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Comparative Statutory Interpretation in the British Isles

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Abstract: *Existing studies of statutory interpretation are often of excellent quality but they have tended either to focus on legal practice to the detriment of comparative jurisprudence, or have examined legal reasoning at a level of abstraction which has made empirical study difficult. The author examines a recent development in this area and considers how it might be used to begin a project to identify any divergences in statutory interpretation among the various legal systems of the United Kingdom.*

Statutory interpretation has for many years, particularly in the United States, been an object of jurisprudential interest (see for example MacCallum 1993). However this field has been so important to legal practice that the bulk of the work on statutory interpretation has been informed by professional requirements rather than legal theory. This has resulted in some works of superb intellectual quality, but relatively little which could be used for incisive comparative study. In the British Isles in particular, this scholarship was traditionally developed through practitioners' typologies whose origins lay in English judicial practice (see for example Maxwell, Craies, Bennion and Cross, most recently revised by Langan, 1969; Edgar 1971; Bennion, 1990 and Bell and Engle, 1995). Although there are some excellent Scottish and Irish commentaries, there are no Scottish or Irish texts dealing with statutory interpretation in the same depth as the major English works – or indeed possessing the same longevity. For some years it has been assumed by many, without much empirical investigation, that the legal systems of Scotland and Northern Ireland (and indeed the Republic of Ireland) share a practice of statutory interpretation so similar to that of England that no there is no worthwhile distinction to be made. The intention of this paper is not to test that assumption but to consider developments in legal theory which might allow it to be tested.

Until recently British and Irish jurists lacked the analytical tools to pursue such an examination. Little assistance can be found in the traditional classification of rules of statutory interpretation. The literal, golden and mischief rules cited by the judges themselves are too broad and outdated to be useful in cross-national comparison and they are more accurately seen as historical indicators of preferences rather than as a collection of rules potentially available at any one time. In addition, it has been argued that they are better understood as rules apportioning priority among competing arguments, rather than as argument forms in themselves.

Further dark has been thrown on the subject by the suggestion that all three rules have been subsumed under the purposive approach to statutory interpretation (for a summary and a critique of this, see Twining and Miers, 1991, 365-369). This argument underestimates the freedom the judiciary have retained to choose between the different rules and overlooks the differing ways in which the rules are used as to provide authority in arguments at higher and lower levels of the judicial hierarchy. We can see that however much we play around with the practitioners' typologies, we do not find a suitable starting point for comparative work.

It is also hazardous to rely uncritically on the classifications used by judges themselves. We cannot assume that when judges in two neighbouring legal systems use the same terminology they are referring to identical practices. References to teleological interpretation, for example, appear both in English law and in the law of the Republic of Ireland, but the roles of the Republic's judiciary are different from those of the English and it is doubtful whether an English judge (outwith the demands of European Community law) would approve the definition put forward by Mr Justice Barr in the Irish decision of *HMIL Ltd* v *Minister for Agriculture and Food* (LEXIS) 8th February 1996:

"'Teleological interpretation is used for three purposes:
(1) to promote the objective for which the rule of law was made;
(2) to prevent unacceptable consequences to which a literal interpretation might lead, and
(3) **to fill gaps which may otherwise exist in the legal order**.'" (The emphasis is mine).

If it is inadvisable to look to judicial definition as a means of comparison, where might we turn? Until quite recently, comparative law was largely deprived of theoretical typologies of argumentation techniques in statutory interpretation which were designed to cross national boundaries. Certainly, there has been valuable comparative work carried out from a jurisprudential perspective. Patrick Atiyah and Robert Summers relied on a lifetime of study in their respective jurisdictions to speculate on the relative emphasis upon formal or substantive reasoning by North American and British judges (Atiyah and Summers, 1987) and despite some cogent criticisms by John Bell (van Dunné, 1989; 56 and *passim*), this stands as a thorough and groundbreaking piece of work. A very good approach has been set out by James Harris, too, in which he proposes that judicial decision-making could be classified under the headings of will, natural-meaning, doctrine and utility models of rationality (Harris, 1979). Nevertheless, useful as these are for studying single legal systems they are perhaps insufficiently detailed for the purposes of close comparison between two or more. Raimo Siltala refers to a further work by the Swedish academic Gunnar Bergholz which although comparative is not specifically directed at statutory interpretation and unfortunately is currently unavailable in translation (Siltala, 1993; 355).

