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Introductory Note by Francis Bennion

This paper, which was included in *Reviewing Legal Education* (details above), argues that the intellectual techniques of what it calls law management 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.

The paper defines law management (it might also be called law handling) as the general intellectual skill, applied in the context of particular facts (whether actual or hypothetical) and supplemented where necessary by detailed knowledge of the area of law in question in a case, of identifying the legal issues involved, formulating the relevant legal rule(s) and, by intellectual manipulation of the relevant materials, reaching the actual or arguable legal resultant of applying the rule(s) to the facts.

Isolated elements of law management are already taught 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 under largely inappropriate names.

A synthesis is now required. This central skill needs, deserves, and is capable of, considerable improvement both in its practice and its teaching. The paper suggests detailed lines of development concerned with handling case law (whether relating to common law or statutory rules, and including the codifier's approach and the appellant's approach), handling Acts of Parliament and statutory instruments, the application of statute law, the handling of European Union etc. law, and the potential contribution of computers.

The paper adds support to the main argument of *Reviewing Legal Education* that lawyers need a liberal education based firmly on primary sources. In describing the nature and uses of the essential technique of law management, which uses only such sources, it shows one way in which the contribution of academic research and theory is needed.

In a final note to *Reviewing Legal Education* (see pp.109-112) Bob Hepple says of this paper (see p. 109): 'Since concentration on these skills alone would be too narrow and formalistic . . . they would be regarded as supplementary to the central tasks of the liberal law degree'. These tasks are well described in a paper by Dawn Oliver titled 'Teaching and Learning Law: the Pressures on the Liberal Law Degree' (pp. 77-86).

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TEACHING LAW MANAGEMENT

by Francis Bennion

It is basic to the argument of *Reviewing Legal Education* that law requires to be taught and learnt from primary texts and full analyses rather than nutshells or other predigested materials, and that society has a need that lawyers 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. One aspect of this necessary input concerns 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 I am talking about. We often speak of research, but there is less discussion about the *purpose* of legal research. In a broad sense, this must be directed to 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 I concentrate on in this article.[1] 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.[2] My aim is to show that this central intellectual skill of what Americans call 'lawyering' needs, deserves, and is capable of, improvement both in its practice and its teaching, and to suggest lines of development.

There is a professional as well as an academic requirement in the sphere of law management. It was pointed out in the report of the first consultative conference of the Lord Chancellor's Advisory Committee on Legal Education and Conduct, 9 July 1993, that little information is available on what lawyers actually do.[3] The report raised the question whether today's lawyers are doing their work properly and suggested that concerns about quality of service need to be addressed by the Advisory Committee's review. In her paper to the conference, Ann Halpern said that in practice as a solicitor she found a lack of ability to solve clients' problems manifested in 'people not recognising or dealing with the full range of legal issues that arise'.[4]

What is law management?

In 1988 William Twining said that direct learning of 'skills' should be made a central component of every stage of legal education and training.[5] 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'.[6]

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'.[7] In his paper in the present collection, Peter Birks speaks of the need for a lawyer to 'spot the presence of an issue [and] predict its resolution'. Elsewhere Gold characterised the skill as that required to 'identify and evaluate relevant facts' and 'identify

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[1] I write in terms of the position in England and Wales, though drawing on Commonwealth and American experience. I believe the techniques of law management to be international in scope.

[2] There is an element of vicious circle here: what is little taught is not much researched.

[3] *Review of Legal Education: First Consultative Conference*, Discussion Group 3.

[4] *Loc. cit.*, 'How many roads lead to Rome?', p. 3. Ms Halpern, a partner in Rowe & Mawe, solicitors, is Chairperson of the Legal Education and Training Group.

[5] W. Twining, 'Legal Skills and Legal Education', 22 *Journal of the Association of Law Teachers* (1988) 4 at p. 4.

[6] N. Gold, K. Mackie and W. Twining, *Learning Lawyers' Skills* (Butterworths, 1989) vi (emphasis added).

