passage just cited, Bennion originally suggested calling it "law management" (though as explained above our preferred term is now law-text analysis). Bennion also thought "law management" a suitable term by analogy with the topic found in barristers' training syllabuses under the heading "fact management".

The Bar Vocational Course defines fact management this way: "The student should be able to examine facts in detail, look at all the possible interpretations of the facts, identify which facts are in dispute, which vital information is missing, how the facts can be linked together to prove a case and how the facts can be assembled to construct a persuasive argument." (2005-06, p 32). The BVC notes that "[f]act management and legal research are the fundamental enabling skills of the specialist advocate" (2005-06, p 11). The BVC does not include law management, though the passage just cited makes equal sense if this is substituted throughout for "fact management". An alternative term is "law handling". (Bennion first used the term "law management" in a proposal submitted to the Council of Legal Education for England and Wales in March 1992 ("Law Management: A Proposal to add Law Management to the Inns of Court School of Law Vocational Course"). He suggested that the "legal research" topic in what was then the ICSL vocational training course should be expanded to include the handling and manipulation of legal sources, and should then be renamed law management.)

Obviously "management" is here used in a sense different from that meant in terms such as "practice management" or "managing your work". These are practical skills, while law management (or law-text analysis) is an intellectual skill employed in practice. (This is the sense used by Macaulay when he said "In the management of the heroic couplet Dryden has never been equalled" (1828).) It embodies at least four of the 24 legal skills listed in the 1988 Marre Report as needing to be taught to students

either at the academic or vocational stage. (1988 para 12.21). In the Marre Committee's words, and retaining their numbering, these are-

- (2) An ability to identify legal issues and construct a valid and cogent argument on a question of law.
- (4) An ability to understand the underlying policy of, and social context of, any law.
- (5) An ability to analyse and elucidate an abstract concept.
- (12) An efficient grasp of techniques for applying the law, *i.e.* problem solving skills.

Several other skills listed by *Marre* are relevant to law management without being comprised in it, for example the ability "to carry out legal research making intelligent use of all source material". (*Ibid.*) Ordinary advocacy skills, though not included, are also relevant. The borderline between formulating a legal proposition and putting it across by advocacy can be difficult to draw, since advocacy begins with the way the proposition is worked out and drawn up even before the courtroom door is reached. Some years ago an American committee on legal education listed the following advocacy skills-

"... that an argument is addressed not to its author, but to a specific tribunal and must for effectiveness move in terms of what will appeal to and persuade that tribunal. Or: the principle of "limited span of attention" of any tribunal, with corollaries: the value of simplicity of thread; the value of points which cumulate instead of scattering; the extra-interest which the statement of facts arouses, and the importance of making that statement frame the issue favorably, and of an arrangement which drives forward. Or again: the value to a legal thesis of a phrasing in language both simple and familiar; or the power, in an answering argument, of a positive thesis which neither accepts the ground chosen by the other party nor loses momentum by a succession of denials or explanations." (Llewellyn Report 1945, p 373 n).

These skills are useful, but they are not law management or law-text analysis. Essentially, we are talking not about how to dress up an argument to achieve maximum persuasiveness but how to work out its substantive intellectual content in the first place. This is a basic lawyering technique that applies to all areas of law, in almost all jurisdictions. While specific knowledge of a particular area will also be needed for full effectiveness, the lawyer can go a long way in unfamiliar areas simply by using the basic technique. It is a technique for use with specialised legal rules, whether familiar or not, as well as general rules applicable to all law. Hence it ministers to the needed versatility of lawyers operating in fields such as general practice or litigation. It empowers critics who need to anticipate the scope of a law before they can suggest how to reform it. It helps overcome the handicap that no student taking an academic course can cover more than a small part of the area, or that

real-life problems are not neatly packaged with a topic label but messily cut across boundaries.

