‘Context Cues Cognition’: Writing, Rhetoric and Legal Argumentation

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Introduction

The contemporary rhetorical turn in law has developed a diverse and substantial literature, much of it concerned with the critique of law’s culture. Stemming from older rhetorical traditions, and more recent seminal work on rhetoric such as Perelman and Olbrechts-Tyteca (1969) it now includes cognitive, sociolegal, semiotic and sociolinguistic approaches and analyses. This body of research on law’s rhetoric is complemented by a substantial corpus of research into the conditions under which communication takes place in the legal arena. Language in the courtroom, for instance, has for some time now been a rich seam for research, as has communications between lawyer and client, both oral and in writing (Alfieri 1990; Dinerstein 1990; Cunningham 1989; 1992; Felstiner and Sarat 1988; 1992; Margulies 1990). In legal education, too, there has been a remarkable growth in the quality and quantity of

research on many aspects of the legal curriculum, much of it interdisciplinary (Maughan and Webb 1995; 1996; Le Brun and Johnstone 1994; Twining 1994). However, the extent to which this research is being used with students in legal curricula is uncertain.[1] Most legal curricula in the UK contain elements of instruction in writing and argument skills; and in the absence of data on the subject it is rash to generalise. But it would probably be true to say that this research is used most often in specialist clinical legal courses, and that much of it has yet to filter down to any great extent into undergraduate pedagogy, particularly in what might be regarded as the core areas of legal writing and argument.[2] This chapter describes the attempt to take a rhetorical and interdisciplinary approach to writing and argument in the teaching and learning of law. I shall discuss some of the cognitive and contextual issues arising from the integration of rhetoric and argumentation within a law syllabus at Glasgow Caledonian University; illustrate how these issues were dealt with in practice, and draw some conclusions as to the use of rhetorical strategies in the teaching of legal argument.

Some of these issues are generic to the teaching and learning of argument, and are well documented in the literature (Galbraith and Rijlaarsdam, 1999). Often they crystallise in the form of apparent aporias: self-expression v. paradigmatic forms of writing and argument (Elbow 1981; Bartholomae 1985); the private domain of the

[1] The most recent reports into law teaching methods in the UK are Leighton, (1995) and Grimes *et al* (1996). Neither reported specifically on these issues. Grimes *et al* suggest that from the evidence of their survey, 'skills are seen by the educators as more than training and properly part of the academic curriculum' (66); but they do note that a follow-up survey is needed to determine quality and quantity of skills teaching, and the extent of curricular integration. For a survey of some American Law Schools' basic training in writing and argument, see Silecchia (1996).

[2] A notable exception in the UK is Maughan, Maughan and Webb (1995), which describes the educational application of research into professional practice, which was set within a conceptual framework derived from the work of Schön (1987) and Argyris. In their skills textbook, Maughan and Webb (1995) cite cognitive research on legal writing.

writer v. the disciplined community of readers (Bartholomae 1995a; 1995b; Fish 1989; Bizzell 1982; Goodrich 1986; Kress & Threadgold 1988; Kress 1989; Bazerman and Paradis 1991); process of writing v. product of argument (Scardamalia & Bereiter 1982; Flower and Hayes 1981; Jackson 1995); generic theory of argumentation v. specific and discipline-based implementations in educational and professional practice (Toulmin 1958; Fulkerson 1996; Fairbanks 1993; Achtenberg 1975; Gale 1980; Boyer 1988; Cox and Ray 1990; Neumann 1990).

All of these issues bear directly on the student experience of learning particular forms of argument and writing within a professional discipline. The claim of each item within the contrasting pairs above is a valid one, but each item requires to be balanced not only within its own dyad, but within the dialogue of other dyads, other issues and many other competing claims to priority within the curriculum and within the profession. In this respect, the resolution of each pair involves a consideration of all: if educational interventions into argument and writing are to be effective, they require integrative strategies which are underpinned by researched and appropriate educational theory, and designed for local programmes of study. The literature of curriculum design and cognitive research supports such an approach. Flower and Hayes (1989, 283), for example, join their voices to those of many educationalists such as Eraut (1994) and Barnett (1994) when, with reference to cognitive research into writing, they call for

> a far more integrated theoretical vision which can explain how context cues cognition, which in turn mediates and interprets the particular world that context provides. What we don't know is how cognition and context

do in fact interact, in specific but significant situations. We have little precise understanding of how these 'different processes' feed on one another.

