How to Do Things with Rules: A Primer of Interpretation, 4th edn

William Twining and David Miers
Butterworths, Sydney, 1999, ISBN 0 406 90408 1, 451pp

The fourth edition of this excellent introductory law text is still impressive in its sophisticated fusion of doctrine and theory, reflection and practice. It is unlike many books presently available which share its general aims, stated by Twining and Miers as being to 'provide a relatively systematic introduction to one aspect of rule-handling: interpretation and application'.[1] In fact, the book achieves far more than that, introducing important legal techniques in a broad and critical context. It is soundly advised by educational theory and it takes the idea of fusing theory with an area as practical as rule interpretation seriously.[2] It does not follow the present fashion of learning skills in the context of a specific area of law; rather, the skills of rule interpretation and application are the focus of the book.[3]

Writing for an audience composed mainly of novices to the law is not easy. This is particularly so when one is attempting to introduce difficult theoretical concepts in a way that makes sensible their relation to legal doctrine. *How to Do Things with Rules* succeeds admirably in this task. It is a substantial, comprehensive, extremely well designed and written book which provides an excellent introduction to the theories and processes of manipulating legal rules and institutions.

My main general criticism of the book concerns the way in which the authors appear to draw an equation between 'law' and 'rules'.[4] It is unfortunate that they have done so without indicating how they understand the relation between law and rules, and why they chose to focus on that aspect of lawness. In the context of discussing Dworkin's contribution to the debate on interpretation, the authors do refer to the distinction which others have drawn between rules and 'other forms of normative prescription', including principles.[5] However, the difference between rules and other prescriptions, and the significance of the difference, is not clearly explained. Indeed, the reader is asked to explain the difference well before there is any explanation forthcoming in the text.[6] I would expect this to confuse those who are not conversant with the debate. It risks creating or perpetuating a particular apprehension about the nature of the legal enterprise, which is not necessary.

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1 Preface, p vii.

2 Preface, p viii.

3 Preface, p viii. This is not to say that these skills are introduced in the absence of any context at all. Rather, the focus of the book is on those skills rather than in the development of competency in any doctrinal subject matter.

4 The equation is never made expressly, but in places — including the title — it is apparent. For instance, 'law and rules are everywhere' (p 1). See also Preface, p ix.

5 At pp 61 and 125–27.

6 At p 62. The general characteristics of 'rules' are described at pp 123–24.

The substantial literature on the distinction between rules and standards could usefully be incorporated in the relevant sections.[7]

The problem of equating rules with law reflects a more general problem I found with the book, which is that concepts are introduced early in the book (in Part 1) without explanation of their significance to the discipline of law, or to the authors. The authors intended Part 1 to engage students in problems of interpretation before introducing the legal tools which are used to resolve such problems. It seems vaguely contradictory then to employ those legal tools in the introductory section, before explaining how they operate. If the intention is to encourage students to explore the potential of ideas free of the shackles of traditional legal assumptions, there may be more effective and less confusing ways of doing it than by referring to the same traditional assumptions.

For example, the old lawyers' distinction between law and facts is used in several places in Part 1, but the authors do not explain what they understand by the distinction, or what they mean by drawing it.[8] This may be intentional; if not, it has the potential to create confusion. It appears to entrench a distinction which must be acknowledged as less sensible to novices than to those who regularly deal in academic discussions of the law.

How to Do Things with Rules, notwithstanding its emphasis on 'standpoint', in my opinion does not really highlight sufficiently the significance of the procedural context in which authoritative statements about rules are made, particularly in relation to the interpretation of legislation.[9] Disputes over the 'meaning' of legal texts arise in the context of attempts to resolve particular problems through adversarial processes. In the adversarial process, neither party is interested in divining the 'real' 'meaning' of any text.[10] Rather, all parties are concerned to persuade the tribunal to accept the potential meaning which advances their own case. The court's role is complex and fascinating — but these issues are only touched on indirectly. The book tacitly

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7 See Carol Rose, 'Crystals and Mud in Property Law' (1988) 40 *Stanford LR* 577.

8 See at pp 9, 13 and 47 the exercises requiring readers to separate questions of fact from those of law, without any explanation as to the distinction or the purpose of drawing it. The distinction is further discussed in part 2, at pp 160–65. In this more extended discussion, the authors confess that 'determining the conceptual basis upon which this distinction rests is by no means easy' (pp 160–61).

9 The authors take issue with the emphasis which is usually given to the standpoint of the judge, particularly in relation to the interpretation of legislation: at pp 171–72. The procedural context of litigation, and in particular the impact of the adversarial system, is referred to in connection with the doctrine of precedent (p 309). Reference to standpoint may actually confuse the issue. While different people use legal texts for different purposes, only some users are authorised to make legitimate statements about those texts — all speakers are not equal. The book accepts this, as it is ultimately concerned with teaching the techniques of identifying authoritative statements.

