'The Need for Training in Statute Law'
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The Need for Training in Statute Law

Some of the jury required the statute book,
that they might proceed the more assuredly.

R.Holtby (1593)

This is the quotation provided by the OED to illustrate an obsolete definition of 'statute book' (as a book containing an Act of Parliament). Does any jury nowadays 'require the statute book' and would they understand it if they did? I leave readers to provide their own answer, and go on to another question. Do even lawyers now 'require the statute book'?

Acts and statutory instruments make up the bulk of modern law. In other words our law consists much more of statute law than of common law or unwritten law. That is to use 'statute law' as a term meaning no more than 'law in statutory form'. It is often so used; but this article investigates whether the term has acquired a more developed meaning, and if so what the consequences for the profession may be.

First or second hand?

Where do sound lawyers go for their law? Do they consult the source, or are they content with a paraphrase or summary? There can be no doubt about the answer. A paraphrase or summary is someone else's idea of what the law says. But it is an axiom of professionalism that practitioners shall form their own idea. They are paid for their own opinion, not someone else's. They take responsibility for the advice they give. When the advice is based on their own first hand research they can assume this responsibility honestly and with confidence. When it is not, there must always be lurking doubt as to its reliability. Who knows if the summarizer skimped his work? No one but the summarizer.

I will not labour the question. Indeed I ought to apologise for raising it, so self-evident must the answer be. Sound lawyers go to the source for their law, whether the source be a case report or a statute. Commentaries on the law, though not to be despised, are a secondary aid.

The nature of statute law

The next question is this. When the practitioner does consult the text of an Act or statutory instrument must he have special skill to extract its meaning? For the reader of a straightforward piece of prose - a newspaper report or a friend's letter - nothing but literacy is required. Is a legislative text like that? We recall the answer given by Coke when James I claimed to sit as a judge in his own Court of King's Bench. The law is based on reason, said the king, and he had reason as much as the judges.

> 'To which it was answered by me that true it was that God had allowed His Majesty excellent science and great endowments of nature; but His Majesty was not learned in the

> laws of his realm of England and causes which concern the life or inheritance of goods or fortunes of his subjects; they are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an act which requires long study and experience before that a man can attain to the cognizance of it...'

With this courageous injunction in mind, let us first consider Acts of Parliament. In one way an Act is the communication of a single mind. In another it is very different. The Act is drafted by one person but it expresses the will of a legislature, the Queen in Parliament. There is a further dichotomy in that the text has two distinct purposes. First it is a Bill, a vehicle for debate required to comply with Parliamentary rules. Then, immediately on royal assent and with but trifling changes, the text becomes an Act. From then on it serves the quite different purposes of operative law. One text, two functions.

These complex origins give an Act a peculiar form. It has a long title, immediately followed by a date (unexplained). It has a 'chapter number' (also unexplained). It always has an enacting formula. It may or may not have a preamble. And so on. There are many components of an Act, each of which can be understood only by reference to its legislative function and history. Some are considered not to be 'part' of the Act. What is the significance of that?

There are other questions. What is the territorial extent of the Act? Does it perhaps have extra territorial effect? When did it come into force? Does it have any retrospective operation? Are there transitional provisions, and if so where are they to be found? Has the Act been amended? Have any of its provisions expired, or been repealed?

Further matters concern the nature of the Act as law. Can it be suspended, or dispensed with? Is it subject to desuetude? Must it be published to have effect? Is the duty to obey it absolute? What of the duty to enforce it? Can the Act be held invalid? Which versions of its text are authoritative? And so on.

Then there are the rules, principles, presumptions and linguistic canons of statutory interpretation. These are held by some to be in disarray. Certainly they are difficult - even contradictory. Yet no one can claim to understand an Act without taking them into account. Every practitioner must feel unease about whether literalism or purposivism has currently got the upper hand. This is a study in itself.

Another area of study concerns statutory instruments, with the doctrine of ultra vires to the fore. Yet another turns on the general effect on our law of the European Communities Act l972. Then we are threatened with the installation as overriding law of the European Convention on Human Rights. How will that affect the interpretation of our Acts?

I may have said enough to convince any doubting reader that statute law is firmly within Coke's prescription for 'long study and experience', and that it would be right to allow the term a meaning more developed than simply 'law in statutory form'. This developed meaning might be stated as the area of law concerned with the nature, function and interpretation of legislation. In this sense statute law possesses one remarkable feature, which renders it unique. You can be a criminal lawyer without also being a tax lawyer. You can be a company lawyer without also being a conveyancer. But you can't be any of these without being a statute lawyer as well. Statute provides the framework of almost every area of current law.