Genre research and learning and teaching in a law syllabus: a case study

Glasgow Caledonian University's department of Law and Public Administration hosts two programmes of legal study: a BA in Law with Administrative Studies, and an undergraduate Diploma in Legal Studies. The Diploma programme entitles students, after a period of traineeship, to practice as a licensed conveyancer or executor in banks, estate agencies (that is, real estate offices), and the like. The typical Diploma year group is composed of students in their late teens and mature students, in a ratio of approximately 3:1. Students who entered their first year were given a four-day induction course which was discipline-specific in content. It aimed to introduce students to the university and its ways -- the social scene, practical advice, ice-breaking activities -- and introduced students to legal research and discipline-specific study skills. In their first semester, students took an introductory module designed by me (Legal Skills 1), which aimed to develop students' legal reading, argument and writing skills.

The Legal Skills module was structured around three units: legal reading, writing and research. In the reading and writing units a multi-disciplinary approach was taken, in which research drawn from rhetorical analysis, genre theory, cognitive and discourse strategies, was applied to legal texts and argument. Students were taught not just to

describe the internal and external elements of any argument, but to '"take into account the dialogic principles and methods used to realise a particular genre in the specific situational context"' (Paltridge, 1997, 21 quoting Guenthner and Knoblauch, 1995, 12). In their own writing in particular, the idea of what one might call 'persuasive eloquence' was emphasised, namely that, for any discourse community, there is a persuasive or appropriate body of writing forms and argumentational rules that the writer must be aware of, and learn to use in appropriate contexts. In this sense, an important theme in the module was what Lea and Street (1998) call the 'academic socialisation' model, in which genres are identified, analysed, re-constructed, and where disciplinary terminology is explored and defined.

Students were inducted into forms of legal argumentation *via* analysis of examples of argumentation in legal texts.[3] In workshops, activities were used to help students construct situational models of the discourse genres they were required to read (case reports and statutes, for example), and those they were expected to produce (seminar papers, problem-solving and discursive essays). They created these situational models by identifying the rhetorical markers of textual representations of law. This approach led to productive meaning-negotiation discussions in which they began to construct the sense of what it is to have genre expertise. This metacognitive sense of genre was important, for as Zwaan points out, genre expectations 'influence the way texts are processed and represented in memory, independent of textual characteristics' (Zwaan, 1994, 930). Indeed, as Zwaan claims, [t]he general notion of "interpretation" can be specified as a strong situation model, a representation in memory that will tend

[3] While it takes what some legal academics might regard as an overly rhetorical approach to interpretation, this module takes a middle road between a traditional research and writing course, and a more broadly-based skills course See Silecchia (1996) for the differences between these approaches.

to dominate incoming information' (*ibid*, 921).

When learning to read the structure of case reports, for example, it is crucial not only that students learn consciously to recognise the structure of a report but also that they are aware of the complex sets of reading skills they bring to bear on it. A case report is, to a new reader, a confusing mixture of legal exposition and argument, as well as a narrative of facts and incidents. The catchwords at the start of a case summarise the legal points at issue, the headnote provides an abbreviated narrative of relevant points of fact and law, while in the judgements, narrative and argument are frequently juxtaposed. In introductory legal textbooks the difference between *fact* and *law* in cases is analysed and illustrated, and students are told they ought to practise separating factual and legal issues as a case report-reading skill. However, while this is an important analytical skill in law, it does little to help first-year students read case reports. Really, the problem for students lies not in the formal characteristics of the case report genre but in their understanding of the relationships between these characteristics. As Kress has pointed out, narrative and argument are two quite different modes of communication:

