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A Law as the Answer to a Question

Part One

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Author's Note This article has taken twenty years to write. The first draft, which mainly consisted of Part One, was written in 1984 and laid aside because it seemed unsatisfactory. I have been working on the article at long intervals ever since. In it I criticise Lord Diplock's 1981 decision in *Caldwell*. When this was at last reversed in ***R v G*** [2003] UKHL 50 it seemed possible to complete the article, so here it is.

From certain viewpoints, for example the sociological, a law can easily be seen as the answer to a question. What persons who find themselves affected by the impact of some unknown or doubtful law feel a need for is just that: the answer to a question that troubles them. To arrive at this answer they need expert help. One of the law student's first lessons must therefore be that he or she is being groomed to provide clients with answers to such questions.

What is the question to which a law is the answer? Generally speaking, it may be framed as: what does the law have to say about such-and-such a state of facts? This is not to draw any distinction between ***a*** law and ***the*** law, since the latter is but a collective description embracing each and every manifestation of the former.

Questions and answers

It may make an academic feel uneasy to be told that a law is the answer to a question. Except in Wonderland, answers come after questions, not before. We are conditioned to feel that a law must already exist before any question about its effect is asked. Otherwise the citizenry is subjected to the ukase or edict, or in other words palm-tree justice. We do not nowadays believe in wise men.

Besides, academics exist to instruct students. How could there be such a thing as a law student if laws were only answers to questions? The student would have nothing to study unless and until a questioner came along. Yet the whole emphasis of the teaching of law is that there exists a ***corpus juris*** or body of law, to which professors and lecturers hold the key.

No, we are not happy with the proposition that a law is the answer to a question. Yet the proposition is in some sense true, so the causes of our unhappiness must be investigated. The generalised question, it will be remembered, is what does the law have to say about such-and-such a state of facts?

The first, obvious, point to get out of the way is that the law may have nothing whatever to say about a particular state of facts. Or more accurately (since a negative response is

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nevertheless a statement), the entire content of the law's utterance may be: on these facts there is no legal input. Should I make to stab you with a dagger while we are enacting a murder charade at some country-house party, the law may have no positive rule to lay down. (That proposition is expressed conditionally because, if say I were so clumsy as to spill your blood with my stage dagger, recourse to legal process might arise even from so innocent an activity.)

Where the law does have something positive to say in relation to particular facts then what it says is, in relation to those facts, 'a law'. The legal system will, if activated, make clear what it has to say about those facts firmly and without equivocation. Moreover what it says so clearly will be backed up by the powers of the state, with brute force if need be.

This is all true no matter how many learned doubts the law books express on the point in question. The effect of a law, when the law is activated, is always made transparently and emphatically clear. That a law is the answer to a question may thus have value in rescuing us from a doubt as to what the law actually is.

But, it may be objected, the result of a case is not a law. It is the product of a law. The given answer to the question posed to the court by those involved in a particular lawsuit cannot be called a law. It is the humdrum result of applying a law.

That is the received view, and it may be right. But something fruitful could possibly result if for a moment we brought ourselves to abandon the received view, and doggedly proceeded upon the basis that a law is the answer to a question.

Parties and precedents

The parties in a case ask a question of the court. What on these facts that we lay before you does the law say? What is the legal result? What order will you hand down? And the court, in the name of the state, gives its response. On appeal this may be altered, but at the end of the legal process finality is reached. The question posed by the parties is firmly and clearly answered. They depart from the courtroom satisfied that they know what answer the law has vouchsafed, even if one or other party is dissatisfied with what that answer does to him or her.

Is the answer a law? We are taught to believe not. It deals only with the facts of the instant case. Even if the identical facts recurred (which is statistically impossible), the doctrine of ***res judicata*** would apply the result only to those parties, engaged in that litigation.

The doctrine of ***res judicata*** is not however the only relevant doctrine. There is also the doctrine of ***stare*** decisis or precedent, founded on the belief that like cases should be decided alike. As Blackstone put it:

> '. . . it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and

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> steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[1]

[1] Kerr Bl (4th edn, 1876) i 47.