[7] N. Gold, 'Are Skills Really Frills?', Papers of the Tenth Commonwealth Law Conference, Cyprus, May 1993, 185 at p. 190.

and evaluate legal issues efficiently'.[8] 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

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> 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...'[9]

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 fails to say *how* research should be used to answer problems. What is described as a worked example of 'full-scale statute law research', running to nearly six pages[10], says nothing about how the reader should use and apply the information the detailed and painstaking research will have revealed. I 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.[11] Picking up Gold's term 'manage' in the passage just cited, I suggest calling it 'law management'. This is by analogy with the topic found in lawyers' training syllabuses under the heading 'fact management'. The Inns of Court School of Law describe their Fact Management Course thus:

> 'The course aims to develop skill which will assist the barrister in thinking about facts, assessing their importance and organising them to construct a logical argument in order to achieve the client's objectives and prove the case. Fact management is fundamental to every aspect of the work of a barrister and underlies all the other skills of negotiating, opinion writing, drafting and advocacy, and conference skills, which all depend on the effective comprehension, identification and use of relevant information.'[12]

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[8] N. Gold, 'The Professional Legal Training Program: Towards Training for Competence', 41 *The Advocate* (Canada) (1983) 247 at 251.
[9] *Ibid*. at 248. Emphasis added.
[10] Pp. 116-122.
[11] The omission may be significant: what is not perceived to exist is not named.
[12] *Evidence & Casework Skills* (1991/92 edition of ICSL Vocational Course manual) 24.1.1.

The ICSL vocational course 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'.[13]

Obviously 'management' is here used in a sense different from that meant in terms such as 'practice management' or 'managing your work'. Macfarlane *et al.* define the latter phrase as including practice management, self management, client management, case management, file management, management of others and practice management.[14] These are practical skills, while law management is an intellectual skill employed in practice.[15] 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.[16] 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'.[17] 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

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[13] I 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'). I suggested that the 'legal research' topic in the ICSL vocational training course should be expanded to include the handling and manipulation of legal sources, and should then be renamed law management.

[14] J. Macfarlane, N. Gold, B. Davies and M. Littlewood, 'Designing New Legal Practice Courses: the Hong Kong Plan', 26 *Journal of the Association of Law Teachers* (1992) 84 at p. 114.

[15] This is the sense used by Macaulay when he said 'In the management of the heroic couplet Dryden has never been equalled' (*Edinburgh Rev.*, 26 Jan. 1828).

[16] *A Time for Change*, Report of the Committee on the Future of the Legal Profession, Chairman Lady Marre (1988) para. 12.21.

[17] *Ibid.*

positive thesis which neither accepts the ground chosen by the other party nor loses momentum by a succession of denials or explanations.'[18]

These skills are useful, but they are not law management. 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 virtually 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 helps overcome practice problems created by facts such as that no student taking an academic course can cover more than a small proportion of the area, or that real-life problems are not neatly packaged with a topic label but messily cut across boundaries.

I have 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.[19] Legal knowledge, including possession of skills, can be treated in the same way. Take an example from 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 accepts 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...'[20] 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.[21] For this field the legal knowledge tree can be set out in the following way-

Law management
|
Commercial law
|
Sale of goods
|
Goods must be of merchantable quality

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

[18] 'The Place of Skills in Legal Education', Report of Committee on Curriculum, Association of American Law Schools (Chairman, Karl N. Llewellyn), 45 *Columbia Law Rev.* (1945) 345 at p 373n.
[19] Francis Bennion, *Statutory Interpretation* (2nd edn, 1992) (in further footnotes referred to as 'SI') p. 662.
[20] Roy Goode, 'The Teaching and Application of Fundamental Concepts of Commercial Law' in P. B. H. Birks (ed.), *Examining the Law Syllabus: Beyond the Core* (Oxford University Press, 1993) (referred to in further footnotes as 'Birks 1993') p. 55 at p. 57.
[21] For an example in relation to vocabulary (or jargon): see *Brady v. Brady* [1989] AC 755.

illustration, especially where, as with *Salomon v. Salomon & Co. Ltd.* [1897] AC 22, it illustrates a number of different points, we need to beware of limiting tuition to law's pathology and remember its facilitating function.[22] 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.[23] 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.[24]

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How then can we define law management? I offer the following.