> Narrative ... is a form whose fundamental characteristic is to produce closure; argument is the form whose fundamental characteristic is to produce difference and hence openness. (Kress 1989, 12, quoted in Baynham 1995, 36)

Students are often baffled by the frequent switch from one mode to another in a case, and by the complexity of the relationship between the two forms, particularly as they seldom have encountered this particular 'mixed' genre before in their academic

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At 266-68 she outlines a series of questions which in her opinion all such first year courses must

reading. Much of the problem of understanding the genre lies in the fact that, as Einstein, McDaniel and other researchers into reading processes have pointed out, expository texts stimulate item-specific processing, while narrative texts stimulate relational processing (McDaniel *et al* 1986; Einstein *et al* 1990). If, however, relational processing is applied to exposition, then readers find it more difficult to organise textual meaning.

The following extract from the headnote of a nineteenth century case is an example of the difficulties facing students in this regard.

No. 84 ARCHIBALD WILSON, Complainer. – *Watson – Lang.*

--- JAMES ALSTON DYKES, Respondent. – *Sol. Gen. Clark – Balfour.*

Feb. 2, 1872. Wilson v. Dykes

Property – Occupatio – Wild Animals – Summary Conviction. – A conviction under a summary complaint, charging the theft from a public road of a pheasant, the property or in the lawful possession of A B, but not specifying how it was his property or in his possession, *suspended*, the Court holding that, where theft of an animal *feræ naturæ* is charged, the complaint must specify how the animal became property.

High Court of Justiciary. Justiciary Clerk

This was a suspension of a conviction obtained before one of the Sheriff-substitutes of Lanarkshire (Spens) at Hamilton, on 12th December 1871, by which Archibald Wilson, a miner, was sentenced to twenty-four hours' imprisonment for the alleged theft of a pheasant which had been picked up on the high road between Bothwell and Hamilton by Wilson, as he was returning from his work.

The complaint against Wilson set forth that he had been guilty of the crime of theft on the date mentioned, in so far that he had, on the turnpike road between Hamilton and Bothwell, wickedly and feloniously stolen, and theftuously taken away, a dead pheasant, or a pheasant totally disabled by shot, the same being the property or in the lawful possession of His Grace the Duke of Hamilton and Brandon.

The Sheriff-substitute, in respect of the judicial confession of the accused, found him guilty and sentenced him to be imprisoned for twenty-four hours. […][4]

This brief and fairly typical extract presents considerable difficulties for twentieth century first year law students. In addition to different font sizes and marginal notes students have to cope with lengthy, often periodic syntax, Latin terms of art and

'grapple with'; and these include many of the issues described above.

latinate diction, and specialised lexis, some of which is largely irrelevant to a student's reading of the case ('Sheriff-substitute', or the names of the advocate and solicitor representing parties in the title of the case), or some of which is crucial to the outcome of the case ('*theftuously* taken away', [my emphasis]). There is the apparent prolixity of the account, which is given in four different versions in this short extract: first the italicised catchwords, summarising the legal points at issue; next the single-sentence expansion of this, followed by a one paragraph summary of the facts of the case; and finally a résumé of the details of this account, dovetailing fact and law. For a student, one of the main difficulties is maintaining a sense of reading purpose in the apparent confusion of expository and narrative styles and the processing conflicts stimulated by these styles. This continues into the body of the case where judges' judgements often intermingle case facts with legal points.

Several activities were used to familiarise students to this difficult form. The concept of audience was explored: who was this written for? What could we say about what the reader expected to read about in the case report? Having defined this, a useful genre comparison for students was with newspaper news articles, a text type which, in its introductory paragraphs at least, often adopts a similarly circling style of structure. We explored why this form of introduction was adopted in both sets of writing. Readers also practised identifying legal terms of art important to the case from relatively unimportant ones.