This looks as though Blackstone thought a law might be the answer to a question. The order of the court is certainly the answer to the question posed by the parties, and the doctrine of precedent prescribes that in future the same order should be given in a like case. It adds that in similar if not identical future cases the order should be treated as a persuasive guide, and applied by analogy. This looks very like saying the court's answer to that particular question possesses the attributes of a law.

But where, asks the objector, was that beautifully clear and certain law when the parties to the case and their advisers struggled beforehand to reconcile conflicting dicta, or penetrate obscure enactments, or both, so as to lay their hands on the truth? The practical answer must be that it was nowhere, having not yet been brought to birth.

Let us for a moment cease to be practical in that sense. What is the effect of treating a particular law as predating the litigation in which it was laid down? Certainly it is to be treated thereafter as predating that litigation, for such is its retrospective effect under the doctrine of precedent. Moreover it was in some sense pre-existing, for it was manufactured from legal materials already lying about. As Blackstone said, the judge who decided the case was sworn to determine, not according to his own private judgment, but according to existing law.

This gets us nearer to what we feel comfortable with. Now we can see the law as predating the question to which it is an answer. But is this at the price of parting with reality?

Laws lie all about us

Aristotle said that what exists ***in posse*** (as a possible eventuality), like that judgment I spoke of just now, in some sense exists ***in esse*** (in being). We have legal materials, such as Acts of Parliament and common law precedents. We have courts standing ready to give judgment according to law when activated. At least ***in posse***, we have available authoritative legal answers to whatever factual questions may come up. It might be helpful juridically if we could think of these potential answers as in some sense already existing, arrayed like uncut books on the shelf of a chained library to be taken down as needed and consulted.

One way in which it might be helpful is this. We could look at our legal materials, often referred to in their own right as 'laws', with new eyes. Instead of merely being, as they merely appear to be, collections of verbal injunctions (or descriptions of injunctions), these statutes and law reports would be seen as providing the clue to inaccessible, because not yet delivered (perhaps never to be delivered), judgments. The chained library would then in a sense be unlocked.

How, in a practical way, could this result be achieved? We might make a start by employing the legal materials always with a sense of their ***potential*** use, as well as the actual use they have and have had. We know that an Act of Parliament must be read in the light of past judicial decisions on it. Let us think of it also as being in continuous use, with more such decisions to come. In the same way let us treat any common law precedent as likely to be modified by future litigation, not to mention future legislation. Extant legal materials are in other words to be regarded not so much as 'laws' in themselves as tools for the manufacture of answers to questions. It is the answers that are the true 'laws'.

The true nature of a law

Now I must try to get closer to the nature of a law, considered as the answer to a question. Regrettably, the judgments of our courts are not framed in the form of laws. They are framed as answers to questions, but the laws they embody need to be extracted from them - often

with great difficulty. The law is there in the judgment, but its formulation is often confused and may even be equivocal. While the court's order must be clear, or it could not be enforced by the court's officers, the law it lays down may not be. Certainly it is often not in accessible form.

One way of curing this difficulty would be for judges to change their methods. As well as making their order, they could hand down a formulation of the relevant law, the law that was the answer to the question put to them, which produced their order. If that proved too difficult, and time-consuming for litigants concerned only with the result, more sophisticated machinery might be devised. There could be some kind of judicial college, perhaps largely consisting of superannuated judges. After a case was over this college would draw up the relevant statement of law and submit it to the trial judge for approval. The college could periodically collate and publish such statements, to the great improvement of our legal system. I have no faith that any of this will happen.

If it does not happen, or until it happens, in what sense can the judicial answers be said to be laws? Like those hidden in the myriad judgments not yet delivered, such laws, it may be said, exist only ***in nubibus*** (in the clouds). That is where it used to be said the common law inheres.

If either sort did exist more substantially, they would need to be expressed as appropriate verbal formulae. Our minds know no other method. We have textbooks and articles, and we have court judgments and orders, but none of these are laws. We have Acts and regulations, which are thought of as laws. Yet, since they are not framed as answers to questions, they too are in what is ultimately an inappropriate form.