These studies supply pieces for the puzzle, but they do not complete the picture. Indeed it would seem that Bergholz and Summers, in particular, were agreed that insufficient work had been done in this field, because both contributed to the international body of essays in *Interpreting Statutes* (MacCormick and Summers, 1991) which put forward not just a comparative study of statutory interpretation among nine different legal systems but also provided an explicit methodology intended to provoke further study. It may be that *Interpreting Statutes* can help us find a solution to our problem. It provides not only a composite theoretical typology drawn from the work of all its contributors but also a separate typology tailored to each of the nine legal systems represented in the collection, including (conveniently) one for the United Kingdom as a whole. These are designed specifically for jurists and the UK typology constructed by Bankowski and MacCormick provides a new and promising tool for comparisons between England, Scotland and the two Irish legal systems. It is the adequacy of that typology which I will examine here.

The UK typology

Bankowski and MacCormick operate with a rather overwhelmingly long list of possible classifications of judicial arguments: sixteen in all. Despite this the list is not fully inclusive. It is summarised as follows (MacCormick and Summers, 1991; 365-73):

1. Linguistic Arguments (semantic/syntactic)

These are used in all cases. They include:-

(a) the argument from only possible meaning

(b) the argument from undisplaced obvious meaning

(c) the argument from logical absurdity.

2. Systemic Arguments (setting the argument in a wider legal context)

These are supplementary forms of argument, introduced where linguistic arguments are concluded to be insufficient to decide the case. They include:-

(a) genetic arguments, which refer to the origins of the statute and its purpose

(b) historical arguments, which refer to the history of the legislation and the social role of the statute

(c) the argument from necessary implication, which maintains that a particular interpretation is necessary to give practical effect in the overall scheme and purpose of the statute

(d) interpretive gap-filling arguments

(e) term of art arguments, which refer to technical legal terms, an intrinsic interpretation section or the Interpretation Act 1978 (in Great Britain; there are separate statutes for Northern Ireland and the Irish Republic). They also refer to trade usage

(f) arguments from binding precedent, specifically the doctrine of *stare decisis* having varying degrees of force in all the jurisdictions of the British Isles, where the statute is express on this specific provision

(g) arguments from analogy, referring to a similar statute or to related subject-matter previously ruled upon

(h) comparativist arguments, drawing analogies with law in other legal systems

(i) the argument from legal principles, which relies upon general norms providing coherence.

3. Teleological / Evaluative Arguments (looking to values or purposes which are said to be implicit in the text)

These are brought in where the above arguments still fail to resolve the conflict. They include:-

(a) arguments from the purpose of the statute:

(i) arguments from justice, which draw upon conceptions of the integrity of the legal system

(ii) (ii) policy arguments, which consider empirical consequences for the society or the legal system

(b) the argument from legal principles, which as an argument is closely related to that cited above in the systemic category, but which here refers to fundamental values, natural justice *etc.*

(c) arguments from common sense, dealing with what might be practicable and workable in a legal setting

(d) arguments from absurdity, which refer not to logical absurdity but instead to a strong negative evaluation.

What insight does a new (and rather complicated) typology offer?

The Bankowski and MacCormick typology is not simple to use. It requires a good deal of examination and re-reading before it can be put to work. It is entirely legitimate to ask whether its potential justifies this effort. In my view it does. I have already argued that the existing common law practitioners' typologies would not just be unilluminating but also misleading if applied to comparative study. A fresh start is unavoidable. In addition, the familiar common law rules of statutory interpretation distract our attention. They focus on technical considerations, as if to beguile us into believing that law is not a matter, at least sometimes, of political decision-making and dispute over the delegation of powers of government. The Bielefeld scholars are hardly political radicals, most of them, but a later work by MacCormick seems to nurture a quiet hope that we not overlook the political significance of each category of argument forms. He writes *inter alia* (and here he is referring to the transnational typology, but his arguments are also applicable to the UK typology):