> Law management is the general skill, applied in the context of particular facts (whether actual or hypothetical) and supplemented where necessary by detailed knowledge of the particular area of law in question in a case, of identifying the legal issues involved, formulating the relevant legal rule(s) and, by intellectual manipulation of the materials (witness statements, case reports, legislative enactments etc.), reaching the legal resultant (or arguable legal resultant) of applying the rule(s) to the facts. All this needs to be accompanied by the working out and formulation of explanations and arguments.

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.[25] One reason for this is no doubt the recent growth in the opposition of teachers to rote learning.[26] Another factor is the increase in the volume, complexity and variety of primary laws. In these circumstances teaching of correct categorization assumes greater importance.

Primary laws can be categorized in various ways, of which the following are perhaps the most important.

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[22] Discussion Group 3 at the first consultative conference of the Lord Chancellor's Advisory Committee on Legal Education and Conduct, 9 July 1993, 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': see *Review of Legal Education: First Consultative Conference*.

[23] '... 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 (Len Sealy, 'Company Law through the Cases' in Birks 1993, 37 at p. 38.

[24] '... 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 (*loc. cit.*, p. 39).

[25] Recent research published by the Royal Commission on Criminal Justice showed that of 187 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' (137 *Sol. J*, 14 May 1993, 444).

[26] Discussion Group 1 at the first consultative conference of the Lord Chancellor's Advisory Committee on Legal Education and Conduct, 9 July 1993, 'agreed that it was essential to ensure that the course did not become a matter of rote learning, as some courses were at present'. See *Review of Legal Education*, the report of proceedings at the conference.

- The division between substantive and procedural law.
- The division between statute law and judge-made law.
- The division between law laid down by the United Kingdom legislature and courts and law laid down by institutions of the European Union and other international bodies or groupings.
- Sub-divisions within these categories, *e.g.* statute law can be divided into Acts, regulations, orders, byelaws etc.

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. Roy Goode said-

> 'Commercial law continues to possess an astonishingly large number of unresolved conceptual problems...The sad fact is that we have tended to take the easy way out, to teach the rule and neglect the concept, to analyse the case and the statutory provision and ignore the philosophical framework. Key policy issues ... pass us by.' [27]

Another complicating factor concerns the nature of techniques that need to be applied. The rules, principles, presumptions and linguistic canons which are applicable 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. 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. 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.[28] 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'.[29]

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The same cannot always be said of legislative passages in judgments. In answer to my 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'.[30] However there seems no reason why a judgment could not contain

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[27] 'The Teaching and Application of Fundamental Concepts of Commercial Law' in Birks 1993, 55 at pp. 60-61.

[28] This may not seem to matter if one is of the Dworkin school which believes that constructive interpretation is superior to 'author's intent' interpretation (Ronald Dworkin, *Law's Empire* (1986), chaps. 2 and 3). However students and practitioners need to know what judges are likely to decide.

[29] P. S. Atiyah and R. S. Summers, *Form and Substance in Anglo-American Law* (1987) 318.

[30] *Proceedings of the Tenth Commonwealth Law Conference*, Cyprus, 4 May 1993, session 1.2.

both a brief 'legislative' passage and an accompanying discursive explanation.[31] 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"'. [32] 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.'[33]

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, whereas what is really called for is mediation or conciliation.

A law management syllabus

I hope I have by now established that law management 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. I say 'seems' because many practitioners would dispute this. Neither the Bar's new vocational course nor the Law Society's new legal practice course features it, or even any of its components, among the 'skills' listed in their syllabuses. When thought about at all it is usually seen as an ingredient of other skills, such as advocacy.[34] 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.[35]

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[31] For a detailed proposal that judicial sub-rules should be couched in this way by 'interstitial articulation' see Francis Bennion, *Statute Law* (Longman, 3rd edn, 1990) (referred to in further footnotes as 'SL'), pp. 305-310.
[32] *Loc. cit.*, 345 at p. 361.
[33] *Loc. cit*., p. 18.
[34] Typically, the Bar's Future of Education and Training for the Bar Working Party, in its interim report entitled 'The Future of Legal Education' (undated, but published in 1993) defined litigation as 'advising in relation to Court proceedings, carrying out the procedural steps that precede a court hearing, preparing evidence and advocacy' (p 3). No mention of the working out of what is to be 'advocated'!
[35] Philip A. Jones, 'Skills Teaching in Legal Education - the Legal Practice Course and Beyond' in Birks 1993, p. 97 at p. 99.