Law-text analysis as the core of legal knowledge

Bennion has written elsewhere of how the purposes of law can be set out in tree form proceeding downwards from the widest generality to the narrowest specialisation (Bennion 2002, p 813). Legal knowledge, including possession of skills, can be treated in the same way. Take an example from English commercial law. In his 1991 memorial lecture for the late Clive Schmitthoff, Roy Goode explained how he began teaching this subject with the idea that it was necessary for him to “cover the field”. Twenty years later he accepted that it is more important to instil in his students the basic principles of commercial law: “Better that they should understand the fundamental concepts, so that they would know how to analyse the legal effects of a fact situation not the subject of any previous reported case, than that they should become bogged down in the minutiae of technical law...” (Goode 1993, p 57). What Goode does not mention is that in order successfully “to analyse the legal effects of a [commercial] fact situation” the student or practitioner needs general law management skill as well as specific knowledge of commercial law fundamentals. (For an example in relation to vocabulary (or jargon): see *Brady v. Brady* [1989] AC 755.) For this field the legal knowledge tree can be set out in the following way:



What needs to be grasped is that in any such tree, no matter what the area of law in question, *the top branch will always be law management*.

The facts in question in a law management exercise may be actual or hypothetical. They will be actual where the lawyer or student is asked to advise, litigate or comment on particular facts. They will be hypothetical where the task is one such as the drafting of a contract or legislative text or preparing a moot argument. Either way, facts are the starting point. Then one needs to find the legal key that unlocks the case. While a case report is useful for illustration, especially where, as with *Salomon v.*

Salomon & Co. Ltd. [1897] AC 22, it illustrates several different points, we need to beware of limiting tuition to law's pathology and remember its facilitating function. (Back in 1993, Discussion Group 3 at the first ACLEC conference pointed out that "lawyers often concentrated on solving problems rather than avoiding them", concluding that "a more strategic and creative use of law was needed instead of this pathological approach". This warning is still important today.) Law management techniques are needed for both solving and avoiding problems, since each depends on exposing the legal thrust applicable to the factual situation. Law reports show that judges and practitioners can make mistakes. ("... the reasoning of the judge(s) may be dodgy or patently bad": Len Sealy, citing *Houldsworth v. City of Glasgow Bank* (1880) 5 App. Cas. 317 (reversed by Companies Act 1989 s. 131(1)) and *Rayfield v. Hands* [1960] Ch. 1 (Sealy 1993, p 38). It is a function of law management to spot these. They may be used to throw doubt on an adverse decision, or suggest ways round it. Legislative drafters also err, and this too can be turned to account if noticed. ("... it is particularly bad that so much legislation is drafted in disregard (or ignorance) of the common law rules that it is designed to co-exist with": Len Sealy again (1993, p 39)).

The law that is to be "managed"

Very often, the law that is to be "managed" must first be found out by research. There is reason to believe that accurate indwelling (*i.e.* memorized) legal knowledge is sparse among many practising lawyers. (Research published by the Royal Commission on Criminal Justice showed that of 187 English solicitors responding to a questionnaire "52 per cent wrongly believed that the Appeal Court can impose a more severe sentence on an appellant ... and advise (*sic*) their clients accordingly" (1993, 444).) One reason for this is perhaps the decline in rote learning and the growth of measurement by outcomes: see the QAA Benchmark Standards for law (2000) and, for England & Wales, the joint statement of the Law Society and Bar Council (1999). Another factor is the increase in the volume, complexity and variety of primary laws. In these circumstances teaching of correct categorization assumes greater importance.

There are complex interactions between laws in the various divisions and subdivisions, with some laws overriding others. Policy considerations obtrude: the literal meaning of a law is sometimes modified by reference to the policy underlying it or to general legal or public policy. Teachers may ignore this aspect or find themselves struggling to include it in crowded curricula.

