English Law and Descent into Complexity
Gray's Inn Reading
Lord Justice Haddon-Cave

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Abstract

The Rule of Law requires that the law is simple, clear and accessible. Yet English law has in become increasingly more complex, unclear and inaccessible.

As modern life becomes more complex and challenging, we should pause and reflect whether this increasingly complexity is the right direction and what it means for fairness and access to justice.

This lecture examines the main areas of our legal system, legislation, procedure and judgments, and seeks to identify some of the causes of complexity and considers what scope there is for creating a better, simpler and brighter future for the law.

Introduction

I am grateful to Gresham College for inviting me to give this year's Gray's Inn Reading.[1] It is a privilege to follow a long line of distinguished speakers from our beloved Inn, most recently, Lord Carlisle QC who spoke last year on *De-radicalisation – Illusion or Reality?*

I would like to pay tribute to the work of Gresham College and in particular to the extraordinary resource that it makes available to us all in the form of 1,800 free public lectures available online stretching back nearly 40 years to Lord Scarman's lecture *Human Rights and the Democratic Process.*[2] For some of us who have not got out much recently, it has been a source of comfort and stimulation, in addition to trying to figure out the BBC series *Line of Duty*.

The slightly provocative but I think accurate title for my talk this evening is: *"English Law and Descent into Complexity".*[3]

The great Ernst Friedrich Schumacher[4] said: *"Any intelligent fool can make things bigger, more complex, and more violent. It takes a touch of genius – and a lot of courage – to move in the opposite direction."* In his pivotal book, *Small is Beautiful: A Study of Economics As If People Mattered,* Schumacher espoused the theories of his teacher, Leopold Kohr[5], that small, appropriate technologies or polities are the way to empower people. Big and complex is not necessarily better than small and simple. So, it should be, I suggest, with the law.

English Common Law

[1] I am grateful to my Judicial Assistant, Seun Adekoya MA(*Cantab*), for his invaluable assistance in preparing this paper.
[2] Lord Scarman, Human Rights and the Democratic Process (gresham.ac.uk)
[3] References to English Law should be read as the law of England & Wales.
[4] E.F. Schumacher (1911-1977), statistician and economist
[5] Dr. Leopold Kohr (1909-1994, economist, jurist and political scientist who opposed the 'cult of bigness'.

I was taught that English Common Law was a beautiful thing.[6] It had a self-simplifying mechanism: elegant Common Law principles would grow tall in the forest and fall like great redwood trees clearing away the undergrowth. But as Sir Stephen Irwin reminded us in his inciteful 2018 Peter Taylor lecture, *Complexity and Obscurity in the Law,*[7] English case law has had its own problems with complexity. From early days, English common law developed incrementally and empirically in a manner which inspired or reflected British empiricists such as Locke, Berkeley and Hume. But over time, *"a complex pattern of established decisions, clear in each case, relatively predictable… became uncertain, unpredictable, and altered in outcome or at least potentially so"*. This was exacerbated by the subsequent contest between the Common Law and the Courts of Equity. The common lawyers' response has been to make ever more elaborate and specific the language in an effort to define legal rights with more particularity. But the ordinary citizen is often *"baffled, dismayed, cynical."* I agree.

Complexity of Our Times

Year-on-year, decade-on-decade, the world and life seems to become more complex (with new technologies, new communities, new demands, new individual and societal frictions, and all at a faster and faster pace). Meanwhile, the law seems to have grown like 'Topsy'[8] : the algorithms and manifestations of the law have multiplied exponentially and become ever more complex and voluminous. The fact is, we labour under the heavy yoke of a lot of law and a lot of dense, complex law at that. Does the law really have to become more complex as the world becomes more complex? Or should we take a leaf out of E.F. Schumacher's book and move in the opposite direction towards simplicity? I venture to suggest that the more complex modern life becomes, the more important it is constantly to strive to simplify the law. Only in this way can we properly meet the increasing challenges and exigencies of modern life and technology, and avoid descending yet further into the morass of legal VUCA[9]. Complexity breeds complexity and a downward spiral to yet more complexity. Complexity undermines the Rule of Law.