Above all, students practised separating narrative from expository passages. They read photocopies of cases and, using two colours of marker pens, marked up the

[4] *Wilson* v *Dykes* 1872 SC 444

margins according to the status of the narratives, then compared these to my version. Other activities included think-aloud protocols in which the purpose was not only to identify and define informational features in the text but also to help them identify the different forms of reading they brought to bear on the text. Once they could do this, they were given cloze procedure activities: they read case reports which had the catch-words or the headnote stripped out, so that they had to supply these once they had read the judgements and other materials. To do this, they needed to apply their understanding of the functions of catch-words and headnotes, and the terms of art which report writers use when compiling headnotes from legal judgements, as well as applying skills of reading narrative and expository argument in the case in order to reconstruct these missing parts. While no specific data on reading improvement *per se* was collected, feedback from students confirmed that these approaches helped them to read cases more effectively.[5] Through this and similar activities, particularly on topics of precedent and *ratio decidendi*, students come to a realisation of what de Beaugrande and Dressler (1981) have rightly termed the intertextuality of legal cases.

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The same approach was taken to the reading of legislation. After introductory classes on statutory writing, which drew not only on well-established texts on legal argumentation such as Twining (1991) and others, but on genre theorists such as Bhatia (1987, 1993), Bhatia and Swales (1983) and Swales (1990), students were given drafting activities. Thus, after reading Gunnarsson's three types of legislative rules (action, stipulation and definition rules) they were asked to draft private members' bills on given situations (Gunnarsson, 1984). For example, in small groups they were given a scenario in which use of longbows had become popular as a sport,

[5] For an approach much more based on logic and founded on the socratic method of American law

but which was endangering public safety. They were asked to draft a Bill: what would they do to alleviate the situation, and how would they draft the Bill? They then compared their versions to each other's work, and to a real Act of Parliament arising from a similar situation, namely the Crossbows Act, 1987. From this comparison arose issues concerning the invisible rules of reading which are implicit in the structure of the genre, forms of language used in statutes, the points at which deliberate ambiguity is used by draughters, and points at which clarity is paramount, the status of definition and the language of command and description -- in short, the critical features of the argument of a statute.

In the writing skills unit genre analysis similarly used to identify the structure and audience expectations of academic legal essays. The heuristic of the 'writing conference' was employed to enable students to think critically about the argumentative tasks that was set for them. Coursework consisted of two 1,000-word essays, the first being the subject of mini-conferences and unassessed, the second being the more formal and assessed task. The point of these conferences was not to discuss essays generally with students, for this discussion could take place to an extent in tutorials where reference was also made to the writing tasks required of students in their other, concurrent modules. Rather, the purpose was to facilitate argumentative structures by helping students, in the words of Scardamalia and Bereiter, to 'internalize' these structures. This was done by scaffolding the student's own modelling of the structure:

> A more readily internalizable form [than dialogue] might be the 'assisted monologue' ... where the talking is primarily done by the student, with the

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schools, see White 1989

> teacher inserting prompts rather than conversational turns. (Scardamalia and Bereiter, 1986, 797-8, quoted in Matsuhashi, 1987. 62) [6]

The argumentational models they structured and the writing heuristics they experimented with in their first essay and which were analysed in the conference could then be used in the second, assessed essay.[7]. Within the mini-conferences, students were encouraged to comment on brief prompts I inserted in the margins of their texts. They were asked by me to analyse their work using the conceptual tools discussed in the tutorials. The conferences were taped, and students could keep a copy of the tape if they wished. Attendance at the conference was voluntary, but most students attended.

The conferences were initially run along lines suggested by Scardamalia and Bereiter, with the intention that they would improve students' understanding and production of legal discourse. However, it became clear after the first few conferences and on studying the conference transcripts that, in spite of their familiarity with the genre-based tools of analysis used in the reading unit, it was difficult for students to discuss the structure of their own writing without describing its social and performative

[6] In their advice here, upon which topic they have conducted much research since then, Scardamalia and Bereiter are of course basing their approach on 'procedural facilitation' rather than 'substantive facilitation'; the intent of this being '"to enable students to carry out more complex composing processes by themselves"' (1986, 61). The approach is one variant amongst a number. For a summary of others, see Newell and Swanson-Owens (1994)