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 management; 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, I propose that the subject of law management 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'.[36] This also applies to the Common Professional Examination.[37]

I suggest we might proceed as follows. Include in skills courses at both academic and vocational level a skill specifically labelled 'law management'. 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. Here are some points on the development of this.

Handling case law

In relation to common law and other 'unwritten' law, the technique of law management involves framing and presenting a legal rule based on case law in the light of the facts of the instant case. Even in relation to statute law, the handling of case law which glosses the relevant legislation is an important skill. In relation to case law, English judges expect to have put before them the case as reported in the semi-official Law Reports unless it is reported only in some other medium. This means that textbook summaries of a decision are rarely acceptable, so advocates must use an appropriate technique for arguing the point of law effectively. Before they can adopt this, they need a technique for extracting the relevant legal rule from the reports. While there may be no dispute about the content of that rule, this does not mean it is easy to find, or to state in the form best suited to the practitioner's case.

Points of law based on reported cases may form a comparatively small proportion of the new practitioner's early experience. However it is vital that he or she knows how to handle them when they do arise, and also knows how to spot the latent point of law which can turn out to be crucial. At the apprenticeship stage pupils are likely to be asked to devil in cases in the High Court or above where law-handling skills are of first importance. This is a very difficult area for the inexperienced practitioner. How far, if at all, can it be assumed that the judge knows the law? In what form should legal propositions be laid before the court? If a skeleton argument is put in, how far does oral argument need to go to supplement this? How far will the court permit it to go? And so on.

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[36] Birks 1993, 10 (emphasis added).

[37] Regulated by its own Board, this was re-established in 1988 for non-law graduates by a joint initiative of the Council of Legal Education, the Council of the Inns of Court and the Law Society.

The student needs to learn how to tease out and state the legal rule which is relevant on the facts. If possible it needs to be so formulated that it is stated (still of course accurately) in a form that goes no wider than the facts. The art of doing this is central to an advocate's function. One useful technique is to state the rule in the combined form of factual outline and legal thrust.[38] The basis of the doctrine of precedent is that like cases must be decided alike. This requires a correct identification and statement of the factual outline that triggers the legal thrust of the rule on actual facts such as are before the court.

The concept of the *ratio decidendi* of a case involves postulating a general factual outline. This is part of the rule laid down or followed by the case, since a legal rule imports a factual situation to which it applies. When relying on a reported case as a precedent it is the first function of the court, and therefore of an advocate advising the court, to generalize the facts of that case. Thus in *Donoghue v Stevenson* [1932] AC 562 the relevant generalized fact was not a sealed bottle of ginger-beer but a product intended to reach the consumer without intermediate examination.[39]

The relevant factual outline proceeds from this to identify the situations which, in relation to the legal rule in question, are material on the actual facts of the instant case. Thus if a man charged with murder claims to be acquitted because what he admittedly killed was a person who through brain damage was permanently unconscious, the relevant factual outline is concerned only with whether the crime of murder extends to the killing with malice aforethought of such a person. It is the function of the court, and therefore of an advocate advising the court, accurately to identify this area of relevance.[40]

Instruction is also needed in such matters as the nature of an obiter dictum, the distinction between binding and persuasive authority, whether a decision has been affirmed, the difference between *extempore*

and reserved judgments, arguing a case of first impression, persuading an appellate court that the lower court got the law wrong, the status of dissenting judgments,[41] overruling per incuriam decisions, and arguing for or against development of rules of common law or equity to meet changes in social conditions, technology etc. Here the actual way in which judges currently handle precedent greatly needs academic examination and comment, since it differs markedly from the classic treatment of stare decisis. There is a present tendency, for example, to place undue emphasis on obiter dicta, often randomly selected. The almost universal practice of our judges today in relying solely on what advocates choose to place before them in the way of legal argument (it was not always so) seriously endangers the consistency of legal rulings and the proper development of the law.