> "Behind linguistic interpretation lies an aim of preserving clarity and accuracy in legislative language and a principle of justice that forbids retrospective judicial rewriting of the legislature's chosen words; behind systemic interpretation lies a principle of rationality grounded in the value of coherence and integrity in a legal system; behind teleological / deontological [*what was previously described as teleological / evaluative*] interpretation lies respect for the demand of practical reason that human activity be guided either by some sense of values to be realised by action or by principles to be observed in it." (MacCormick, 1993; 28).

MacCormick further argues that linguistic interpretation is primary and that teleological / deontological interpretation has to be restrained in legal justification because one of the functions of law is to reduce uncertainty and provide solutions where values conflict or are incommensurable (MacCormick, 1993: 28). A similar interest can be found in the Bielefeld group's later study of precedent (MacCormick and Summers, 1997), where the claim is made that the normative force of precedent produces coherence and uniformity in law and represents "fundamental constitutional and politico-moral values" including "formal equality, legal certainty, legal stability and the predictability by citizens of the probable mode of application of legal norms." (MacCormick and Summers, 1997; 487-88). We can see here a line running from jurisprudes such as Frederick Schauer (Schauer, 1991) through Atiyah and Summers to the Bielefeld analysis. None of these various claims will be unfamiliar to jurists,

but the Bielefeld typologies offer a systematic means of examining and comparing judicial reasoning with regard to background principles. The value added is the accessibility of the work to social scientists.

The work of the Bielefeld group straddles the descriptive and the aspirational. It sketches broadly the justificatory argument forms which are publicly upheld in common among a variety of legal systems (note the reference to "operative" interpretation: MacCormick and Summers, 1991; 10) but it also aims to contribute to the bettering of these decision-making processes by attempting to articulate more comprehensively the justificatory arguments of each system and to represent them in a form which is comparable from one system to another. It aims too to present them as forms, however imperfect, of rational reasoning within systems capable of governance through a logically ordered framework of norms rather than a merely arbitrary order.

I will not consider the implications of these aims here (or the controversies from which they slither away), other than to suggest that if legal theorists wish to carry out comparative jurisprudential study of judicial justification then to some degree they are likely to subscribe to a similar point of view, even if their conception of law is less coherentist than that of MacCormick and some of the other contributors. Disputes at this level must be the subject of another essay. The important point here is that if we subscribe to the broad aims of the Bielefeld scholars, we can hope to gain some socio-political insights about judicial justification in the process of comparing one system to the next. Jurisprudence has rarely articulated effectively with social science at a level at which empirical work can incorporate jurisprudential understanding (the work of Rottleuthner or the systems and autopoietics theorists does not assist close empirical analysis), so this would be a considerable achievement. If Scots and English law diverge regarding the way in which they construe their legislation, or if the Republic of Ireland has developed a subtly different approach to statutory interpretation since it became a (latterly) independent state with a written constitution, this is a matter of political interest and we should thank jurisprudence for enabling us to examine it.

How comprehensive is the Bankowski and MacCormick typology?

I have argued that the typology outlined above has the potential to provide a more broad-ranging understanding of why judges select particular argument forms. The next question is whether the typology realises these expectations when it is applied in practice.

Those who attempt to apply the typology to caselaw in the UK and the Irish Republic will find that the argument forms distinguished by Bankowski and MacCormick smudge into each other in practice and it is frequently difficult to identify a particular judicial statement as belonging to one category rather than another. This is a problem which is probably inherent in this kind of classificatory enterprise rather than an isolated failing of the Bankowski and MacCormick typology. Judicial argumentation is aimed at a variety of legal and non-legal addressees and in the common law legal systems the discursive or rhetorical, rather than explicitly logical, style of judgments does not help the analyst in deciding which type of argument has been used. Nevertheless, Bankowski and MacCormick are right to insist that discrete forms of argument can be identified and the question they face is whether they have identified

them all. There are several queries which may need to be addressed regarding the proposed typology and I will consider them under the three headings of linguistic, systemic and teleological / evaluative argumentation categories.