We are not alone in the UK in grappling with the virus of complexity. The American political scientist, Professor Steven Teles, coined the term *"kludgeocracy"* to describe the complexity and over-regulation of modern American government. A *"kludge"* is defined by the Oxford English Dictionary as *"an ill-assorted collection of parts assembled to fulfil a particular purpose".*

It is some comfort to know that *klugeocracy* is not a new concern. It also troubled our sixteenth Century monarch, Edward VI[10] who lamented: "*I wish that the superfluous and tedious statutes were brought into one sum together, and made more plain and short"*.[11]

Should Laws Ideally Be Clear, Simple and Certain?

Should laws ideally be clear, simple and certain? Even Homer Simpson would say the answer obviously is yes. But we don't live in an ideal world. I'll come back later to why we seem to find this so difficult in practice.

It is worth reminding ourselves of what three distinguished commentators say about this fundamental aspiration of simplicity.

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[6] Many generations of lawyers like me owe a great debt of gratitude to James Campbell MC, Rt Hon. Sir Patrick Elias and Richard Siberry QC of Pembroke College, Cambridge.

[7] https://www.judiciary.uk/wp-content/uploads/2018/04/speech-lj-irwin-pnba-complexity-and-obscurity-16042018.pdf

[8] See Harriet Beecher Stowe's novel, *Uncle Tom's Cabin* (1852).

[9] Volatility, uncertainty, complexity and ambiguity.

[10] Edward VI (1537 – 1553)

[11] Quoted in *When laws become too complex,* published by the Office of Parliamentary Counsel in March 2013 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/187015/GoodLaw_report_8April_AP.pdf)

In his seminal book, *A Theory of Justice*, John Rawls contemplates the Rule of Law in its substantive form. Rawls posits that there is an essential connection between the rule of law and liberty, as the rules of the legal system are designed for the purpose of *"regulating … conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations".* He goes on to point out that: *"If the bases of these claims are unsure, so are the boundaries of men's liberties.*[12] Rawls recognized that the Rule of Law demands *"that laws be known and expressly promulgated, that their meaning be clearly defined"*.[13] If *"statutes are vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of liberty are uncertain."*[14]

In his indispensable monograph, *The Rule of Law,* (which every judge keeps under their wig), Lord Bingham advances eight principles that comprise the Rule of Law, including the basic precept: *" the law must be accessible, and so far as possible, intelligible, clear and predictable…".*[15] Lord Bingham gave three reasons for this. First, as far as the criminal law is concerned, citizens need to know what it is that they must do or refrain from doing on pain of criminal penalty. Secondly and more generally, if citizens are to claim their legal rights and perform their obligations, they need to know what is required. Third, the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties' rights and obligations were vague or undecided.[16]

And in his marvelous book, *The Constitutional Balance*, the late-lamented Sir John Laws emphasised that the Rule of Law required *"certainty"* as well as *"fairness"*.[17]

See also, for instance, the Select Committee on Constitution Sixth Report which states that laws should be *"open, clear, stable, general"* (as well as applied by an impartial judiciary).[18]

Simple and clear rules are important across both the formal and substantive aspects of the Rule of Law, *i.e.* both the form of laws and the boundaries between individual rights and society.

Complexity hinders access to the law. Accessibility is central to the Rule of Law. It is also a fundamental constitutional principle, recognised in UK law, EU and in the jurisprudence of the ECtHR. Law cannot be accessible if it is unduly complex or unclear. This is particularly true for the disadvantaged in society.

So, we can be pretty sure of one thing - that simplicity in the law is good, complexity is not so good. There is a false comfort in complexity. It may look impressively sophisticated and intellectual but is it sensible and practical?