The codifier's approach

The theoretical concept of the ratio decidendi is taught early, but instruction is needed in extracting it in an actual case (particularly where there are several judgments), finding ways to support it (*e.g.* by citing a judicial dictum), arguing for or against its extension by analogy

[38] The technique is explained in SI, pp. 301-305.
[39] This is of course a simplification of highly complex legal issues: see W. Twining and D. Miers, *How To Do Things With Rules* (3rd edn, 1991), pp 311-320.
[40] See Francis Bennion, 'Legal death of brain-damaged persons' 44 NILQ (1993) 269.
[41] A dissenting judgment may be upheld on appeal or influence later law. For example Harry Rajak has said that Lord Morris's dissenting judgment in *Bushell v. Faith* [1970] AC 1099 is 'essential reading': 'Substance and Method in Company Law' in Birks 1993, 47 at p 52.

when it does not fit the actual facts, distinguishing it where necessary, and applying the processes outlined above. It may be important to identify the ratio decidendi to determine whether the decision is binding on a later court.[42] In practice it is not so much the ratio decidendi of an individual case that is likely to be important, but the legal rule for which a line of cases can be cited as authority (the two may of course amount to the same thing). A useful exercise is to *codify* the relevant rule, citing the case(s) on which the rule as codified is said to be based. The traditional concentration by law teachers on extracting the ratio decidendi of an individual case might usefully be redirected to framing the codified rule for which one or more cases stand as authority.

What may be called the codifier's approach can be very useful in case work. When reading a decided case, whether it concerns written or unwritten law, or a mixture of the two, the student or practitioner should do so at several levels. Apart from reading it for what it actually says and decides, it is helpful (particularly for students and inexperienced practitioners) to read it critically. The arguments presented by the advocates and in the judgments should be tested and assessed (a point to which I return below). Where an argument is being constructed on the basis of the case, its place as an element in what could be a codified rule should be worked out.[43] This may be pure common law codification or 'mixed' codification embracing both written and unwritten law.

The appellant's approach

The critical approach to the reading of decided cases, where the arguments presented by the advocates and in the judgments are tested and assessed, may be called the appellant's approach. I give it this name because the reader is placed in the position of a possible appellant from the decision. This is an exercise which can of course be done even where the case was decided by a 'final' court such as the House of Lords: it may be useful to detect weaknesses and flaws even though there is no possibility of appealing the decision. The purpose of doing so relates to the *argument* that may be deployed in the practitioner's instant case by reference to the decision being examined.

For students at the academic level, the critical approach to decided cases is a necessity, since the essence of academia is criticism. This reminds us that law management is not just a humdrum tool. While confined to finding out how the law and particular facts mesh, it involves an awareness of a range of linguistic, sociological, jurisprudential and other considerations that might influence a court's decision on those facts.

Handling Acts of Parliament

English courts require an advocate to cite primary sources of legislation as officially issued.[44] Quite apart from rules etc. of statutory interpretation, touched on below, there are many practical aspects to the handling of the relevant statutory materials once they have been found by research. This is an area where, it is unfortunately necessary to point out, there is considerable ignorance among practitioners

[42] See, *e.g. AB v. South West Water Services Ltd* [1993] 1 All ER 609 at 620 ('...the point formed no part of the ratio of the case and it is not binding on us').

[43] As to the method of codification to be used see SL pp. 74-77 and Francis Bennion, 'The Technique of Codification' [1986] Crim LR 295.

[44] Peter Birks has noted, disquietingly, that 'Non-law graduates who have completed their crammed conversion have rarely read as many as twenty cases in the law reports or taken even a single volume of statutes from the shelves' (Birks 1993, 9 at p. 12).

and even judges.[45] No one can be sure of arriving at and presenting the correct rule derived from an Act without knowledge of such matters as-

(a) enactment and assent procedure, including the way Bills are drafted and amended;

(b) the structure of an Act, including the juridical nature of the long title, preamble (if any), recitals (if any), purpose clause (if any), sections, sidenotes, provisos, headings, short title, Schedules, punctuation and format;

(c) geographical extent of an Act, including relevant rules of private international law (conflict of laws);

(d) the persons and things to whom or which an Act applies, again including private international law rules;

(e) the various ways an Act may be brought into force, including differential commencement and the vexed question of retrospectivity;

(f) the vital matter of transitional provisions, so often overlooked in practice;

(g) ways in which Acts are amended, whether textually, indirectly or by implication;

(h) repeals, whether express or implied, including savings.