[7] I use the word 'heuristic' here in the same sense that Flower and Hayes used it in their early work which defined writing as predominantly problem-solving, and heuristics as being those routines and sub-routines that writers depended upon to produce coherent argument and form. See, for example, Flower & Hayes, (1981). In addition, computer-based learning courseware is used to support learning of legal argumentation. *Contracts*, written with Professor Joe Thomson of Glasgow University, introduces students to the skills of legal problem-solving; illustrates the major stages of the writing process; facilitates the analysis of students' own writing processes; and presents good models of legal writing and alternative strategies to enable good practice (Maharg, 1996a). *Stylus*, an online style guide to legal essay writing, gives guidance to students on presentation, use of paratactical materials, and legal citation.

aspects. The following extract is a good example of this.[8] The 'assisted monologue' began with the topic of clarity of structure. The student, Ian, shifted it to a discussion of how his use of disciplinary terminology, which he felt unsure about, affected the structure of his argument:

Interviewer: […] do you think […] you're unsure about your writing?

Ian: I don't think - not too much. I suppose there is maybe a possibility that I just don't want to be cornered - I don't want when I'm writing the essay to put it as if - I don't want to be cornered, to look as if I haven't got a clue what I'm talking about. So you try and cover as much ground as you can, if you know what I mean, so that you don't, you aren't totally wrong rather than following one chain of thought and then 'Oh that's completely wrong'. If you try and make it a little bit more broad then you've got a better chance of not being wrong. But it's maybe just a habit I've got into trying to do that because I think in a lot of the exams I did in the Higher there wasn't maths or anything like theory, it was like Modern Studies, Geography, Economics, English. A lot of essays I had to write in the exam. I think that's what's got me into the habit of it, writing like that, so that when the marker comes to mark it, it's not - they can't say 'Oh that's right or wrong'. I've tried to cover myself.[9]

[8] Students' names have been altered to preserve confidentiality
[9] The 'Higher' is the Higher examination which is usually taken in fifth year of high school. The grades obtained are a key determinant of university entrance in Scotland.

What was turning into a discussion of surface features suddenly became an exploration of Ian's coping strategies when faced with the task of writing an essay on law. Uncertainty of language, he felt, led to uncertainty of structure, and his strategy of 'covering myself' he considered a weakness arising from anxiety about register and legal terms of art. This was turning point in the conference for Ian. Later on it was possible to show him that, while there could be a causal link between language use and structure in his writing, what he viewed as a mere coping mechanism was one amongst a variety of possible and acceptable rhetorical moves, and one often used by academics and judges alike.

Other students made the same discursive shift from text structure to personal experience and process. One mature student described powerfully her feelings of frustration in struggling to express herself in the constraints of disciplinary argument:

Sarah: So I knew myself it was just absolutely, totally, it's not what I wanted it to say, it's not exactly what I wanted it to say, I mean, Friday afternoon at half past three I was still typing it out and I thought 'This is ridiculous, I've usually got everything done by now'. I just couldn't for the life of me get what I wanted down on paper, and I thought 'There is no point in changing it now it's too late - it's to be in for four o'clock'. Just a fail. I just knew it right away. I was like that 'There's no way that's gonny pass'.

Interviewer: It's a dreadful feeling that, isn't it?

Sarah: Oh no, I knew myself I even said, I says, the essay is a lot of crap, I says, it's total and utter rubbish that's in it. But now I can see it, I've looked at it at home, I mean I've got a copy in the house, and I have actually sat and read it, I thought, 'I should have put that there, and that there and that should have been further on.'