What form would be appropriate? If the question is What does the law have to say about such-and-such a state of facts? the obvious answer is On such-and-such a state of facts, the thrust of the law is as follows . . . Yet that is a little too obvious. No one could seriously expect a law to be expressed as a formula that first spells out in detail every
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conceivable factual situation to which it applies.

So what we need is a factual outline. This can be defined as a generalized description which sufficiently identifies the facts that are relevant to the legal thrust in question. These must be the facts in the absence of any one of which the legal thrust would be different. The answer (or 'law') also needs to contain an adequate description of the legal thrust itself. What result does the law produce when it answers the question posed by these facts?

A collection of laws in this form would leave the questioner with the comparatively simple task of identifying the particular law the factual outline of which corresponded to the facts of his own case, and then seeing what its legal thrust was. To do this would require him to strip his own facts of inessential detail. This is a task for which a lawyer's skills will be required, though technology now exists to carry out this task in many cases by use of computer terminals interrogated by a lay user. A lawyer's skills would certainly be needed to apply to the actual facts any elements in the factual outline which were expressed broadly, leaving scope for the exercise of judicial judgment or discretion.

So we can express a law that is the answer to the question What does the law have to say about such-and-such a state of facts? in other words. We can express it as: If the state of facts fits the factual outline ffffff, then the legal thrust will be tttttt. This may be described as the ideal form of a law.

In the second half of this article I will go into some detail on how such an ideal form might be arrived at.

Part Two

In Part One of this article I suggested that we could make sense of the proposition that a particular law is the answer to a question by constructing a factual outline which would trigger the thrust of that law. How far are we from possessing laws in this ideal form? Perhaps not quite so far as we think. To be effective, any enactment or judicial rule must be framed so as to show what its legal thrust is. It must also show how that thrust is to be triggered by proof or admission of certain facts, which it indicates in outline form.

Legal thrust and factual outline

At this stage of the argument it might aid precision to introduce some definitions. By an enactment is meant a proposition of law contained in an Act of Parliament, statutory instrument, or other item of legislation, as officially promulgated. The term judicial rule is used to denote a proposition of law laid down, whether at common law or by way of statutory interpretation, in the judgment of a court. The legal thrust of a proposition of either sort is the effect in law produced by its application in real life. The sole purpose of an enactment or judicial rule is to achieve a particular legal effect. Thus in criminal law the legal thrust is expressed by saying that where the factual outline is satisfied the person in question is guilty of an offence, to which certain legal consequences (such as liability to a specified penalty) are attached.

The factual outline may be wholly expressed, or partly implied. Thus an enactment may say: 'a person who does so-and-so is guilty of an offence'. The full statement of the factual outline is however 'a person *with criminal capacity* who does so-and-so is guilty of an offence'. The italicised words are left to be inferred. They exclude a child under ten, or older persons with mental impairment such that they cannot form the necessary criminal intent or *mens rea.*

The factual outline omits facts which are always irrelevant, that is which can never affect the question whether or not the legal thrust is triggered. (A murderer is guilty whether his name is Jones or Robinson, and whether he lives in Balham or Peckham.) It may contain alternatives. Lord Diplock gave the example of buggery at common law, 'which could be committed with a man or a woman or an animal.[2] Each of its elements is by lawyers either undisputed or doubted. Most elements will be undisputed, except perhaps on the periphery; otherwise the administration of law could not go on. Where a relevant element is disputed the case will turn on which view is held by the court to be correct. Thus if a man charged with murder claims to be absolved because the person he admittedly killed with malice aforethought was *non compos mentis*, the point of law is concerned only with whether the factual outline of the crime of murder extends to the killing of persons who are *non compos mentis.*

It is the function of a court accurately to identify the relevant factual outline. The basis of the doctrine of precedent, namely that like cases should be decided alike, requires a correct indication of the factual outline that triggers the proposition of law on actual facts such as those before the court. This most assuredly does not mean, as sometimes it seems to be thought to mean, that a precedent is authority only in relation to the actual facts of the case where it is laid down. In his book *Precedent in English Law*, Sir Rupert Cross came close to saying this when he insisted that under the doctrine of precedent judgments must be read in the light of the facts of the cases in which they are delivered.[3] Lord Halsbury LC did mistakenly say it-

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[2] *R v Courtie* [1984] 1 All ER 740 at 744.
[3] 3rd edn (1977), p 42.