Next comes the technique of isolating the part of the Act which is relevant in the case, known as an 'enactment'. The relevant enactment, very often no more than a single sentence (or even part only of a sentence), is the unit upon which the decision will turn. There is a practical technique (known as selective comminution) for isolating this without violating Parliament's actual language. There is a further technique (interstitial articulation) for expanding the official words of an enactment with detail either drawn from reported cases on the enactment or put forward by the advocate in advancing argument. Where there is dispute about the legal meaning of the enactment, there is a technique of putting forward the opposing constructions of the enactment, between which the court is invited by each side to choose. The task is then one of ascertaining and weighing the relevant interpretative factors.[46]

The isolating technique mentioned above also applies to statutory instruments (SIs), and for this purpose it may be necessary to combine in one formulation materials drawn both from Acts and SIs. This can be done by composite restatement.[47] It is a partial answer to Goode's complaint of 'the intrusive nature of legislation, which traps the scholar in a wood of legislative verbiage so that he cannot see the trees'.[48] In handling an SI it is necessary to bear in mind, in relation to the parent Act, the matters specified above. In relation to the SI itself the user needs to be aware of such matters as commencement, amendment and revocation of SIs, parliamentary control, the rule of primary intention, the general interpretative principle, the *Padfield* approach, severability and the doctrine of ultra vires.[49]

Statutory interpretation

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[45] Basically this arises from long-standing refusal to recognise what is seen by Professor Carol Harlow of LSE as the need 'to give statute its true place as the centre of gravity of the legal system': Peter Birks (ed.), *Examining the Law Syllabus: The Core* (1992), p. 69.

[46] See SI, Appendices A and B, pp. 887-892.

[47] See SL, chap. 23.

[48] 'The Teaching and Application of Fundamental Concepts of Commercial Law' in Birks 1993, 55 at p. 62.

[49] All these are discussed in SI: see index.

The teaching of statutory interpretation has not kept pace with developments. Both at the academic and vocational stages it remains crude, going little beyond the so-called literal rule, golden rule and mischief rule even though the judges have long left these behind.[50] If anything should be singled out nowadays it is purposive construction.

Effective law management requires thorough deployment of interpretative techniques, but seldom gets it. Nor are these techniques as fully developed as they could be if the necessary research were engaged in. There is widespread ignorance, manifested in the law reports, about the way the Interpretation Act 1978 affects the legal meaning of enactments. Yet this is often important, and frequently raises problems. For example on the definition of 'person' the practitioner needs to be aware of questions such as: is a foetus a 'person'? [51] in an enactment regulating solicitors, does 'person' include a body corporate? [52] in an enactment regulating licensing of firearms does 'person' include a minor? Here are a few more traps in the 1978 Act.

The rule that the singular includes the plural and vice versa is often overlooked or got wrong.[53] The important definition of 'land' is often

ignored.[54] Many seem unaware that 'land' in an Act unexpectedly includes, *e.g.*, a right of way and a restrictive covenant.[55] The important rule that where an enactment confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires is often overlooked. [56]

European Union etc. law

The basic techniques of formulation, interpretation and amendment of EU law also belong within law management, along with the differing doctrine of precedent.[57] There is dispute on whether EU law should be taught separately or alongside corresponding UK law, though the tendency is towards integration. EU law management techniques need only be taught separately where they differ from UK techniques, though it is necessary to bear in mind the distinct concepts that underlie EU law. As Derrick Wyatt points out, 'Community law, like any other legal system, has a set of conceptual assumptions which run like geological strata

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[50] The 1991/92 edition of the ICSL manual *Evidence & Casework Skills* (at p. 260) merely says, under the heading GENERAL RULES OF STATUTORY INTERPRETATION, 'literal, mischief, etc., *eiusdem generis, noscitur a sociis*, etc., presumptions of interpretation'. Of general academic textbooks most virtually confine their treatment to the three supposed 'rules'.

[51] *Re F (in utero)* [1988] 2 WLR 1288; *R v. Tait* [1989] 3 WLR 891.

