WRITING CASE NOTES AND CASE COMMENTS[1]

Jessica Giles, Law Lecturer, The Open University

Contents

I Introduction

This material provides a framework and guidance for writing case notes and case comments. The case note is the simplest, shortest, most descriptive account of a case, the comment sets it in context, explains its significance and critiques it. It uses discursive argument to synthesise a wider body of material to establish a position on some law-related point. Case notes are short pieces of writing of between 300-800 words. Case comments are pieces of around 2000 – 3000 words. The writing of case notes tends to follow a specific pattern. In contrasts, there is no one "correct" way to write a case comment. There are certain guidelines that can be followed. In so far as it relates to case comments this material is not therefore intended to be formulaic but it is provided as an initial framework for those interested in this form of legal writing.[2]

[2] This contrasts to case note and case comment writing in the USA where some law schools have established a format for authoring case notes and case comments for submission to their journals. Whilst in the US the structure is not strictly required it is strongly encouraged. Case notes, which in the US are longer commentaries of up to 10,000 - 17,000 words on a judicial decision, exist along side shorter case comments which can be between 5000-7,000. US style case notes consist of Part I which sets out the legal back ground to the case; Part II explains the problem or issues, it can examine previous case law and the impact of the case on that existing law or look for gaps in existing legislation; Part III considers a solution to the issues identified in the earlier part. This is followed by a conclusion. The aim is to provide a resource for legal professionals and others working amidst the pressures of legal life in practice: see for example 2014-2015 Publishable Notes Manual, Columbia Law Review, page 5: http://columbialawreview.org/wp-content/uploads/2014/09/2014-2015-Publishable-Notes-Manual.pdf . Date accessed 29 September 2015.
Similarly for competitive student case comment writing a formula is set, but authors are not required to stick to it: 1. Facts of the case 2. Holding 3. Road map explaining structure of the comment 4. Analysis 5. Conclusion: see Georgetown Law 2015 Write On Competition Instructions: https://www.law.georgetown.edu/academics/law-journals/writeon/upload/2015-Write-On-Competition-Instructions.pdf. Date accessed 29 September 2015.
See also Note Submissions for the Stanford Law Review: http://www.stanfordlawreview.org/submissions/print/note date accessed 29 September 2015.
And Harvard Law Review: see http://harvardlawreview.org/about/ date accessed 29 September 2015.

Learning outcomes

After studying this material you should be able to:

- Create a case note of a judicial decision
- Identify the purpose and format of a case comment
- Decide upon a topic or case upon which to comment
- Engage in discursive argument about a judicial decision
- Plan and write a case comment
- Style a case note and a case comment

2 Writing case notes

The ability to write a clear and succinct case note is useful in and of itself as a legal skill, particularly in common law legal systems which operate a doctrine of precedent whereby judicial decisions form part of the law of the land. It is also important in case comment writing since a clear understanding of the essential elements of a judicial decision forms the basis of accurate analysis and enables an author to set out a brief summary of the judicial decision at the outset.

In order to write a case note it is necessary to learn how to deconstruct a legal argument set out in a judicial decision and identify various parts of the judgment. The various parts serve different purposes.

This task is carried out in the UK by law reporters, trained barristers or solicitors, who write case summaries and headnotes, the later are published, together with the judgment, in various law reports series. These can be found in law libraries or in online databases such as Westlaw or LexisNexis. JustCite is a useful tool for searching for cases and discovering which law report series a case is reported in.

There are also freely available open access case summaries of all the important UK cases together with those of the Court of Justice of the European Union provided by the Incorporated Council of Law Reporting at: http://cases.iclr.co.uk/Subscr/Search.aspx. For other useful sites please see Appendix 1.

2.1 How to start

To understand a judicial decision it is necessary to identify the facts, issues, legal procedure and arguments of the parties and to understand the point(s) of law that have been included by the judge.

Creating a case note involves working through the judge's reasoning and understanding how the law has been applied to the facts in order to reach the final decision.

It is necessary to understand a judgment in detail even where a case report of the case already exists. Existing reports of UK cases such as those which can be found, for example, on legal databases such as Westlaw or LexisNexis, provide clear succinct summaries of essential elements of the case and can prove really useful to support your summary of the case and can help you orientate yourself around a case. It is, however, always important to deconstruct the case yourself when writing a case note or a case comment because the additional information in the judgment may well be relevant to your writing.

Reading the legal argument of the parties (in those systems where trials are adversarial and where legal argument is reported) can be useful since this is the starting point for discovering more than one point of view on an issue. In the UK the judgement will often include a summary of the arguments of the parties, but only the most important cases carry an official report of argument and this is only written up in the official law reports of the Incorporated Council of Law Reporting. If you are going to consider legal argument you will need to read the summary of this set out by the judge in the judicial decision.

Where there is no headnote or case summary available you will need to write the summary yourself from scratch, that is from the original judgment, so it is well worth gaining this skill.

In order to consider the arguments of the parties and find all the relevant information it is therefore necessary to read the judgment and pull out the information you require.

Before deconstructing a judicial decision it is necessary to consider which type of legal system the decision was given in. This is because different legal systems produce different types of judgments and understanding this will help you know what to expect from the judicial decision. Judgments from civil law systems do

not include a summary of the legal argument. It is important to understand this if you intend to carry out a comparative analysis of cases across different legal systems. In the next section you will learn about the different types of judgments arising in various legal systems.

In addition to understanding the type of legal system in which judgment was given it is also important to bear in mind the level and jurisdiction (authority to hear certain cases) of court. In those countries with common law systems only courts higher in the hierarchy create precedent (binding decisions) and whilst those from lower courts might be of interest to academics they are of limited value to practitioners.