Statute lawyers today

How do present day practitioners make out as statute lawyers? One thing is certain. They are not trained as such. Few universities or polytechnics run courses in the subject. Indeed it is not generally regarded as a subject. The mark of an academic 'subject' is the existence of professors who profess it. There are chairs in all kinds of subjects nowadays. The University of Bristol

currently proposes to appoint a Professor of Care of the Elderly, and no doubt there is much deep learning in that particular field of scholarship. But no university in the United Kingdom has a chair in statute law.

This absence of academic concern may exist because the legal profession holds no examinations in statute law. The Law Society never have done. The Bar scrapped theirs some years ago.

Does it matter? Practitioners, it may be said, can pick up what is needed during their pupilage or articles. To which the answer can only be that pupilage and articles are for acquiring the practical skills and wrinkles of a profession. In modern educational theory they are considered unsuitable for the teaching of theoretical principle. That is perhaps a matter of opinion. The decisive answer to whether the lack of training in statute law matters can be yielded only by an inspection of the evidence. If it really does have deleterious consequences that will show up in the output of the profession. So let us examine that. We begin with the work of the judiciary, as manifested in its judgments.

The judiciary and statute law

Study of modern judgments reveals a remarkable fact. Judicial errors are frequently made about statute law which are so elementary that they can scarcely be imagined in any other field of law. Here are some examples, relating to the long title of an Act. This is referred to as the 'short title' in *The Ydun* [1899] P. 230, 236; *R. v. East Powder Magistrates' Court* [1979] 2 All E.R. 329, 332; and *R. v. Duncalf* [1979] 2 All E.R. 1116, 1120. It is referred to as the 'preamble' in *Ward v. Holman* [1964] 2 Q.B. 585, 586; *Thornton v. Kirklees* [1979] 2 All E.R. 349; *Re Coventry decd.* [1979] 3 All E.R. 815, 819; and *Kassam v. Immigration Appeal Tribunal* [1980] 2 All E.R. 330, 332. It is referred to as a 'heading' in *Re Diplock's Estate* [1948] Ch. 465 and *Hodgson v. Marks* [1970] 3 All E.R. 513.

Now the nature and function of an Act's long title, preamble, short title and headings are each quite different. If a judge uses the wrong description it suggests that he is unaware of these distinctions and so unable to construe the Act correctly.

A more fundamental ignorance is displayed by judges who allow themselves to utter statements suggesting that, in some contexts at least, only the express words of an Act may be considered. In a famous dictum, Rowlatt J. said of taxing Acts: 'Nothing is to be read in, nothing is to be implied'.[1] Lord Goddard CJ appeared to rule out implication in Acts of every description when he said that the court 'cannot add words to a statute or read words into it which are not there'.[2] In fact, however, implication is inseparable from any use of language. It can never be ruled out in statutory interpretation, as every volume of law reports copiously illustrates. It is disastrous for an interpreter to overlook the fact that the express words of every Act are accompanied by a host of implicit statements.[3]

Another principle about which some judges appear ignorant is that an Act must be read as a whole. In *British Broadcasting Corporation v Ioannou* [1975] QB 781 the Court of Appeal took a point that had not been taken in the court below and decided the case by reference to a particular paragraph in Schedule 1 to the Trade Union and Labour Relations Act 1974. In a later case a differently constituted Court of Appeal acknowledged that this had been an error, since the Court had overlooked the effect on that paragraph of other provisions in the Act.[4] Mr Colin Ross has recently described how criminal courts go astray by not reading Acts as a whole.[5] In a book on

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[1] *Cape Brandy Syndicate v I.R.C.* [1921] 1 KB 64, 71.
[2] *R. v Wimbledon JJ., ex p. Derwent* [1953] 1 QB 380.
[3] For details see Bennion, *Statute Law*, chap. 12.
[4] *Dixon v British Broadcasting Corporation* [1979] 2 All ER 112.
[5] [1981] Crim L.R. 808.

drafting published in 1981, Mr Stanley Robinson criticises judges for ignorance of interpretation techniques.[6]

Judicial ignorance of statute law was displayed by the Divisional Court in *R. v. West London Stipendiary Magistrates, ex parte Simeon*.[7] The court erroneously put an end to a large number of pending 'sus' prosecutions by their decision on s. 8 of the Criminal Attempts Act 1981. Section 8 says that the 'sus' provisions of s. 4 of the Vagrancy Act 1824 'shall cease to have effect'. The 'sus' provisions also appear in the repeal Schedule introduced by s. 10 of the 1981 Act. There is thus a twofold repeal. The court held that s. 8 disapplied s. 16 of the Interpretation Act 1978 (which is designed to preserve pending court proceedings when an offence creating section is repealed). Their reason for this finding was that otherwise s. 8 would have no purpose, since 'it would have been sufficiently covered by the general repeal provisions in s. 10'. Now the fact is that this system of twofold repeal has been in constant use by Parliament for many years. Its object is to give prominence in the body of the Bill to an important repeal, while enabling the repeals Schedule to be comprehensive. There was simply no ground for finding that the savings in s. 16 of the Interpretation Act 1978 were intended by Parliament to be disapplied.