Problems with the linguistic argumentation categories

One practical problem with any reconstruction of judicial reasoning in a globally systematic form lies with the judges' own use of the terminology. "Only possible meaning" is a phrase that itself has more than one meaning. Some judges take it to mean "the only meaning of any kind including literal or absurd" while other take it to be the only meaning which could be countenanced within the legal context, regardless of other possible meanings which are deemed to be extraneous to legal interpretation in this instance. Sometimes it appears to be regarded simply as the only practicable meaning. The Bankowski and MacCormick typology appears to lack a category containing arguments based on ordinary meaning, which could perhaps encompass this kind of presumption.

The linguistic arguments are said to be put forward "in the given context" MacCormick and Summers, 1991; 365) which could allow them to cross over into systemic arguments and so make the two difficult to distinguish in practice. It could be argued that the point at which an argument becomes systemic is when it appears necessary to take in the surrounding text to give a full interpretation of the provision. A linguistic justification is based on a meaning which is not undermined by context, while a systemic argument is established on the basis of context. Some cases may fit either category adequately, falling somewhere between.

The *argument from only possible meaning* is a particularly difficult one to identify in practice. The form that the judge's argument takes is to say that essentially there is no statutory interpretation problem. On the other hand, where there is some difficulty and he decides to follow the argument from the only possible meaning of the text this argument is undermined by the fact that he has been forced to contemplate alternative results. Though he decides that there is only one possible meaning to be attributed this has not been instantly clear to him. Perhaps the argument should be called by some other label: it is an argument from the only meaning acceptable to the judge, or the only meaning worth contemplating, or the only meaning the judge feels able to justify by legal reasoning. Having said this, it may be that the description "only possible meaning" is justified, as demonstrated by Lord Reid's eloquent explanation in *DPP* v *Ottewell* [1970] AC 642 at 647:

"It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings. The impression of the English language (and, so far as I am aware, any other language) is such that it is extremely difficult to draft any provision which is not ambiguous in that sense. This section is clearly ambiguous in that sense: the Court of Appeal (Criminal Division) attach one meaning to it, and your lordships are attaching a different meaning to it. But if, after full consideration, your lordships are satisfied, as I am, that the latter is the meaning which Parliament must have intended the words to convey, then this principle does not prevent us from giving effect to our conclusions."

The *argument from undisplaced obvious meaning* is also ambiguous although not as fundamentally questionable. It is hard to distinguish this argument from arguments made from the statute as a whole. This argument exists where there is more than one acceptable literal reading of the text but it is argued that one of the possible

readings is such that it must be accepted as the correct interpretation on linguistic grounds. The other possible readings are insufficiently strong to displace or to put in doubt the preferred reading.

It is even possible that a fourth additional category could be added to the existing typology, in the form of an argument from possible meaning. In many cases the judge justifies one possible reading of the text on the basis of systemic or teleological arguments. When using the UK typology to classify this type of decision, it is difficult to do so without (falsely) implying that he rejected the linguistic arguments from only possible and undisplaced obvious meaning. This implication is not intended by Bankowski and MacCormick (MacCormick and Summers, 1991; 365), but it does tend to result from the way in which the arguments are identified. If the classifications are to be used in practice they would need to identify which linguistic arguments are being applied or rejected. If, instead, we include the additional argument from possible meaning in the typology, this allows all linguistic arguments made by a judge to be represented singly and together with systemic or teleological arguments.

The linguistic arguments also exclude a particular form of argument which may appear: this is that the text has a logical self-contradiction which makes it impossible to read in its own terms. The words in which the provision is stated are then incapable of a single sensible reading.

At the same time the systemic reading of the text as a whole may also produce contradictions which are similar to linguistic ones. The confusion within a section which is at odds with itself is clearly possible in practice. The distinction is again made at the point at which it becomes necessary to read the text as a whole to ascertain the meaning (where systemic reading itself leads to contradiction other justificatory arguments are necessary).