2.2 Common law, Civil law, international and supranational legal systems: understanding different types of judgment

The courts in common law and civil law jurisdictions produce different types of judgments.

In a common law system, such as that in England and Wales, the decisions of certain courts higher up in the hierarchy of courts have force of law in the same way as Acts of Parliament created through the democratic process. Both legislation and case law have equal effect as law of the land. In England the doctrine of parliamentary sovereignty applies so that Parliament can always legislate to effectively overrule a judgment of the court that it does not like. Furthermore UK courts do not have a power to declare any Act of Parliament unconstitutional and therefore void. They only have a limited power to make a declaration of incompatibility where they deem an Act to be incompatible with the provisions of the Human Rights Act 1998. This contrasts with the American common law system, where, for example, the US Supreme Court can declare an Act unconstitutional and therefore void.

The operation of a system of precedent means that courts are bound to follow a previous judgment of a court higher or (in certain circumstances) at the same level in the hierarchy of courts where the facts are the same or sufficiently similar to those in the previous case.

So in the UK a High Court judge must follow the decisions of the Court of Appeal on the same issue. Both the High Court and the Court of Appeal must follow the decisions of the Supreme Court on the same issue.

In countries, such as France, that have a civil law system the judgments of the courts do not have legal effect in the same way as judgments of the common law system courts. The judgments of courts in civil law systems apply as between the parties to the dispute but they do not bind later courts and they do not have the same legal effect as law made by parliament.

The operation of the common law system requires that judgments are more detailed than those in civil law systems so they will inevitably be longer and provide more information on the case. Common law systems tend to use the adversarial means of trial whereby the parties or their legal representatives present their arguments in court and the judge resolves the case on the basis of the arguments put before her.

In a civil law jurisdiction the trial is usually based on the inquisitorial approach. This means that the judge takes a more active role in the case by asking questions of the parties in advance; the judge, rather than the parties, can decide the issues of law that need to be resolved; even where the parties present argument this can be carried out by written submissions and there is not necessarily an oral hearing, the judge(s) might decide the issue on the paper submissions. The judge does not have to take account of previous decisions.

The European Court of Human Rights

In Europe and elsewhere courts also exists within international and supranational legal systems. The European Court of Human Rights, for example, is governed by international law and the application of its judicial decisions within national legal systems depends on the manner in which those legal systems treat such judgments. In the UK, for example, under section 2(1) of the Human Rights Act:

“A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights”

The European Court of Human Rights does not itself follow a doctrine of precedent (it is not bound by its previous decisions). The court applies a “margin of appreciation” when deciding cases. This enables it to decide that a member state is better placed to decide, in the light of local social and historical conditions, the extent of protection to be accorded to particular rights. Because conditions differ from member state to state it will therefore refrain from identifying breaches of fundamental rights in some cases but not in others. This means it can sometimes appear to give contradictory or inconsistent judgments.

In addition the European Court of Human Rights can determine that social conditions have changed and something that was not acceptable a number of years ago is now acceptable and it will therefore decide a case differently.

The operation of the margin of appreciation enables the ECtHR to hold together the diversity of national opinion within the European Convention of Human Rights member states. This underlying policy or aim does affect the judgments it hands down: for interesting academic discussion of the role of the European Court of Human Rights see: *Universality or Diversity of Human Rights?: Strasbourg in the Age of Subsidiarity* by Robert Spano, Human Rights Law Review 2014 14(3), p 487: http://hrlr.oxfordjournals.org/content/14/3/487.full.pdf+html date accessed 26 November 2014 and Argentoratum Locutum: *Is Strasbourg or the Supreme Court Supreme?* By Brenda Hale, Human Rights Law Review 2012 12(1), p 65: http://hrlr.oxfordjournals.org/content/12/1/65.full.pdf+html?sid=c2de82fc-31f1-4cdb-ad46-5b1c059f76a3

Judgments of the European Court of Human Rights are fuller than those handed down in civil law systems – they are perhaps more of a hybrid type of judgment setting out the facts, the law, the argument of the parties and the application of the law to the facts. They will often include dissenting or concurring judgments from a limited number of the judges.

The Court of Justice of the European Union

The Court of Justice of the European Union is the highest court of the European Union and sits within a supranational legal system. This means its judgments must be followed by the national courts within that legal system. It was initially set up as a civil law court and its judgments tended to be short and to the point. Over time the influence of the common law judges in Europe can be seen in the development of the CJEU case law as it developed a more discursive type of judgment. Many cases are decided on paper submissions, there is no oral hearing, and the judgment of the court is unanimous, there are no dissenting opinions. An advocate general will often provide an opinion to the court before it gives its judgment. The Advocate General's opinion is advisory, it does not form part of the judicial decision.

As the EU has grown and the role of the CJEU has expanded and the judgments are now longer and more akin to the types of judgments that can be found in common law legal systems. The court now follows a doctrine of consistency. This means it reserves the right to depart from a previous decision but will follow previous cases where possible.

The underlying policy which the CJEU has in mind when deciding cases is EU integration. The CJEU was instrumental in holding the EU together in its early years and it continues to have this overall goal in mind.

Identifying the legal system for the purpose of case not and case comment writing

It is a good idea to make a note of which type of legal system a case comes from when writing your case note or case comment. As you write bear in mind the constraints upon the court when reaching its decision and the affect its judgments have within its own legal structure, whether that is a national, supranational or an international one, when writing a case note and a case comment. This is particularly so when considering judgments of courts which are affected by particular policy concerns such as the ECtHR and the CJEU.