The same principle applies in most walks of life - that simplicity is generally your friend and complexity is unfriendly and potentially dangerous. As was once memorably said when in the context of examining the causes of the Columbia and Challenge Space-Shuttle accidents: *"NASA was so complex it could not describe itself to others".*[19]

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[12] A Theory of Justice, John Rawls, p. 235
[13] *Ibid.* p. 238
[14] *Ibid*. p. 239
[15] 2010.
[16] Lord Bingham described the third reason as "*rather less obvious, but extremely compelling*"
17 Sir John Laws and The Constitutional Balance, The Constitution Unit, Sir John Laws and The Constitutional Balance | The Constitution Unit Blog (constitution-unit.com)
[18] Paul Craig, The Rule of Law, Appendix 5, Select Committee on Constitution Sixth Report **[DATE?]**.
[19] *The Nimrod Review*, para. 2029
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229037/1025.pdf

Welsh law
I cast a fragrant bouquet in the direction of Welsh law for two reasons. First, Wales has a long and distinguished history of seeking to clarify and simplify its laws. As the many well-read Welsh Benchers of Gray's Inn may know, the preamble to the *Book of Iorwerth* from 1240 notes, the 10th Century laws of *Hywel Dda* involved a codification of the law and the ordering of it into published books: *"And by the common counsel and agreement of the wise men who came there they examined the old laws, and some of them they allowed to continue, others they amended, others they wholly deleted, and others they laid down anew …".* Second, the new Welsh law reform project will be ground-breaking in the United Kingdom and lead to Wales creating codified legislation for the future and presenting the law in ways that help citizens to access it (see further below).

Why Then Is There So Much Complexity in The Law?
Why then is there so much complexity in the law? This is, itself, a complex question which others have written about and would occupy a separate lecture.

I mention a few of the obvious causes:

- An explosion in legislation and regulation over the past 70 years;
- Globalisation and a much more interconnected world at all levels;
- An increasing emphasis on individual 'rights' (some of which Hohfeld might have categorised as 'liberties')[20];

More prosaically:

- An explosion of law reporting (you can find authority for pretty much any proposition);
- The advent of the digital age (and the tyranny of cut-and-paste)
- And (dare I say it) the ingenuity of lawyers thinking of clever and obscure points [(which take a lot of time to work out but ultimately don't advance the sum total of legal knowledge)].

Counsel of Perfection
There is also, an admirable culture of counsel of perfection which had pervaded the development of English law – mostly to its great benefit, namely, a desire to devise laws, rules and exceptions that cover all potential scenarios and achieve uber-consistency and predictability. But this can, sometimes, be self-defeating and lead in practice to difficulty, obfuscation and uncertainty. As Arthur Conan Doyle said, *"A counsel of perfection is easy at a study table"*[21]. As Voltaire said, *"Perfect is the enemy of the good".* Sometimes, the perfect can simply mean lawyers endlessly arguing amongst themselves in their own Tower of Babel. Sometimes, the pragmatic and workmanlike is better than the legally perfect, as well as of more use to society in the long run. Anyway, enough of all that.

The Rise Of 'The Regulatory State'
I would like to turn to highlight one major particular feature which forms the backdrop to this discussion – namely, the rise of what academics have termed *"the regulatory state"* [22] in the UK since the Second World War. This has, of course, been the most significant cause of the volume and density of laws in this country. The privatisation of key industries and public utilities by the early 1950s led to the growth of regulation, with each new[ly?] privatised industry spawning its own regulator.[23] There was a shift from self-regulation by sectors such as accounting, law, medicine and finance, to statutory regulation.[24] There were new statutory protections against social risks, such as workplace health and safety, consumer protection and pollution.[25] There was a significantly enlarged

[20] Hohfeld, *Fundamental Legal Conceptions as applied in judicial reasoning* (1919).
[21] Arthur Conan Doyle in *The Great Boer War, 1900, chapter 7*
[22] *The Rise of the Regulatory State in Britain*, Michael Moran, Parliamentary Affairs, p. 19
[23] Ibid, at p. 21
[24] Ibid, at p. 22
[25] Ibid, at p. 24

public administration. The welfare state grew rapidly in scale and importance and with it regulatory codes to direct the relevant bodies.

The architects of the 1980s privatisations apparently intended the regulation to be temporary. Some commentators believed that such regulation was a means of simply *"holding the fort"* until competition arrived.[26] Instead, the regulation has become permanent. There are good reasons for this - many of the privatised industries were monopolies, the utilities provided essential services, or the industries produced negative externalities.[27] A further catalyst has been the need to implement EU policy through the technique of regulation. [28] A further major cause of regulation has been the desire to manage risks.[29] A lack of effective regulation has led to crises in various industries from the financial crash to foot-and-mouth disease. Increasing public demand for government action on issues such as climate change has meant that the state is likely to play a greater role in the direction of society in the coming years. Regulation is seen as a way to protect society from the failures of the state and business actors.