As a final example of ignorance among the judiciary we may take a recent reference by Lord Wilberforce to the legislature 'and its drafting agents'.[8] In fact the legislature in Britain possesses no drafting agents. The draftsmen are all agents of the government or executive. This is a feature of our constitutional arrangements which not uncommonly gives rise to complaint (particularly among backbench MPs, who because of it have no access to skilled draftsmen). It is not irrelevant to a general understanding of Acts of Parliament to know, and keep in mind, that they are drafted by officials who are under the control not of Parliament but the government of the day.

Practitioners

The law reports suggest that counsel do not always argue points concerning Acts or statutory instruments with sufficient attention to the principles of statute law. The lack of any grounding in these is all too obvious. Since the profession is unaware of the procedures by which legislation is drafted and enacted, the significance of certain features is missed. Often a provision which conclusively answers the point at issue in a case is misunderstood or even overlooked completely[9].

Practitioners often fail to urge a purposive construction when it would help their case to do so.[10] Provisions of the Interpretation Act l978 are ignored. In *R. v. Adams* [l980] l All E.R. 473 counsel did not apparently cite s. l2(1), which allows a statutory power to be exercised from time to time. The definition of 'land' in Schedule 2 was overlooked in *Westminster C.C. v Haymarket Publishing* [1981] 2 All E.R. 555.

Stories of official misunderstanding of statutory provisions are commonplace: they even feature occasionally in the popular press. This happened with the recent tale of how 25 disabled drivers had to be given pardons because prosecuting authorities, defending solicitors and courts all overlooked a ten year old amendment of the regulations governing use of invalid carriages on motorways. Another notorious recent error was the failure to understand principles governing the delegation of statutory powers which led to the issue of thousands of invalid summonses.[11]

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[6] *Drafting*, p. 3.
[7] *The Times*, 16 February 1982.
[8] *Edwards (Inspector of Taxes) v Clinch* [1981] 3 All ER 543 at p. 545.
[9] For a recent example see *I.R.C. v Metrolands* [l981] 2 All E.R.l66, where the decisive effect of s. 45(8) of the Development Land Tax Act l976 was apparently missed.
[10] See *Alexander v Tonkin* [l979] 2 All E.R. lOO9.
[11] See *R. v Gateshead JJ., ex parte Tesco* [l981] l All E.R.lO27.

Another instance was the overlooking by numerous prosecutors of transitional provisions in the Magistrates' Courts Act l980. In several cases this required the discharging of juries and the obtaining of bills of indictment in the High Court.

Academics

Sir William Graham Harrison, the First Parliamentary Counsel, was once invited to address the Society of Public Teachers of Law on criticisms of the statute book. He began by apologising for the fact that what he had to say might appear elementary to some. 'I have found', he said, 'so much ignorance of the elements, where I should not have expected to find it, that I wished to be on the safe side'.[12]

Even the most distinguished academics occasionally fall into error on the subject of statute law. For example in his 1976 book *Statutory Interpretation* the late Sir Rupert Cross said 'it is by no means uncommon for the enacting words to go beyond the matters mentioned in the long title'.[13] In fact such a thing would be a breach of Parliamentary rules, and in modern practice is not allowed to happen.

This was an isolated lapse by Cross. The fact that he wrote that particular book demonstrates his awareness of the importance of the subject. Nevertheless the book, in its strange air of bewilderment, displays the sense so many academics have of statute law as virgin territory, scarcely explored and not mapped out.

Other distinguished academic lawyers who have realised the importance of statute law include C.H.S. Fifoot, Glanville Williams, Alec Samuels and Brian Hogan. These are among the exceptions. Too often there is a failure by academics to grasp that the principles of a subject like criminal law are nowadays controlled not by common law judges but by the framers of legislation.

Conclusion

The random instances given above may be thought to confirm that there is some ground for disquiet. Only a thorough inquiry could establish the full extent of the harm done by lack of training in statute law. It seems clear, even without this, that good could come from adding it to the syllabus.

It is to be hoped that the authorities respectively responsible for admissions to the Bar and the Solicitors' profession will consider examining candidates for entry on their knowledge of statute law. The examination could usefully cover the drafting and enactment of legislation, the nature and operation of statute law, the Interpretation Act l978 and other relevant Acts, the interaction of domestic law and EEC legislation, and the rules, principles, presumptions and linguistic canons of statutory interpretation. Of particular value to future practitioners (and their clients) would be a grounding in the specialised technique of presenting argument to the court on the meaning and effect of relevant legislation.[14]

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[12] *Journal of the SPTL* (l935), p.9.
[13] Page 158.
[14] This article was sent to *Guardian Gazette* 18 January 1982. Published 24 February 1982. Fee of £80 received 28 April 1982. VAT on this received 12 May 1982.