The following sections will cover deconstruction and reconstruction of judicial decisions. In light of the above explanation, however, it should be noted that some of the information that is available in common law jurisdictions – such as an explanation of the arguments of either side – will not necessarily be set out in the judicial decisions given in other types of legal system and so unless there are external sources that can be relied on this material will not form the basis of the discursive argument in the case comment.

2.3 Deconstructing and reconstructing legal argument

Deconstructing a legal argument is rather like completing a jigsaw puzzle. It is necessary to group types of information together (just as before starting to put the pieces of a jigsaw together, one might find all the straight edged pieces or pieces of a similar colour when preparing to complete the jigsaw puzzle).

Once all the pieces are grouped together it is then possible to put them together to create a full picture of what the judgment is about.

This means identifying the “pieces” from within the judgment itself:

- the facts,
- the procedural history (the type of action and the court(s) in which the case has been heard),
- the issues (the questions about the law) that the case decides,
- the law that the judge applies,

- the application of that law to the facts,
- the final decision in the case.
- material that is irrelevant to the case note but might be relevant to a case comment

2.2.1 Deconstructing a legal argument: organising the pieces

In order to identify the relevant elements of the judgment you might find it useful to use the table set out below. As you read through the judgment use a highlighter to identify the different parts of the judgment and then use the table to write the relevant information in to the appropriate boxes.

Relevant facts (these are the events which lead up to a claim being made).	
Procedural history: this includes: (1) the type of claim: for example it might be a claim for judicial review of administrative action, which in the UK would be made in the High Court (Administrative Division) or; an application to the European Court of Human Rights or; an article 267 reference from a national court to the Court of Justice of the European Union (2) the history of any appeal process that has taken place and a summary of decisions that were made by previous courts lower in the hierarchy.	
Relevant law: (this is the law that is in dispute (either legislation or case law) in the case. This will be a section of an Act or an Article in a convention). A judge in their judgment might mention several sections or laws and will also mention several cases. In terms of identifying the point of law decided it is necessary to identify that part of the legislation upon which the	

determination of the case rests.	
The issues in the case: these are the legal issues (points of law) that the judge has to decide.	
The argument of the parties: an explanation of the arguments presented by either side will usually only be found in judgments within common law jurisdictions that use the adversarial style of trial. The judge(s) will set out the arguments of the parties often pointing out which is the stronger argument and why.	
The legal background and the interpretation of the law: this is a broader examination of the law applicable to the case, the relevant law set out in the box above is the law upon which the case hinges, but the judge is also likely to set out the legislative context of the case and then provide their reasoning based on that law indicating how they are reaching their decision. This information is likely to be useful for a case comment.	
The ratio of the case: this is the legal decision which the judge comes to. It is the point of law decided by the judge(s) and will be a new, previously undecided, point of law and upon which the resolution of the case depends.	
The ruling in the case: this is the result in the case. Here, for example, it is possible to state either that the claimant won or lost their claim/application or their appeal.	

Once a case has been deconstructed in this way it can be reconstructed to form a case note and then used to provide a concise summary of the case at the outset and also form the basis of more in-depth analysis in the body of the case comment.

2.2.2 Reconstructing a legal argument: putting the pieces together

Once a case has been deconstructed it can then be reconstructed. Case notes usually follow a format which, although it varies slightly, will contain

- **The title**
  This includes the case name, the number allocated to the judgment (the neutral citation supplied by the court services), the court in which judgment was given in, the judge(s) who heard the case and gave judgment, the date of judgment.
- **The catchwords**
  These are broken down into:

  (1) three catchwords setting out the subject area into which the case falls so that professional lawyers, academics and others can easily search on databases. For example: “Human rights - Freedom of religion and belief – Manifestation of - …..” This categorisation helps when writing and researching case comments because it is possible to identify other relevant cases which should be considered when researching and which should be referred to in the case comment.

  (2) Sometimes it is necessary to set out a brief explanation of the legal provision subject to dispute in order to make sense of the facts of the case

  (3) A brief set of catchwords explaining the key facts (narrative) in the case. Where a case note does not contain a narrative part explaining the facts then the factual part of the catchwords will be slightly longer. These are written in chronological order. Usually the definite article (“the”) will be omitted.

  (4) The issues in the case, that is the legal question(s) the court considered. The issues listed must match up with the ruling given by the court. When you write out the court’s decision it should answer the questions set out as issues in the case. The issues are set out in the catchwords and the ruling on the points of law (the issues) is set out in the body of the law report or case note of the case

  (5) The legislation subject to consideration and upon which the resolution of the case depended.

- **The narrative and procedural paragraphs**.
  Some reports or case notes contain a narrative, that is an explanation of the essential relevant facts in the case and an explanation of the procedure. These paragraphs expand on the brief explanation of the facts in the catchwords.

- **The holding**
  This is an explanation of the new point of law in the case. It needs to succinctly summarise the decision of the court on the meaning of the legislation or the interpretation of existing case law.

- **Cases considered**
  Some case notes or reports include a reference to the cases that have been considered by the judges and indicate whether they were, for example, followed or distinguished or overruled. This will only apply in common law jurisdictions.