[52] *Law Society v. United Service Bureau Ltd.* [1934] 1 KB 343.

[53] See, *e.g. Stearn v. Twitchell* [1985] 1 All ER 631 (overlooked that 'correspondence' includes a single letter); *R v. Secretary of State for the Environment, ex p. Hillingdon LBC* [1986] 1 WLR 192 (held 'committee' did not include a single person).

[54] As in *Westminster City Council v. Haymarket Publishing* [1981] 1 WLR 677.

[55] See *R v. Hammersmith and Fulham LBC, ex p. Beddowes* [1987] QB 1050.

[56] See, *e.g., R v. Adams* [1980] QB 575; *Wilson v. Colchester JJ*. [1985] AC 750; *R v. Pinfold* [1988] 2 WLR 635*; R v. Immigration Appeal Tribunal, ex p Secretary of State for the Home Department* [1990] 1 WLR 1126.

[57] D. D. Prentice points out that EU law 'produces rigidity in that obtaining an alteration to a Directive is virtually impossible': 'Some Observations on the Teaching of Company Law' in Birks 1993, 33 at p. 34n.

through different types of subject matter, both substantive and procedural, be it institutional law, social law, or economic law'.[58] Legal method also differs-

> '... there should be more emphasis on what might be termed "EC legal method". Students are often totally baffled on first reading a decision of the European Court of Justice, let alone an Advocate General's opinion! Time must be taken in the course to explain differences in legal reasoning, the function of the Advocate General, the influence of continental legal systems...'[59]

Law management brings in the principles (little examined yet) of interpreting EU law, for example that the European idea of purposive construction is much looser than ours or the little-known reluctance of the European Court to examine legislative history.[59a] The question whether UK legislation needs to be interpreted in European fashion where it is implementing a directive poses acute problems. [60] Another new problem area for British judges (and therefore advocates) concerns the possibility that an Act of Parliament may be invalid or require judicial postponement of its commencement.[61] References to the European court under Article 177 call for skill in the way a point of law set out in an order of reference should be worded. Such orders are of ever-increasing importance, and the mode of drafting of the point(s) of law in question can be crucial to the success of a litigant's case. The case law on such references will grow in significance. Human rights are dealt with in the European Convention and also, to a limited extent, in EU legislation. Even though the Convention does not (as yet) form part of the corpus of law directly applying in the UK it is still necessary to take account of it in law management practice.

The contribution of computers

It is clear that computers have an important part to play in the evolution of law management techniques. Perhaps the most effective law management training tools that can be envisaged are those which could be devised by computer programmers, but little has yet been done in that direction.[62]In his paper in this collection Hugh Collins has shown how computer tutorials can offer ready access to an interactive learning environment. Much of what he says is relevant to the subject of law management and I need not repeat it.[63]

Conclusion

This paper adds support to the main argument of the present book that lawyers need a liberal education based firmly on primary sources. In describing the nature and uses of the essential technique of law management, which uses only such sources, it shows one way in which the contribution of academic research and theory is needed; and could indeed be enhanced. I propose to elaborate this theme in a

[58] 'Integration, Separation and Comparison' in Birks 1993, 21.
[59] E. M. Freemen, 'Errors and New Directions' in Birks 1993, 25 at p 26.
[59a] See Tom Rensen, 'British statutory interpretation in the light of Community and other international obligations' 14 Stat. L.R. (Winter 1993) p. 186.
[60] See *Marleasing v. La Comercial* [1990] ECR 1-4235; *Lister v. Forth Dry Dock and Engineering Co. Ltd.* [1989] 1 All ER 1134.
[61] *Factortame Ltd. v. Secretary of State for Transport* [1990] 2 AC 85.
[62] One of the early pioneers was Ronald Stamper with his work on LEGOL at the LSE: see my article 'LEGOL and the electronic home lawyer', (1981) *Law Society's Gazette* p. 1334.
[63] *E.g*: 'For each part of a course, a student can be led through the legal materials by a series of puzzles which require the student to understand and manipulate the legal materials' (p. 8).

forthcoming book which will sketch out a syllabus on the following lines.[64]

The syllabus should begin by explaining various *techniques* of the law, leading to an account of how necessary is the technique of law management. It involves a synthesis of presently disparate and separately-taught techniques such as fact management, legal research, legal method, problem solving (to a limited extent only since there are other areas of problem solving in law), handling case law (finding the ratio decidendi, applying the doctrine of precedent etc.), applying the rules, principles, presumptions and linguistic canons governing statutory interpretation, and using the techniques of advocacy (again to a limited extent only, relating to the preparation and marshalling of argument on points of law).