10 In the summary of the judicial approach to interpretation of legislation, the authors treat this as an objective exercise — the fact that inconsistent interpretations of the text are being pressed on the decision maker by disputants is not even referred to (see pp 281–82).

accepts that there are some interpretations which are better than others — namely those which are reached following the correct application of legal principles. Many theorists, as well as most practitioners, could be expected to take issue with this idea.

The authors also do not explicitly articulate the assumptions they make regarding constitutional theory and practice. I think this is a significant shortcoming in a book which is ultimately concerned with the operation of legal institutions. There are suggestions in the text from which the reader can attempt to assemble the assumptions on which the authors have proceeded — for example, they assert that legislation 'remains the single most important source of law in our legal system'.[11] While this assertion may be relatively uncontroversial, it reflects a particular perception about the respective roles of parliament, the courts, and other legal institutions which should be explained, at least in summary. To do so is important, for it affects the choices and priorities that the authors have made in the structure and content of the book.

How to Do Things Outside of the United Kingdom

Notwithstanding its acceptance and incorporation of globalisation and regionalisation,[12] the book is written for a specific audience. Reference to the law of the United Kingdom — mainly of England — constitutes such a substantial part of the text that it does not lend itself to prescription as a text in other jurisdictions.[13] However, it is an excellent resource for teachers of law at university as a source of ideas and inspiration in subject design and development. It is from this standpoint that I offer the following thoughts about its virtues.

The authors' reference to educational philosophy has resulted in a thoughtfully designed book which takes into account the interests and perspectives of the learner. The authors prefer what they describe as a 'contextual' approach to legal education — one in which legal phenomena are understood and explained in terms of their social, historical, economic, philosophical and political contexts, while remaining the focus of inquiry.[14]

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11 See p 227.

12 Preface, pp x–xii.

13 Aside from the inapplicability of the legislation and case law referred to, the United Kingdom's membership of the European Union distinguishes its constitutional situation from that of many common law countries, to whose readers the book might appeal. While there is general similarity in the techniques of rule interpretation and application between Australia and the United Kingdom, there are also differences in the practices endorsed by the authors and those which apply in Australia. To an Australian reader, the criticisms expressed in relation to plain English drafting of legislation seem very strange (see pp 246–53), and the absence in the United Kingdom of statutory interpretation legislation is another substantial difference.

14 See p 113.

This approach, which has been popular in some circles in Australian legal education,[15] is manifest in the structure as well as in the content of the book.

How to Do Things with Rules is divided into three parts, the first of which is an introduction to the themes and issues subsequently developed in the more substantial second and third parts. This is an interesting idea in the introduction of legal skills, and one which I suspect would prepare students well for the more difficult issues which discussed later in the book. Part 1 incorporates many illustrations and exercises, which are interesting and thought-provoking and encourage students to reflect upon and build their understanding of legal concepts on their own experiences.[16] This is documented to be an effective method of developing expertise.[17]

The authors postpone introduction of legal approaches to rule handling (Part 3) until after generic processes are introduced in Part 2. The second part contains comprehensive discussion of the generic approaches to rule handling applied in many areas of human endeavour — focusing on the non-legal. This illustrates the authors' preference for a contextual approach. The final part addresses specifically legal techniques of rule interpretation and application, particularly interpretation of legislation and judicial precedents.

The idea of introducing problematic and potentially boring (especially to first-year law students) issues in legal interpretation in familiar and non-legal contexts is effective. Many and frequent interesting examples and exercises intersperse the text in Part 1. This is visually appealing and takes into account the importance of ensuring students' active participation in the development of their understanding. The exercises included in Part 1 are often complex, indicating that the authors regard readers as knowledgeable and capable of working at a high level. This distinguishes this work from some other books written for an introductory level audience. The exercises intended for use with Parts 2 and 3, as well as supplementary exercises for use with Part 1, are contained in Appendix 1 rather than in the body of the text. Consequently, Part 1 of the book has a different appearance, tone and pace to the following two parts, which read in a similar fashion to many standard legal texts. One wonders why the authors apparently changed their attitude to the importance of including exercises to ensure students' active participation from Part 1 to Parts 2 and 3.

The book departs from many of the classic legal fictions which are often applied in the early years of tertiary education. The technique of introducing specifically legal tools for dealing with rules last is unusual and effective. The book encourages students to speculate about and think critically about legal principles; this is also unorthodox in introductory texts. It introduces, in a careful and detailed way, a wide range of theories about law. It commences its discussion of specifically legal approaches to interpretation with legislation,

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[15] See especially S Bottomley and S Parker (1997) *Law in Context*, 2nd edn (1st edn 1994), Federation Press.

[16] Preface, p viii.

[17] J Biggs (1999) *Teaching for Quality Learning at University*, Society for Research into Education/Open University Press, pp 73–74.

rather than with case law. In my experience, such factors are far more likely to lead to profound and critically informed understandings than more traditional approaches can aspire to achieve. The structure, content, and style of the book remain salutary lessons to legal educators about excellence in education, in particular in the design and writing of legal texts.

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