  Here is an example of a report of a case (a headnote) indicating the various sections from 2014 OJLR 3(3):

Church of Scientology of St Petersburg & Others v Russia (Application no 47191/06): European Court of Human Rights (First Section); Isabelle Berro-Lefèvre, Julia Laffranque, Paulo Pinto de Albuquerque, Linos-Alexandre Sicilianos,Erik Møse, Ksenija Turković, Dmitry Dedov: 2 October 2014

Human Rights – Freedom of Religion or Belief – Interference with - Russian law providing that "a religious organisation" was a voluntary association of Russian nationals and permanent residents of Russia formed for the profession and dissemination of faith and duly registered as legal entity - Justice Department carrying out religious study and refusing to register Church of Scientology of St Petersburg as "religious organisation" on grounds of "non-religious" nature of group as well as on technical grounds and on "unreliability" of group's existence for fifteen years – Refusal upheld on appeal to St Petersburg City Court - Whether refusal to register as religious organisation violation of right to freedom of religion in the light of freedom of association – European Convention on Human Rights, art 9 in conjunction with art 11

In the continued absence of European consensus on the religious nature of Scientology teachings the court had to rely on the position of the domestic authorities on the matter and determine the applicable Convention provisions in the light of it: see *Kimlya and Others v Russia*, application nos 76836/01 and 32782/03, § 79, ECHR 2009, and *Church of Scientology Moscow v Russia*, no 18147/02, § 64, 5 April 2007. The Court did

not therefore need to determine whether or not Scientology was a religion because it could defer to the judgment of the Russian authorities on that matter. In any event rather than the groups' 'non-religious' nature, it was the applicants' purported failure to fulfill the requirements of the legal provision establishing a special fifteen-year waiting period that applied only to 'religious organizations' which had been decisive in the Justice Department determining and the Russian court's confirming that the Church of Scientology of St Petersburg was not a "religious organization" within the meaning provided for under Russian law.
The refusal to register the applicants was an interference with their rights pursuant to Article 9 in the light of Article 11. Since none of the grounds invoked by the domestic courts for rejecting the document issued by the Municipal council confirming the church's existence for 15 years was based on an accessible and foreseeable interpretation of domestic law the refusal to register the applicant group had not therefore been in accordance with the law.
Whilst it was not necessary to do so the Court considered it important to reaffirm its position that the lengthy waiting period which a religious organisation had to endure prior to obtaining legal personality could not be considered "necessary in a democratic society": see *Kimlya* and *Religionsgemeinschaft der Zeugen Jehovas and Others*. In so far as the fifteen-year waiting period under Russian law affected only newly emerging religious groups that did not form part of a hierarchical church structure, there was no justification for such differential treatment. Such a provision was peculiar to Russian law and there were no other member States of the Organization for Security and Co-operation in Europe that required a religious organisation to prove such a lengthy existence before registration was permitted. Such a provision was not therefore necessary in a democratic society. The refusal to register the Church of Scientology of St Petersburg as a religious organisation was accordingly a violation of Article 9 interpreted in the light of Article 11 of the Convention (see paragraphs 40- 46).
Recorded at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-146703
Reported by: Hugh McFaul, Barrister, h.j.mcfaul@open.ac.uk

2.4 Deciding upon a topic or case upon which to comment

You may well already have a judicial decision in mind for comment. If not there is a list of catchwords from case notes published in the Oxford Journal of Law and Religion this can be found on the PILARS web page under resources. The cases are listed in alphabetical order according to subject matter and so it is possible to scan the list and decide which cases might be of interest. The list highlights potential comparative analyses that can be carried out between jurisdictions or on different topics.

2.5 Summary

This section has explained how to deconstruct and reconstruct a judicial decision. Section 3 explains the purpose and format of case comments and section 4 sets out the steps that can be taken to carry out discursive analysis.

3 Purpose and format of case comments

Case comments are short pieces of academic writing about judicial decisions. They vary from circa 2000-3000 words, for example the case comments published in the Oxford Journal of Law and Religion, OUP, to between 5000 words for case comments and up to 17,000 words for case notes in the American tradition evident in the Harvard Law Review, The Stanford Law Review and the Columbia Law Review.

This section will consider the purpose and format of case comments using the shorter case comment style used in the Oxford Journal of Law and Religion as a reference point, while also bringing in some examples from the American tradition. When writing a case comment it is important to have in mind the journal or web resource for which the comment is being written in order to identify the format used by the intended publication.

First you will consider the purpose for which the comment might be written.

ACTIVITY

Think about the different ways in which it is possible to analyse a case – for example it is possible to compare the case with other cases in the same subject area or to analyse it in the light of current political trends.

Write out some thoughts on a piece of paper or in an online word document.

END OF ACTIVITY

In the following section you will read about the various ways to analyse a judicial decision.

3.1 Purpose

Case comments provide academic insight into judicial decisions. They are useful to, amongst others, practitioners and those working in the voluntary sector who may not have the time to read around a subject in depth; to other academics studying in similar areas; to the judiciary to assist them in future judicial decision making and to students researching in the area.

A case comment may carry out one or more of the following:

- **Critically examine a judgment of the court to identify whether the court's judgment is or is not, in the light of academic and other opinion, in the author's view, just. If it is deemed unjust then consider what the remedy might be?**

  This involves asking the questions "what is the law established by the judgment", "is the result just?" or "what should the law be"? It may involve sythesising law with another discipline such as theology, philosophy, economics or sociology: see, for example, *A Marginal Victory for Freedom of Religion* by Dr David H McIlroy [2013] 2 OJLR I: 210-216, *The Brüstle and Eli Lilly cases: Creation-God or Humankind?* by Jessica Giles, [2012] I OJLR II: 518-523, *Zgodnie z Obysczajami Religijnymi (According to Religious Rights): A Dissenting Opinion on the Polish Slaughter case* by Joel Silver [2014] 3 OJLR II-347: these case comments are available on open access at: http://ojlr.oxfordjournals.org .