Another complicating factor concerns the nature of techniques that need to be applied. The rules, principles, presumptions and linguistic canons which apply to the interpretation of UK legislation, and therefore form part of the technique of law management, are not entirely the same when it comes to the interpretation of a treaty given legislative effect or an EU directive. This also applies to the doctrine of precedent as it applies to a decision of the Appellate Committee of the House of Lords at Westminster as compared to a decision of the European Court of Justice at Luxembourg or the European Court of Human Rights at Strasbourg. In England in particular, as the inevitable integration continues of English jurisprudence, based on common law, with Continental jurisprudence, based on civil law, so will it be necessary to unify the respective law management principles. Meanwhile they have to

be applied separately, according to the source of the legal rule in question. So both need to be taught and learnt. Furthermore, as a result of the Human Rights Act 1998, Convention rights and Convention jurisprudence now permeate the interpretation of much of UK law.

It is often not realised that in arriving at the legal result of applying the rule to the facts a lawyer has to unlock and release some part of the endeavour originally put into the composing of the judgment or enactment in question. Considerable intellectual effort goes into the composing operation. It is wasted if proportionate labour does not go into construing and applying the product; moreover the law applied may not be the law intended. (This may not seem to matter if one is of the school which believes that constructive interpretation is superior to “author”’s intent” interpretation. However students and practitioners need to know what judges are likely to decide.) Deployment of this original effort means that, for those who know how to take advantage of it, a high degree of precision may be possible in the application process. This is particularly true of British legislation. Atiyah and Summers point out that in the United Kingdom, unlike the United States, the legislature gives its instructions in the form of “exceptionally precise and detailed commands, drafted with great technical skill” (Atiyah and Summers 1987, p 318).

The same cannot always be said of legislative passages in judgments. In answer to Bennion’s suggestion in a seminar that it would be advantageous for judges to cast appropriate portions of their judgments in legislative form, the Australian judge Kirby J said they would not do this because “the discursive nature of their judgments is the historic basis of the development of the common law” (*Proceedings* 1993, session 1.2). However there seems no reason why a judgment could not contain both a brief “legislative” passage and an accompanying discursive explanation. (For a detailed proposal that judicial sub-rules should be couched in this way by “interstitial articulation” see Bennion 1990, pp 305-310). The latter could in suitable cases resile from any “definitive” attribute the former might be thought to possess. Judges ought not to shrink, in the name of the developing common law, from being precise as to the legal proposition they are laying down; even if at the same time they feel obliged to express misgivings about it.

Despite the most intensive effort, it is often found by the “law manager” that the legal result of applying the rule to the facts is uncertainty. An important element in law management techniques is the ability to assess the nature and extent of this uncertainty. The nuances involved are well summed up by the American committee previously cited: “consistent discrimination among competing case-law formulations in terms of “safe, pretty safe, not safe enough”, is as much a needed lawyer’s skill to be made habitual as is discrimination in terms of “sound, probably sound, dubiously sound, unsound”, or in terms of “technically tenable or untenable; and if tenable, then compelling, adequately persuasive, risky, or too risky” (Llewellyn 1945, p 361). The art of assessing the degree of such uncertainty is difficult for students to master. Ann Halpern has said of her contract students:

“They never seemed to be willing to assess whether their ideas, arguments, interpretations would succeed or what the risks might be in promoting a particular argument. This habit is one I recognise in practice.” (ACLEC 1993, p 18)

Finding the legal result (certain or doubtful) of applying the rule to the facts may not be the end of the story. What the law *says* is the result may not be so in reality. For example the law laying down a particular offence may say that a person guilty of it is liable to imprisonment for a term not exceeding three months, but if caught the criminal may end up with nothing worse than a conditional discharge or even a police caution. The law may say that the facts surrounding a particular marriage give grounds for divorce, but what is really called for is mediation or conciliation.

A syllabus

We hope we have by now established that law management or law-text analysis is a central legal skill. It seems to follow that it should be taught in some manner, or at least practised, on all types of legal course, because it will always be relevant to the students' work on the course. We say "seems" because many practitioners would dispute this. The attitude lingers that such skills should be learnt on the job, as part of an apprenticeship course (otherwise known as pupillage, articles or traineeship). Philip Jones has given the answer to this: "... learning through practice can be problematic for clients, time-consuming and ineffective. Bad habits can be as easily learnt as good practices" (Jones 1993, p 97.)