> 'Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are to be found.[4]

So too, as is notorious, did Lord Diplock in ***Roberts Petroleum Ltd v Bernard Kenny Ltd***[5] (see below).

The importance of the factual outline, and the difficulties associated with it, become more marked when a common law judgment breaks new ground. In his famous speech on the duty of care which he delivered in ***Donoghue v Stevenson***[6], Lord Atkin was careful to mark out the wider area of relevance (or factual outline) arising from the facts of the case concerning a dead snail in a bottle of ginger beer. The liability in the instant case, namely of a bottler who launches upon the market a sealed bottle of ginger beer containing a decomposing snail, was generalized just so far as Lord Atkin's careful words indicate-

> A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of

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> reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

Note that this dictum, while going into detail about the type of product and method of sale, gives no detail about what conduct actually constitutes negligence. This is left as a broad area not, as a matter of law, to be divided up by judicial sub-rules (at least at that stage of its development). Otherwise, as Patrick Atiyah has said-

> '. . . the generalising power of the negligence concept would very likely be lost, because multiplication of specific instances and subdivisions of the law would surely obscure what those instances and subdivisions have in common.[7]

Modifying the factual outline

Without a carefully-delimited factual outline, any question of the precise legal meaning of an enactment or judicial rule is likely to be academic. To be exact, it may demand the impossible in asking enquirers to seek within a compact formula the resultant of endless possibilities. The unlikelihood of achieving this explains that dislike frequently displayed by judges for hypothetical questions of law.[8] The dislike was illustrated by the Lords' rejection of a clause, in what became the Rating and Valuation Act 1928, which would have empowered the relevant Minister to refer to the High Court questions of law unrelated to specific facts.[9] The rules as to criminal insanity laid down in ***M'Naghten's Case***[10] under the former practice whereby the judges could be called on to advise the House of Lords are an example of the inadequacy of judicial decisions unrelated to a factual outline. Yet Parliament often refrains

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[4] *Quinn v Leathem* [1901] AC 495 at 506.
[5] [1983] 1 All ER 564 at 567.
[6] [1932] AC 562 at 599.
[7] P S Atiyah, 'The Legacy of Holmes Through English Eyes' (1983) 63 Boston Univ LR 341 at 356. See also *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743 at 758.
[8] See, eg, *Re Rowhook Mission Hall, Horsham* [1984] 3 All ER 179 at 191.
[9] See C K Allen, 'Administrative Consultation of the Judiciary' (1931) 47 LQR 43.
[10] (1843) 10 Cl & F 200.

from spelling out detail; and judicial rules, even where judges attempt a generalization, tend to be unduly constrained by the actual facts of the case in which they are laid down.

These considerations mean that a court is often required to modify the factual outline handed down to it. If the facts of the case before the court fit literally within this outline but demand amendment of the legal thrust of the rule, the outline is too broadly stated. If on the other hand the facts of the case do not fit into the outline, but do call for the same legal response, the outline is too narrow.

The factual outline laid down by an enactment is often too wide for juridical purposes. Grammatically it includes, or may be thought to include, some factual situations which are, and others which are not, intended by Parliament to trigger the operation of the enactment. Alternatively, the statutory factual outline may be thought to need clarification, for example by the finding of implications. In either case it is for the court to modify the literal factual outline. Such modifications become by the doctrine of precedent what may conveniently be called sub-rules in elaboration of the proposition of law as it previously existed.

Again it is open to a subsequent court, asked to follow such a common law precedent as *Donoghue v Stevenson*, to assert that the judicial generalisation of facts (or factual outline) went wider than was justified. Equally, a subsequent court may declare on the other hand that the generalisation should have gone wider still, as indeed happened with the developing tort of negligence. Subject to these possibilities, the decision stands as a guide to the proposition of law in question. It must however be stressed that in most cases the court will have shrunk from expressing any such generalisation as Lord Atkin most helpfully laid down in the passage cited above. This judicial reluctance is unfortunate for the development of the law, and its clarity.