- **Examine the context and background of the case and explore the various arguments presented by the parties. This type of comment can be predictive in nature where the case is still subject to appeal.**

  This involves explaining the legislative context, case law and factual background to the case. It can involve considering how the judgment further develops the law: see for example *The Affordable Care Act Employer Mandate Cases: Regulation versus Conscience on its Way to the United States Supreme Court*, by Eric C Rassbach [2013] 2 OJLR I:200-205 and *Duty or Dignity? Competing Approaches to the Free Exercise Rights of For-Profit Corporations by Spencer Churchill*. 37 Harvard Journal of Law and Public Policy 1171 2014.

- **Explain the background and then the implications of a particular case on an area of law and put forward suggestions for the future application of the case or for reform**.

  This involves understanding the wider implications of the judgment on other areas of law, or on other groups or individuals beyond the immediate parties to the action: see the case comments by McIlroy, Silver, Giles and *Religious Values and Two Same-Sex Marriage Cases Decided by the Supreme Court of the United States* by Lynn Wardle [2013] 2 OJLR 2-462, see also *Questioning Sincerity: The Role of the Courts After Hobby Lobby* by Ben Adams and Cynthia Barmore: Stanford

Law Review online http://www.stanfordlawreview.org/online/questioning-sincerity date accessed 25 November 2014.

- **Create a comparison between the case under discussion and other similar cases.**

  This involves examining other cases that have been decided on the issue and highlighting and explaining similarities and differences: see *Religious Autonomy in Europe and the United States – Four Recent Cases* by Donlu Thayer [2013] 1 OJLR II-510.

- **Present two or more points of view on issues arising in the case in order to come to a conclusion**.

  This involves examining what others with different views have written about the topic or considering the arguments presented by counsel for both sides in the case and reaching a conclusion by weighing these views: see McIlroy page 210 and Silver page 352

- **Create a dialogue with an existing commentary and add some additional original thought to the debate**

  Where a case comment already exists a subsequent author might choose to take issue with a comment that has been made and "reply" to the points made in the earlier comment and then add in some original thought of their own. This creates a useful dialogue between academics on points of current debate: see *Reports of Accommodation's Death Have Been Greatly Exaggerated* response by Elizabeth Sepper in Harvard Law Review 2014 Vol 128:I : see http://harvardreview.org/2014/11/reports-of-accommodations-death-have-been-greatly-exaggerated/

  In each case it is important to ensure that research is carried out to find what has been written about the case or the topic in academic literature. It is also important to add in an original insight concerning the effects or implications of the case.

3.2 Format

Whatever structure is chosen a case comment requires a clear structure and certain basic content. The content needs to include an introduction, a brief

explanation of the case to set the scene with further explanations brought into the body of the case comment as necessary, the discursive argument (analysis) and a conclusion drawing together the points made in the comment.

Case comments differ from longer articles that can be found in legal journals in that they tend to be focused on a particular case or limited group of cases. The explanation and analysis will be limited to the particular case or the issues arising from that case. They will be shorter – a journal article will be 5000 words or longer whereas a case comment will be 2000-3000 words.

3.2.1 Key elements of a case comment: the introduction

A case comment should include a brief introduction. This can explain why the case comment is being written or indicate the importance of the case, for example Thayer, page 510:

> "On 11 January 2012, the Supreme Court of the United States issued its judgment in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission (EEOC)* (132 S Ct 694), the most important religious freedom case to come before the Court since the 1990 *Employment Division, Department of Human Resources v Smith* (494 US 872)."

Or it might provide some context to indicate the tenor of the case comment, for example see *A road cut through the law to get after Orbán?* By Carl Gardner [2014] 3 OJLR III-p 506

> "**Roper:** So now you'd give the Devil benefit of law!
> **More:** Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Robert Bolt, *A Man For All Seasons* (1960) Act I

> On 8 April 2014, the European Court of Human Rights (Second Section) gave a judgment in *Magyar Keresztény Mennonita Egyház and Others v Hungary* (application nos 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12), a case concerning the registration of churches under the controversial 2011 Churches Act. This is among a number of constitutional and legal changes in Hungary that have caused concern internationally, and was referred to in a letter to the

Hungarian government by the then US Secretary of State Hillary Clinton in December 2011:

> The US government is deeply concerned that no modifications have been made to the Law on Churches. Outside observers note the rules for religions to gain recognition are prohibitively cumbersome, and the requirement for two-thirds approval by Parliament unnecessarily politicizes decisions surrounding a basic human right. (http://www.refuge.hu/hillary-clinton-s-letter-to-pm-orban/)
>
> Viktor Orbán's FIDESZ government is widely considered populist and authoritarian. As the Wall Street Journal reported on 31 July this year
>
> "I don't think that our European Union membership precludes us from building an illiberal new state based on national foundations," Mr Orban said in a speech earlier this week. He went on to cite Russia, Turkey and China as successful models to emulate, "none of which is liberal and some of which aren't even democracies." (http://online.wsj.com/articles/hungarys-illiberal-turn-1406829873)."

And Giles pages 518-519:

> "It is difficult to find … anyone who would argue that human beings created the world or human kind. When, however, a step is taken into the world of the patenting of biotechnical inventions… the theological and theoretical ground starts to shift under ones' feet. This commentary will consider the Brüstle and Eli Lilly cases on the patenting of biotechnical inventions and biological material in the light of the deontological and consequentialist basis of the reasoning of the Court of Justice of the European Union and the Supreme Court of the UK, respectively, to seek to discover whether a more cautious approach needs to be taken in the interpretation of the legislative provisions and case law."