This form of argument is different from the first two in that it asserts a negative. The first two are arguments in favour of a particular interpretation; this one acts to deny the words of the statute as they stand. Essentially its place in the argumentation process is to prepare the way for other forms of argument (*i.e.* systemic or teleological) to be used. It is an argument justifying the non-use of the terms of the text.

Problems with the systemic argumentation categories

To begin with, in the category of systemic arguments the list seems to omit three types of argument which should also be represented.

First, judges often interpret a statutory provision in a section to harmonise with other parts of the section in which it is contained. This could but need not be a linguistic argument. They in addition have resort to arguments in which the statutory provision is understood in harmony with other parts of the statute and any closely related statute. This is somewhat less than the argument from necessary implication that Bankowski and MacCormick outline in their list of systemic arguments. The authors describe the group of systemic arguments (which seem essentially to be non-teleological arguments) as arguments which:

"…locate the text under dispute in its setting within the legal system, first, as against the other parts of the same Act, second, as against other pieces of legislation (if any) which, together with the present Act, form a single statutory scheme and finally in the general relation of the

relevant whole to the bodies of statutory and/or common law which make up 'branches' of law..." (MacCormick and Summers, 1991; 366-67).

Their typology seems to provide incompletely for arguments of the first type. The list does include the argument from "necessary implication" and the "interpretive gap-filling" argument, but each of these only covers a small proportion of the arguments which judges make by reference to other parts of the statute.

The argument from other parts of the same statute is normally used when a judge argues that there is neither a single possible meaning nor an "undisplaced obvious meaning" and then maintains that the provision is best understood in the context of some part of or all of the surrounding statute. This is certainly not put forward as an "interpretive" gap-filling argument and it is not as decisive an argument as one made from necessary implication. Instead it has the same relation to the argument from necessary implication as the argument from undisplaced ordinary meaning has to the argument from only possible meaning. It could be described as an argument from presumptive implication. An example can be found in the English case of *R* v *Hillingdon London Borough Council*, *ex parte Puhlhofer* [1985] 3 All ER 735, where Ackner LJ in his dissenting judgement considered the possible meanings of the word "accommodation" in s4 of the Housing (Homeless Persons) Act 1977. The question was whether facilities which were habitable but profoundly inadequate could amount to "accommodation" sufficient to relieve a council of its responsibilities towards a homeless family. There was no one plain meaning of the word in his view, but one of the possible meanings was to be preferred because it was "strongly reinforced" by the wording of another section of the statute. Ackner LJ maintained that, read together, this interpretation made the best sense of both sections.

In the transnational typology in the Bielefeld study, there is put forward an argument from contextual-harmonisation which encompasses the argument from presumptive implication. MacCormick and Summers explain it thus:

"…the governing idea here is that, if a statutory provision belongs within a larger scheme, whether a single statute or a set of related statutes, it ought to be interpreted in the light of the whole statute in which it appears, or more particularly in the light of closely related provisions of the statute or other statutes *in pari materia*, and that is what is a more or less obvious 'ordinary' or respectively 'technical' meaning ought to be interpreted in that light, with the result that even a special meaning (different from ordinary or technical meaning) may be appropriate." (MacCormick and Summers, 1991; 365).

This does however conflate what seem to be two different types of argument: the internal argument from within the statute and an external argument from other related statutes. Exactly what constitutes a "set of related statutes" may be clear or it may be open to debate. It is not necessary for instance that a "set of related statutes" contain statutes which deal with the same narrow subject-matter and here we may take the example of the Sex Discrimination Act 1975 and the Race Relations Act 1976. These two statutes were conceived and developed together as part of a grand legislative project on discrimination (see Lester, 1994 for an insider's account) and they are drafted in a similar broad style with a similar anti-discriminatory intent. Provisions of one have been used to interpret the other (see for example *Singh* v *West Midlands Passenger Transport Executive* [1988] IRLR 186). The resemblance between the two is obvious on reading and it would be reasonable to describe these two as a "set of related statutes". Nevertheless it remains open to a judge to distinguish the two in

particular circumstances and discount judicial interpretations of the other – not least because sex discrimination is partially governed by European Community law and the purposive interpretative approach required by EC directives, while race discrimination is not.