In *Roberts Petroleum Ltd v Bernard Kenny Ltd*[11] Lord Diplock complained that-

> 'Even when making successive revisions of drafts of my own written speeches for delivery on appeals to this House, which usually involve principles of law of wider application than the particular case under appeal, I often find it necessary to continue to introduce subordinate clauses supplementing or qualifying the simpler, and stylistically preferable, wording in which statements of law have been expressed in earlier drafts.'

The clear but remarkable implication of this is that decisions of the House of Lords are relevant only to the particular facts of the instant case. In this the dictum can be regarded only as an aberration. If accepted as good law it would import an unthinkable rejection by the Law Lords of the very constitutional function appellate judges are appointed to fulfil. Lord Diplock came very near such a rejection when in the same speech he said 'The primary duty of the Court of Appeal on an appeal in any case is to determine the matter actually in dispute between the parties.[12] Lord Diplock complained about having to qualify broad statements of law. But no judge is obliged to qualify such statements unless they constitute a factual outline that goes too wide (or too narrow) to accommodate the legal thrust in question; or unless they misrepresent the legal thrust.

Sometimes such judicial findings are disputable. In *R v Caldwell*[13] Lord Diplock surprisingly laid down an objective test for recklessness in criminal law. The provision in question was the Criminal Damage Act 1971 s 1(1), a selective comminution of which relative to *Caldwell* reads-

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[11] [1983] 1 All ER 564 at 567.
[12] Ibid.
[13] [1981] 1 All ER 961.

> ‘A person who without lawful excuse damages any property belonging to another, being reckless as to whether any such property would be damaged, shall be guilty of an offence.’

Lord Diplock laid down a sub-rule as to the meaning of ‘reckless’ here. The following restates this limited version of s 1(1) to include the sub-rule:

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> (1) A person who without lawful excuse damages any property belonging to another
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> (2) being reckless as to whether any such property would be damaged
>
> (3) that is by doing an act which in fact creates an obvious risk that the property will be damaged
>
> (4) without giving any thought to the possibility of there being any such risk
>
> OR
>
> (5) recognising that there is some risk involved and nevertheless going on to do the act
>
> (6) shall be guilty of an offence.

Lord Diplock in *Caldwell* was faced with a simple choice. He could have ruled that recklessness, like negligence, is a pure question of fact for the jury. He rejected this, and elected to lay down a sub-rule by way of modification of the statutory factual outline. He was not obliged to do so, but it was his right if he saw fit. It is well recognised that courts are entitled to elaborate statutory broad terms in this way.[14]

Use of processed terms in other legislation

A grasp of the juridical significance of the factual outline may save us from error in another respect.

In *Hanlon v The Law Society*[15] the House of Lords agreed with Lord Denning MR’s view in the court below that the phrase ‘recovered or preserved’ as used in the Legal Aid Act 1974 s 9(6) bore the same meaning as it had been given by judicial processing when used in the Solicitors Acts. Only Lord Simon struck a discordant note-

> ‘The words in the Solicitors Acts have been liberally construed, consonant with the obvious parliamentary intention of promoting the interest of a solicitor whose activity has resulted in a proprietary benefit to his client. But the same liberal approach to construction is not appropriate in a measure imposing a charge for a social service: the words should certainly not be extended beyond the ordinary sense which is appropriate in the context.’[16]

This dictum shows that Lord Simon had understood a distinction that appears to have escaped his colleagues. By choosing a processed broad term from similar if not identical legislation,

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[14] For a criticism of judicial elaboration of such statutory concepts as recklessness see F A R Bennion, ‘Leave my word alone’ (1981) 131 NLJ 596. Robert Goff LJ expressed his ‘unhappiness’ at having to follow the Diplock ruling in ***Elliott v C (a minor)*** [1983] 2 All ER 1005 at 1010. The ruling was ultimately reversed in ***R v G*** [2003] UKHL 50.