3.2.2 Key elements of a case comment: a brief explanation of the case subject to comment.

It is useful to set the context of the case comment by summarising the essential elements of the relevant judgment(s). Further explanation of additional facts and material from the judgment or dissenting judgments can be included in the main body of the case comment to support the discursive argument. However a clear,

brief explanation of the essential facts and the main ruling(s) in the case at the outset is helpful to ensure that the reader can orientate themselves properly when reading the case comment. It might help to fill in a table, such as that set out in section 2, with the details of the case in order to identify the essential elements of the case for inclusion at the outset.

3.2.3 Key elements of a case comment: engaging in discursive argument.

Writing a case comment involves engaging in some form of discursive argument. This involves deciding on the purpose of the case comment as highlighted in section 2 above, carrying out research to provide the basis for the discursive approach to be taken, drawing that research together and writing it up.

In order to understand how to critically engage in discursive argument for the purpose of writing case comments it helps:

- To be able to deconstruct and reconstruct the arguments presented by an author of a journal article or book. In this way it is possible to learn how discursive argument is constructed and to construct some yourself.
- To identify resources using key search terms for use as the basis for the discursive argument
- To compare and analyse the views of different authors
- To weigh arguments and decide which are the stronger
- To think creatively on the basis of what has been read
- To come up with original insights or original ways of dealing with the material
- Pull these together in a focused manner to comment in 2000-3000 words on a specific case or set of cases.

The discursive argument (analysis)

The analysis will reflect the type of case comment that is being written and will involve research being carried out on one or more of the following points:

- The state of the law (legislation and case law) before the judgment was given.
- The effect the judgment has had on the law
- Why the case was treated differently than other previous cases

- What the implications are for other similar cases in the future
- What the implications are on other areas of law
- What commentators have written about this area of law and whether the ruling was accurately anticipated by them or not.
- Whether there is any (contrasting) academic commentary on the ruling
- Interdisciplinary research involving a synthesis with other disciplines such as theology, philosophy (ethics), sociology, political science or economics. This means considering what light these disciplines throw upon the ruling and how the case can be analysed in the context of other disciplines such as these. This involves asking questions about the case such as, “Could the judgment be said to be in line with the tenets of a particular religion?” (synthesis between law and theology). “Can the judgment be said to be in line with a particular aspect of moral reasoning?” (synthesis of law and philosophy/theology). “Were there any political motivations behind the courts ruling and were these acceptable?” (law and politics). You can no doubt think of many different approaches that could be taken. They key here is to understand how the additional discipline with which the law is being synthesised asks questions of itself and other disciplines.

Section 4 will consider the topic of discursive analysis in more detail.

3.2.4 Key elements of a case comment: the conclusion

The conclusion in a case comment should clearly and concisely pull together the main arguments made throughout the case comment and summarise the implications or interim conclusions reached in the body of the writing.

3.3 Summary

This section has covered the purpose and format of a case comment, providing guidance on the specific angle you might choose for writing your case comment and taking you step by step through the various elements of a case comment including the introduction, explanation of the judicial decision, the discursive argument and the conclusion.
The next section will lead you through an exercise in discursive argument.

4 Discursive argument: guided exercise

Section 2 gave some examples of the various types of discursive analysis that can be undertaken. After having decided on the type of analysis it is next necessary to find resources and carry out that analysis, writing it up into a coherent case comment. This section will consider the steps that can be taken to complete this process.

4.1 How to go about arguing discursively and academically

Discursive academic analysis involves considering more than one point of view on an issue, discussing those points of view and weighing them against each other to come to a conclusion as to whether one point of view can be favoured above another. It is also about thinking critically about the issue to come up with some original insights. Even if you personally have an opinion, it is vital to consider the views of others and to take them into account.

4.2 Finding resources

Having decided on the type of analysis it is then necessary to carry out research using key search terms in order to discover sources of information in which others have expressed their opinions. If you are based in an academic institution you will be able to access legal databases such as Heinonline, LexisNexis or Westlaw or ask library staff for assistance. The databases and your own library will have tutorials on how to carry out searches using key search terms.

For a very useful summary of the connectors and Boolean operators for the main databases you can use the Inner Temple library resource at: http://www.innertemplelibrary.org.uk/Guides/usingconnectorsandbooleanoperators.pdf

If you do not have access to a university library then it is possible to use local libraries and do internet searches to find relevant sources. Sources must be reliable and properly referenced.

It is important to consider the reliability of the resources that you use. You can use the Open Universities PROMPT criteria which are available on their OpenLearn site: http://www.open.edu/openlearn/science-maths-technology/computing-and-ict/information-and-communication-technologies/information-on-the-web/content-section-1.7.1

PROMPT stands for:
Presentation: is the material you propose to use appropriately presented?
Relevant: is it appropriate for your research question?
Objectivity: is there bias or is the material objectively written providing balanced analysis?
Method: is it clear how the information was obtained?
Provenance: is it clear where the information comes from?
Timeliness: is the information up to date?

Once the research is complete the material needs to be structured in a logical way presenting a coherent argument. Here are some suggestions as to how a logical structure might be created, there are other ways of structuring a case comment but this provides some initial guidance:

4.3 Judicial reasoning

The judicial reasoning in the case itself might provide a logical structure for the case comment by giving rise to various issues: see for example McIlroy's case comment in which he considered the European Court of Human Rights ruling in *Eweida* under the following headings: (i) an employees right to manifest their religion in the workplace (ii) the individual's freedom to change jobs and whether this guaranteed religious freedom (iii) reasonable accommodation (iv) freedom of conscience (v) the margin of appreciation.