There is a resistance among many legal academics to law management, either as a skill to be taught or as an intellectual discipline forming part of legal research. Douglas Vick observed, in a discussion of doctrinal research, that some underestimate "the sophistication of the interpretative tools that have been developed and the critical techniques applied in doctrinal analysis" (Vick 2004, p 179). It is disheartening to read Roger Cotterrell discuss why a prominent legal thinker can believe that law lacks even a methodology (because, Cotterrell argues, law lacks "the intellectual marks of disciplinarity") (1998, p 178-179). Indeed Cotterrell himself, although sympathetic, underestimates what doctrinal thinkers do. Until law management is recognised as a complex intellectual activity, requiring not just knowledge of lists of rules but a disciplined legal imagination, this ignorance can only continue.

Academic input is badly needed here. Isolated elements of law management are of course already taught in academic courses under such names as "problem solving", "the doctrine of precedent", "statutory interpretation" and "legal method". This has the drawback of fragmenting what is essentially one skill and hiding the pieces in confusing places: lawyers have many types of problem to solve, not just those comprised in law-text analysis; handling precedents is at the heart of law management, not an isolated skill; legislation requires to be analysed in ways going beyond mere "interpretation"; legal method is a vague, amorphous concept.

Instead of this piecemeal approach, we propose that the subject of law-text analysis be viewed as a whole, though not that it be taught as a whole. It should however be *taught*, rather than just being left to the knockabout of practice (though practice will improve proficiency). It has a high theoretical content, much of which has yet to be investigated and laid out. This means it is wrong to think that apart from a few sketchy details it can be left to the vocational stage. Peter Birks has pointed out that a law degree must aim to deliver "the essential skills necessary to find, discuss, record, understand and *use* the law, which skills include and require both a grasp of analytical and evaluative theory and a sense of historical development" (Birks 1993, 10

(emphasis added)). This also applies to the Common Professional Examination/Graduate Diploma in Law which offers non-law graduates an accelerated route into the English profession. And, of course, many law graduates will never enter the profession. It is unacceptable that they graduate without having acquired such a core intellectual quality of their academic discipline.

Fitting all this into a law degree is not easy. Julian Webb and Amanda Fancourt recently commented that “law schools feel under-resourced and often under strain; student numbers have grown exponentially; staff numbers and “plant” have not kept pace, and the growing research and teaching audit culture adds to administrative burdens and can serve to keep some of the most experienced teachers out of the classroom” (2004 p 301). The most that can be expected of law teachers is that law text analysis is integrated into existing courses, not added to them.

Jackie Davies and Cathie Jackson recently outlined what appears to be an excellent example of integrated skills teaching at Cardiff Law School and this could easily be adapted to a law management model. Indeed, they stress that “skills teaching can appear “bolt-on” and irrelevant to the course if not closely integrated into the curriculum” (Davies and Jackson, 2005 p 152). It seems that Cardiff’s approach has led to a significant increase in student grades on that course (p 160).

We suggest we might proceed as follows. Include in skills courses at both academic and vocational level a skill specifically labelled “law-text analysis”. Treat this as a *running topic*. Start to teach its elements to first-year students. Continue teaching it off and on throughout the academic course, and also on the succeeding vocational course. After the initial sessions, treat it as an accompaniment to core subjects, basing exercises on topics within the core.

We end by stressing that this proposed syllabus is designed for students burdened with ever-widening courses. We do not expect law management to be erected into yet another subject in a crowded curriculum. Rather we contemplate that it will be treated as a necessary accompaniment to student work on most if not all individual subjects and aspects of the legal system. While there are other important legal skills (such as negotiating skills) we believe they all ultimately depend on an achieved ability to find out how the law applies to particular facts.

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