[15] [1980] 2 All ER 199.

[16] P. 216.

the draftsman may have meant it to be given the same construction. In that case he should perhaps have said so (though it is not drafting practice to attract processing expressly). For while use of a processed term in later legislation may betoken an intention that it should have the same meaning, the interpreter always needs to remember that the factual outline laid down by the two enactments will be different, and this may well affect the legal meaning of the processed term in the second place where it is used.

In this particular instance, the result arrived at by Lord Simon's colleagues may well have been correct. The point can be tested in this way. Suppose A and B successfully sue to recover property. A is legally aided, while B is not. The court might well be called on to construe the Legal Aid Act 1974 s 9(6) in relation to A and the Solicitors Act 1974 s 73 in relation to B. Can it be supposed that it would give 'recovered or preserved' different meanings for each? The answer was provided by Lord Lowry-

> 'I cannot imagine different answers being appropriate, depending on whether questions arose under s 9(6) or under s 73'.[17]

It was suggested at the end of Part One of this article that the ideal law would be worded If the state of facts fits the factual outline ffffff, then the legal thrust is ttttt. We examined above the substance of this universal answer to questions of law people seek to have answered. Now finally we return to its form.

Under our system it has no settled form. Sometimes a relatively simple enactment will begin 'Where . . .' or 'If . . .', and then we know a statement of the factual outline is about to follow. For example the Law of Property Act 1925 s 151(1) says-

> '(1) Where land is subject to a lease-
>
> > (a) the conveyance of a reversion in the land expectant on the determination of the lease; or
> >
> > (b) the creation or conveyance of a rentcharge to issue or issuing out of the land;
>
> shall be valid without any attornment of the lessee . . .'

Here the factual outline is simply 'where land is subject to a lease'. Indeed that may be too simple, for the reader will probably need to know what are the legal meanings of the expressions 'land and 'lease'. These must be sought elsewhere.

There are two distinct legal thrusts here. Let us look at the first. The conveyance of a reversion in the land expectant on the determination of the lease shall be valid without any attornment of the lessee. Again this contains several terms whose precise legal meaning the reader may need to seek elsewhere. Nevertheless this form of statement is on the right lines. It clearly distinguishes the factual outline and the legal thrust. It is not fully comprehensive, but then few such statements could hope to be. Moreover it is equally apt for the statement of a common law rule. ***It is the answer to the question Where land is subject to a lease, is the conveyance of a reversion in the land expectant on the determination of the lease valid without any attornment of the lessee?*** We see that this law at any rate is the answer to a question. The same, I believe, applies to any other law.

If this is the best form in which to present a law why is it not more often employed? In the case of judgments it is scarcely employed at all, for many of our judges do not see

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[17] Ibid.

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the need of it. In the case of legislation it is employed rarely, for many of our drafters do not see the need of it either.

Judges are distracted by their duty to determine the *lis*, or issue between the parties. The legal argument presented to them is often inadequate, for busy advocates have little time for thorough research. For both judges and counsel the lists are congested, and the next case beckons. So judges do not feel confident that they can adequately present their findings of law in this ideal form.

Drafters are also busy, and not looking for ways of extending their task. What needs to be said in modern legislation tends to be highly complex, not lending itself to straightforward propositions such as the Law of Property Act 1925 s 151(1). Adding to or amending a vast mass of confused legislation, the drafter feels little inclination to attempt any improvement in the system.

And yet (as has been said repeatedly in this article) a law, any law, is in very truth the answer to a question. The trouble is that it is not usually presented in the form of an answer to a question, and there seems little prospect that this will change. Between the question that exists, and the answer to it that in some sense exists also, there is interposed the opaque barrier constituted by our inadequate legal materials and methods.

The solution can only lie in some form of processing of these materials to convert them to a form more near to the ideal. Over the years I have suggested various possible methods for this, but so far with little response. Meanwhile it is important that the new generation of practitioners should be trained to understand the true nature of the law they will have to deal with, and how it should ideally be framed. In time this new generation will populate the bench, the chambers, and the drafting office. Then, if they have been properly taught, things may improve.

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