This pattern followed the logic of the courts ruling (points (i), (ii) and (v)), pointing out, in addition, an area which, in the author's opinion, should have been considered but was not ((iii) reasonable accommodation) and discussing the dissenting opinions ((iv) on freedom of conscience).

4.4 Context of the case

Alternatively the context in which the case arose might provide a structure: see Rassbach's case comment where he first explains the legislative context and reactions to it, then he outlines the litigation followed by the legal arguments in the case including analysis on those arguments and finally he considers what might happen next.

4.5 Comparison with other cases

Alternatively the comparison with other cases might provide a structure: see Thayer's case comment where she first explains the ruling in the US case, Hosanna-Tabor, and then explains how the European Court of Human Rights dealt with similar issues in *Sindicatul* and *Fernandez Martinez*.

4.6 Disagree with an existing case comment

If you have read a published case comment and disagree with it you can address the issues discussed in that case comment and carefully present counter arguments. You will need to bear in mind that the reader has not necessarily read the previous comment and so a brief explanation of the judicial decision and the points made by the other commentator will be necessary. Make sure you include some original thought of your own and not just counter arguments: see *Reports of Accommodation's Death Have Been Greatly Exaggerated* response by Elizabeth Sepper in Harvard Law Review 2014 Vol 128:I : http://harvardreview.org/2014/11/reports-of-accommodations-death-have-been-greatly-exaggerated/

4.7 Analyse the judicial decision in the light of another discipline

To analyse a judicial decision in the light of another discipline you can either start with the structure of the judgment itself or you can consider the questions that arise within the other discipline and state those – highlighting how the judicial decision measures up to the analysis provided.

ACTIVITY

This activity involves indentifying various points of view and constructing a summary and coming to your own conclusion on an issue. It assists in developing skills of discursive analysis.

You are going to learn how to deconstruct and reconstruct an argument by listening to an excerpt from the Moral Maze Radio program which you will be guided to below.

This excerpt discusses whether it is ever appropriate to require citizens to forgive the perpetrators of violent acts in order to regain peace and stability in a country. It discuss both the situation in Northern Ireland, where after many years of civil unrest and many deaths, including those of civilians, as a result of bombings, peace was finally brokered. This involved amnesty being offered to certain individuals who had taken part in the violence. It also refers to the situation in South Africa where for years a system of apartheid kept blacks segregated from

whites and treated them as second class citizens. In South Africa the Truth and Reconciliation Committee was set up to seek to enable both sides to move forward peacefully and rebuild South Africa.

- Make sure you have a pen and paper to hand or a word document open on your screen handy so that you can note down the various arguments for and against the issue being discussed.
- As you listen note down the points the speakers make. You can pause the recording to do this.
- When you have done that write out a plan to construct a logical argument presenting arguments for and against the issue of whether or not it is right to require citizens to forgive the perpetrators of terrorist acts in order to restore peace and stability.
- See if you can weigh those arguments and come to a conclusion as to which is the stronger argument.

Here is a table which you might like to use to help you set out the different points of view on the issue:

Views on the issue of whether forgiveness should be forced on a people after civil unrest or terrorist acts in order to bring about peace	**Do I agree/disagree with the view Was the view expressed by the speaker consistent or inconsistent**
Opinion 1 – Michael Portillo: view of the speaker and reasons for their view	
Opinion 2 – Melanie Philips	
Opinion 3: Michael Taylor	
Opinion 4: Kenan Malik	

Opinion 5: (the witness) David Vance	
Which opinion was on balance strongest and why?	
My own view based on a consideration of the above was that ….	

Here is the discussion from the Moral Maze radio program excerpts. Listen to it and make notes. You can pause the recording when you need to: http://www.bbc.co.uk/programmes/b03ktz12 Sat 14 December 2013. Date accessed 29 September 2015.

There is some feedback provided on the following page.

ACTIVITY FEEDBACK

Were you able to identify the different points that each speaker was making? Did you agree with some and not with others?

Here is a short summary of what each speaker thought. I have written in some ideas in the right hand column to provide examples of discursive analysis.

Views on the issue of whether forgiveness should be forced on a people after civil unrest or terrorist acts in order to bring about peace	**Do I agree/disagree with the view Was the view expressed by the speaker consistent or inconsistent**
Opinion 1 – Michael Portillo: view of the speaker and reasons for their view ***There can be justification after a political struggle to impose forgiveness in order to seize stability*** ***Credence should be given to the utilitarian argument that a greater good is served by stability being regained than the interests of a few victims whose pain is ignored.***	Utilitarianism is not necessarily a helpful argument here. Citizen's need to be sure justice is being done – sometimes this means offenders need to be punished. Government may loose its legitimacy where its citizens regard it as perpetrating injustice.
Opinion 2 – Melanie Philips ***It is important to separate out the potential for an individual to forgive and collective forgiveness.*** ***Forgiveness has to be earned through restitution – someone has to make up for what they did.*** ***Forgiveness can never trump justice***	Yes I agree with the first part but not the second part. If forgiveness is for the benefit of the forgiver they need to forgive whether or not the wrong doer has made restitution.
Opinion 3: Michael Taylor ***Forgiveness by individuals and by groups is a virtue, it can benefit the forgiver and the forgiven. Whether it is used depends on the circumstances in which we are called to forgive. The state is there to maintain stability.***	Yes I agree it depends on the circumstances. What worked in South Africa was not necessarily appropriate for Northern Ireland.