Then it is necessary to describe in brief and simple terms the various *types* of law on which law management techniques must operate. As well as common law and statute law these include European law (consisting of Community law, law of other elements within the European Union such as the European Convention on Human Rights, international law in Europe, and the emerging common law of Europe). The syllabus could then be innovative in showing that many criteria are uniform for the interpretation both of statute law and case law, since both are informed by the principles of *legal policy*, including concern for human rights and international treaty obligations (including of course the treaties of Paris (1951), Rome (1957), Brussels (1965) and Maastricht (1992) and the Single European Act 1986).

Going on with how the court *decides* a case, the syllabus would continue the innovative note by synthesizing the way in which a court handles common law and statutory issues. This leads naturally to a discussion of the doctrine of precedent, which again would apply to interpretation both of common law and statutory texts.

Next the nature of *legal rules* would be dealt with. For law management to operate successfully it is necessary to understand the nature of the various types of legal rule. Some are more precise than others; some operate more or less flexibly; some are open to development or to the argument that they should be discarded by the court as obsolete or unsuitable. Then would follow a treatment of the *factual outline* laid down by the legal rule in question and the concomitant *legal thrust* when the facts of a particular case fall within the outline.

Next would come a chapter on what is called by some law schools (for example the Inns of Court School of Law) *fact management*. This involves ascertaining the facts of the case, distinguishing relevant from irrelevant facts, and assessing the ways in which the facts should be established (by agreement, evidence, judicial notice, admissions etc), gathering evidence, and taking witness statements. These matters would be gone into only so far as necessary for discussing law management aspects.

The next topic is identification of the legal *issues* that arise on the facts. This is often a difficult task, yet needs to be performed precisely and accurately. There are special techniques for stating the issues in an opinion, pleading, skeleton argument or judgment. It is then necessary to deal with *case law* techniques such as how to read a case report, arriving at the ratio decidendi and applying the doctrine of precedent. Case law presents a problem not so acutely found with legislation, namely how to work out the correct statement of the relevant legal rule. Here a textbook often needs to be relied on, though this is not popular with judges. They prefer to act on the words of fellow judges, often diffuse and contradictory. These need very careful handling by the practitioner and a sound method for presenting them to the court with accompanying argument.

[64] In using the convenient term syllabus here I do not mean to suggest, as is made clear below, that law management should be added as yet another topic to present overcrowded courses.

Then would follow a discussion of the techniques for the management of *legislation* of various types. This includes the technique of what has up to now been known as statutory interpretation, but goes wider. For example it includes a little-known technique, known as selective comminution, for isolating the precise statutory words on which an argument needs to be constructed. Another technique concerns the identification of the opposing constructions which the two sides may wish to place upon an enactment. A further technique, interstitial articulation, is concerned with filling out gaps in legislation by sub-rules. These may, and often should, be worked out in judgments. Earlier, the advocate may advance his or her case by formulating them.

Next it is necessary to show how to handle a *multi-law* case, where more than one system is relevant. This brings in conflict of laws (otherwise known as private international law) and the vital question of the overriding of national law by European Community law.

The final stages would be concerned with the techniques that govern the constructing of legal *arguments, opinions, pleadings and judgments* once the work of extracting the legal conclusions has been completed. The syllabus should cover the judicial function as well as that of advocates and other prac-

titioners. There is much room for improvement in the way judges carry out their functions in relation to law management. The syllabus will be found useful for training judges.

I end by stressing that this proposed syllabus is designed very much with the needs in mind of students burdened with ever-widening courses. I do not expect law management to be erected into yet another subject in a crowded curriculum. Rather I 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) I believe they all ultimately depend on an achieved ability to find out how the law applies to particular facts.