Reviewing the transcripts, I found myself in them adopting less of the 'prompt' role described by Scardamalia and Bereiter, and more of a collaborative role; one that was more Rogerian in tone.[10] Sarah had already started working on her second essay, and she used taped recording to help her manage the complex sets of lectures notes, book notes and essay fragments out of which she assembled her argument. This was a technique I had suggested in class, but it was also one she had used before, at high school 16 years earlier. The particular context of this extract is again a discussion of structure, and Sarah is discussing her second essay:

Sarah: […] In my [second] essay I actually taped it first […]. I sat and I had all my notes down. I just relayed off what I wanted to say and then just took it bit by bit -- that's relevant to that and that's relevant to that and then did it. So I took your advice on Wednesday night and I was up to 4 o'clock on Thursday morning doing that essay right enough. I did! I taped it first and then when I sat down with all my notes, bits of paper here, and I went, 'Well I'm wanting that in this bit here so I

[10] An important part of this collaboration was empathy with the learners' construction of meaning; and in this respect Rogers' definition of empathy is acute: '[i]t means frequently checking with [the client] as to the accuracy of your sensings, and being guided by the responses you receive. You are a

would have it all and this is to be added in to such and such a bit [...]

Interviewer: But did the taping of it work?

Sarah: Yeah. I find it a lot easier, a lot easier, because my brain works faster than my writing so if I've said it all right -- I've added that bit and that bit -- so that's fine I'll just write it out, what I've said, and then I can add the bits in here, there and everywhere. And I thought well that's it -- perfect, got it.

In the second essay Sarah abandons the attempt to write formal English from the start. Instead, she discovers a method of splicing taped speech and notes which works for her. She is learning to control process in order to achieve product, and her method mediates between personal voice and disciplinary argument. It relies heavily on arrangement of blocks of argument, and the use of taped voice to review notes and merge the blocks in one meta-argument. The student here is really engaged in learning on a number of levels – how to cope with the demands of disciplinary argument, how to learn the law, how to write using her own past experience and the new genres of text she is encountering at university. Investigating the conflicting demands that take place between these items (and there are many more), we can begin to discover, as teachers, how the 'negotiation of inner voices shape[s] the *hidden logic* of the text' (Flower 1994, 55). To an extent this negotiation was aided by what might be thought to be a version of Brandt's concept of literacy as involvement of reader and writer (1990); but while conducting the mini-conferences, and on review of the

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confident companion to the person in his/her inner world'. (Rogers 1980, 142)

transcripts I found that it was characteristic of the discussions to move from analysing students' arguments solely within the context of their texts, to active collaboration by means of an exploration of the texts' social and personal contexts. Sarah, for example, perceived that the higher grade she achieved in the second essay was the result of the discovery that a way of working she had learned in another part of her life could be a valuable heuristic at university. In this respect the collaboration was a re-membering, a putting together again of forgotten compositional practices, and adaptation of them to the demands of a new discipline.

Conclusion

It is a well-documented tendency for law teachers to focus on the teaching and learning of substantive law, rather than legal skills or the integration of skills and knowledge. Within the last few decades this has been the subject of considerable critique. Kissam (1987, 142), for example, has argued that law schools, by failing 'to employ the writing process as an effective learning device', generally encourage legalistic attitudes towards language. The concentration on substantive or 'black-letter' law and the finished product, he posits, inculcates formalist views of genre and gives students the illusion that *auctoritas* is to be found in legal terms of art, and not in argumentation or problem-solving analysis.[11] This was the case with Ian, as we saw above.

Legal Skills 1 was an example of a module designed around the rhetorics of legal

[11] The literature on this is extensive. See for example Maughan and Webb (1995), Le Brun and

argument. It alerted students to the choice of strategic alternatives within processes of writing, reading and legal research, and concurrently, the pre-existing genres of legal argumentation relevant to their level of study; and enabled them to integrate one with the other. In this respect the process models of Flower and Hayes and others were useful to first-year students, for the language of student writing process was more available to them than that of generic argument structure, which they found difficult to enact. When argument structures were taught in a localised genre sense, within legal assignments, they became more readily available to students. But as Creme and Lea point out, 'writing cannot be regarded as something that exists in a decontextualised vacuum' (1998). It was crucial to take into consideration the situated learning experiences and personal constructions brought by students to the task of learning the law.

Johnstone (1994), Maughan and Webb (1996), Maharg (1999)

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