Opinion 4: Kenan Malik ***Forgiveness is not a good in itself. It is an open question whether in South Africa, the stress on forgiveness failed to tackle the underlying problems which results in the difficulties still faced by that country today***	The issue of whether the South African experience has succeed is interesting and would merit further research
Opinion 5: (the witness) David Vance ***It is valid for individuals to choose to forgive but if it trumps justice it is difficult to find moral value in it. Forgiveness might have been appropriate for the situation in South Africa but it is entirely. inappropriate to use it in Ireland. Many terrorists walked free after only serving one or two years of their sentence. There should be no appeasement (making concessions to an enemy) of men of violence.***	This is difficult – should forgiveness ever trump justice?
Which opinion was on balance strongest and why?	***David Vance, who spoke from personal experience, was very persuasive. He had obviously thought about and had direct experience in Northern Ireland and thought that justice was more important in order to bring about a longer term good for society. He felt that society was not best served by denying justice to its citizens for the sake of peace. He felt justice did not encompass forgiveness.***
My own view based on a consideration of the above was that ….	***It is difficult to require another person to forgive since forgiveness is an individual choice. Collective forgiveness in terms of the state not***

	punishing terrorists, is something which individual citizens might find difficult to accept but might go along with without personally forgiving what has happened. It is a decision of the government on behalf of its citizens and so only indirectly is it the choice of the citizens. Unless a greater good is achieved it is difficult to find justification for imposing the requirement to forgive. The decision must be made in the context of the political situation in a country and a government would need to be certain of the ultimate good for society. It would be interesting to learn about the effects of the imposition of forgiveness in South Africa, there was evidence given in the Moral Maze that this had not been altogether successful. Until such time great care would need to be taken if a government were to require its citizens to forgive in order to regain peace and stability.

Now reconstruct the argument set out above in your own words. You can use as many paragraphs as you need to do this. Then write a paragraph explaining which argument was the most convincing and why. Finally come to a conclusion indicating your own point of view. Your conclusion will do doubt be very different to the one I have written out above – this is what academic discourse is all about.

Top tip: when you write your own opinion into a piece of academic writing you must not use "I". So no "I think" or "I am of the opinion". You need to write objectively. Use phrases such as "Based on the arguments explained above it could be argued that X holds the most convincing point of view because ……." or "Based on the above arguments it can be concluded that….". "Whilst X's argument is convincing because….. Y's argument is more forceful because…..": it is at this point that you can put in what you think by pointing out what is right or wrong with the arguments presented and which you agree and disagree with.

For some additional ideas see the excellent resources at Manchester University's academic phrase bank: http://www.phrasebank.manchester.ac.uk/being-critical/ Date accessed 29 September 2015.

Write your reconstruction and opinion out on piece of paper or online in a word document and add in any original insights that you have had. You might like to discuss the subject with a friend or relative.

When you write discursive argument you need to break down the information in your sources (journal articles, books, sources from the internet), consider what weight to give it and how it measures up against the tools you are using to analyse the material (for example religious texts, systems of morality, political analysis), then summarise it and write out your conclusions.

5. Style

When you write a case comment for a journal you will be required to apply the style of that journal. This means ensuring that you quote authors in the appropriate way, footnote in accordance with the correct convention and note the use of terminology and capitalisation. So, for example some journals will use a capital "A" for "Article" when referring to an article in a treaty, others will not. The OJLR, for example, requires the use of a capital "A" for article: so it would be necessary to write "Article 9 of the European Convention on Human Rights". You will also need to know how to cite cases and reference articles in accordance with the requirements of the journal.

Check in advance which style is applied so that you can style your work before submitting it.

6. Summary

Section 2 examined how to deconstruct a judicial decision and reconstruct it as a case note. Section 3 then covered the purpose and format of case comments. After considering the various types of case comment, it then explained the key elements of a case comment, and the structure of a case comment. Section 4 explored how to write discursive analysis. Finally section 5 covered the styling of case comments.

Summary of the stages in writing a case comment

Writing a case comment requires you to:

1. Identify the journal or web based organisation that you intend to write for, ascertain length, style and type of case comment required.
2. Identify a case(s) or topic of interest.
3. Find any existing reports or summaries of that case on legal databases
4. Deconstruct the case and write it up as a case note in order to ensure that you have fully understood the essential elements and that you have identified other additional information relevant to the case comment. This can be done using a table setting out various elements that need to be identified.
5. Decide on the type of case comment to be written and carry out appropriate research using key search terms and basing your research on appropriate sources.
6. Carry out some discursive analysis summarising the views of others and coming up with some original insight of your own.
7. Write up the case comment to meet the word count and style requirements of the particular journal OR
8. Find a legal blog and post an informed comment there to test out your ideas and find out what others think.

GOOD LUCK WITH YOUR CASE COMMENT WRITING

APPENDIX 1: Useful sites for finding case law

The UK database can be found at http://www.bailii.org

Cases from the European Court of Human Rights case be found on HUDOC: http://hudoc.echr.coe.int

Cases from the Court of Justice of the European Union can be found at: http://curia.europa.eu

Generally the judgments of the senior courts in any nation state can be found on the web site of that court: for example see the US Supreme Court web site http://www.supremecourt.gov interestingly the US court also enables the public to read the parties submissions in the case.

There are various sites where short digests or notification of law and religion judgments can be found such as:

The Strasbourg Consortium: http://www.strasbourgconsortium.org
Cardiff University Law and Religion Scholars Network case database: http://www.law.cf.ac.uk/clr/networks/lrsncd.html
Law and religion blog: http://www.lawandreligionuk.com

It is also possible to subscribe to the useful and informative ICLRS Law and Religion Headlines http://www.iclrs.org/common/headline.php

PERMISSIONS

Our grateful thanks go to Oxford University Press for freeing access to the case comments referred to in this piece.