The presumption is that "related statutes" share (for the purposes of the particular case) the same legislative intention. This presumption is more vulnerable than the related presumption that a statute is normally all of a piece, to which is attributed a single statutory intention. (Certain codifying acts, notoriously including the Offences Against the Person Act of 1861, and other statutes bringing together disparate provisions within a single text, are exceptions to this and are only with difficulty understood in this way.)

Against this it may be argued that the internal and the external argument are not so different in kind as to justify creating yet another category to separate them. The concept of conceptual harmonisation conveys the essence of both and, as pointed out before, it also succeeds in encompassing the argument from presumptive implication which is missing in the UK typology.

Second, the argument from contextual-harmonisation also encompasses another argument which is omitted from the UK typology. Here, the judge maintains that a statutory provision should be read more narrowly or widely than the literal interpretation would suggest. This argument is drawn from other sections of the statute, where qualifications are used which, if they had been used in the relevant provision, would indicate a narrower or wider interpretation. The contextual-harmonisation argument then operates in a negative fashion: since the draughtsman has not used the qualification in this instance, the judge is entitled to infer that that this particular provision was intended to be seen differently and indeed to feel bound to make this inference. This is an argument from necessary exclusion, perhaps, and is different from the argument from necessary implication where additional words are taken to be implied by the surrounding context. There are many examples but one is sufficient. In *R* v *Bradish* [1990] 1 All ER 460, the Court of Appeal in England held that a statutory offence of being in possession of a prohibited weapon contrary to s5(1) of the Firearms Act 1968 was an offence of strict liability. One of the reasons the court reached this conclusion was that other sections of the Act had made express reference to a state of mind while s5(1) had not.

There is a possible third omission in the group of systemic arguments. It is unclear whether the argument from analogy can stretch to include argument from persuasive precedent, which may be entirely in point (unlike analogical arguments) while not authoritative. This type of argument, the argument from persuasive precedent, appears to fall under a later technical heading in the authors' section on materials employed by judges but it cannot be described solely as a use of materials. It may be very much a matter of choice for the judge whether persuasive precedents are cited in judgement at all. Frequently they come from respected courts in other jurisdictions, and such precedents are then often used to support policy arguments about international co-operation or harmonisation. While the persuasive precedents themselves are materials, arguments from those persuasive precedents constitute a distinct form of argumentation. They are, incidentally, particularly important in smaller jurisdictions. The Irish scholar John O'Connor wrote in 1974:

"…English, Northern Ireland and Scottish decisions since 1922 enjoy such a high degree of persuasive authority that modern UK case law will be ignored by the Irish practitioner at his peril." (O'Connor 1974; 26.)

O'Connor was being too polite: the numbers of Scots and Northern Ireland cases cited in the Irish Republic have always been tiny, except where they reach the House of Lords. Nevertheless the English decisions, while in no way binding, have in practice exercised enormous influence because the much greater volume of cases heard in England provides a useful source of developed law on most topics.

Beyond this consideration of omissions, there are points to be raised regarding several of the individual categories.

The *genetic argument* is an argument from intention of Parliament. Here there is a linguistic reading of the text which is plausible but which should be rejected in favour of one more in accordance with the purpose of the Act with regard to the previous state of the law. It is looking to the problem that the present statute is intended to remedy. An example would be where the present text did nothing to alter the previous law when read strictly although it was clearly intended to. At this point a reading which fitted with the desired alteration to the law would be inserted to give effect to the intention of Parliament.

This is a strict definition of the mischief rule. It is a reading of the text with regard to the intention of Parliament as evidenced by other texts within the system. It is not a wider teleological argument from the overall purposes behind the particular Act. The argument is systemic in nature and views the text in question as part of a body of law.

The *historical* form of argument is similar to the genetic argument in that it examines the text in the context of a body of statutes. The difference is that this examination is not made with regard to discovering the ends of the text in issue but rather to determine where exactly it fits into the wider picture. In looking at this wider picture the authors suggest that political and social history may be examined in establishing the context of an Act.

This seems to go beyond reading the text in the context of the legal system as a whole to looking to the place of that system within the overall social setting and runs the risk of becoming a teleological / evaluative argument. As such this reference might better be read narrowly as looking at the particular social context of an Act as established by its usage or that of similar legislation. This establishes it clearly within the confines of systemic arguments.

In a sense the genetic argument may be seen as a more particular version, or subset, of the historical argument. Both are diachronic legal arguments. As regards the historical argument, it might be suggested that, if we were to group the justificatory arguments into leading and subordinate groups, the historical argument would be subordinate, being of a nature more designed to give support to a reading than to establish it independently.

The *argument from necessary implication* has been discussed above as a problematic category. It might be better expressed less determinatively as an argument from implication, to cover the general case where the judge produces a reading of the provision from an examination of the text as a whole. This is a weaker

synchronic argument liable to appear in support of a possible literal reading of the text.

The *argument from binding precedent* is a simple synchronic argument based on the momentary legal system and in such a case it is sufficient justification that this is the case. It is expected that in such instances as this occurs within the analysis it will be in cases where it is disputed that the precedent applies. Cases of a simple nature are unlikely to be regarded as instances involving statutory interpretation. They are also less likely to be reported, which is just one of the many reasons why no conclusive statistical comparison can realistically be made between different legal systems. Although the Bielefeld typologies provide new scope for more empirically-inclined studies, we should not fall into the trap of thinking that because a phenomenon has become more accessible to social science, instances of it can therefore be measured.

The teleological / evaluative argumentation categories

The teleological / evaluative categories seem to present no obvious problems; it is in their nature that they are widely cast and broadly inclusive. I have experimented with using them and have no observations to add.

In general, although there are flaws in the coverage provided by the linguistic and systemic argumentation categories, the flaws are not such as to destroy the empirical value of the enterprise. It is also obviously unhelpful to add even more classifications to the sixteen already identified. Perhaps the best conclusion is that the typology forms an excellent starting point for a researcher who is willing to carry out a pilot study which would enable the typology to be adapted for empirical research.

Conclusion

The UK typology proposed by Bankowski and MacCormick has considerable potential. The individual researcher could adapt and amend it without much difficulty. If we are willing to accept that it yields tentative conclusions rather than clearly quantifiable results, it could be used to compare judicial justifications in the UK jurisdictions in several ways. We could examine how the judges reason in Scotland, England and the Irish jurisdictions over a particular period of time in the highest appeal decisions (allowing for the very important distinction between the levels of final appeal in the two jurisdictions). We could compare judicial reasoning in a particular field of law, or in private law as opposed to public law. We could begin to study a nascent form of constitutional interpretation which might develop in cases under the Scotland Act 1998 or the Human Rights Act 1998: both of these statutes have a constitutional quality even though they lack the protected status of constitutional documents and will also be more amenable to amendment. Because they are more easily amendable, there is less need for the originalist or integrationist styles of interpretation found in true constitutional interpretation in other legal systems such as the Irish Republic or the United States. Nevertheless, it might be interesting to see if a tradition of quasi-constitutional interpretation develops in the UK, and whether there will be any distinctions between the ways in which Scottish judges reason in comparison to English or Northern Irish judges.

In conclusion, I would argue that the criticisms I have made do not diminish the profound achievement made by Bankowski and MacCormick and the Bielefeld group. The group has declared a central aim "to reconstruct the fragmentary material

issued by decision makers into rational, coherent and systematic wholes" (MacCormick and Summers, 1991; 19) and in defiance of a history of grievously underdeveloped rationalisation of existing categories taken from UK judicial doctrine, Bankowski and MacCormick have constructed a convincing typology of statutory interpretation which has considerable empirical promise. MacCormick and Summers claim in their introduction to *Interpreting Statutes* that the collection provides "information and insight into interpretational practices as revealed in the published opinions of the higher courts of those countries." (MacCormick and Summers, 1991; 19). The onus now lies on others to use that information and insight to question some ageing folktales and I would suggest that someone begins with a tale or two about Scots, English and Irish law.

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