The regulatory state is here to stay. The Trade and Cooperation Agreement between the EU and the United Kingdom means there will not be a regression of labour, social or environmental standards, and the multiple committees governing the relationship point to more rules not less.

Nostalgia
It is easy to feel misty-eyed about the days when statutes were short and judgments were shorter. And I sometimes do. My favourite statute is the Parliament (Qualification of Women) Act 1918 which is precisely 27 words (which, pleasingly, has not been amended at all in the past 100 years):

> *"s.1. A woman shall not be disqualified by sex or marriage for being elected to or sitting or voting as a Member of the Commons House of Parliament."*

It is easy to feel misty-eyed about the 'Golden Age' of the Common Law (1845-1885) starring Barons Pollock and Parke and, of course, Blackburn J as he was then. Other heroes of mine are Scrutton LJ and Dr Lushington whose judgments regularly did not exceed a few pages.[30]

But let's look at where we are today.

Legislation

Volume of Legislation
The complexity of legislation must be set in the context of its increasing volume. Since the 1970s the number of Acts of Parliament passed each session has fallen from over 70 in the 1970s to

[26] Professor Littlechild S C (1983), The Regulation of British Telecommunications' Profitability, London, Department of Industry, para 4.11. Reprinted in Bartle I (ed), The UK Model of Utility Regulation, CRI Proceedings 31, University of Bath, September 2003. "Competition is indisputably the most effective means – perhaps ultimately the only effective means – of protecting consumers against monopoly power. Regulation is essentially a means of preventing the worst excesses of monopoly; it is not a substitute for competition. It is a means of 'holding the fort' until competition arrives. Consequently, the main focus of attention has to be on securing the most promising conditions for competition to emerge, and protecting competition from abuse. It is important to ensure that regulation in general, and the profit control scheme for BT in particular, do not prejudice the achievement of this overall strategy".
[27] *The Rise of the Regulatory State in Britain*, Michael Moran, Parliamentary Affairs, p. 26
[28] *Capital and Ideology,* Thomas Piketty. The EU budget is only around 1% of the EU's Gross National Income, so its technique of implementing its policy has been primarily through regulation.
[29] *The Rise of the Regulatory State in Britain*, Michael Moran, Parliamentary Affairs, p. 29
[30] See Dr Lushington's judgment in *"The Zephyrus"*(1842) 1 W. Robinson 329 and *"The Charlotte"* (1848) 3 W. Robinson 68.

around 50 in the 2010s.[31] However, this masks the marked rise in pages per Act, which has risen fourfold from 21 pages in the latter part of the 20th century to reach 86 pages in the modern day.[32] During the same period, the average number of clauses included within each act has more than doubled.[33] Likewise, the number of statutory instruments has increased from around 2,000 instruments in the 1970s to an average of 3,000 from 2010 to 2019.[34]

Between 1983 and 2009 Parliament enacted over 100 criminal justice bills and over 4,000 new criminal offences were created. It has been reported that immigration rules and guidance run to over one million words,[35] which is greater than the number of words in all the Harry Potter books combined. What would Professor Dumbledore have said? In the 21st century alone there have been eight Immigration Acts.[36]

Two Types of Complex Legislation

Complex legislation comes in principally in two forms. The first is outdated legislation drafted in another era which is badly in need of reform for the modern age, *e.g.* the laws regulating marriage which have seen little change since their genesis in the Marriage Act 1836.[37] The Law Commission has stated that the current rules are "unduly complex" and "overly restrictive" and in need of modernisation.[38] The second is legislation which is born complex and then repeatedly amended to make it even more unintelligible. The most notorious example is immigration law, which has been universally been criticised by legal commentators and journalists alike.[39] As the Law Commission commented in its recent consultation *Simplifying the Immigration* Rules, a significant cause of complexity has been the prescriptive approach adopted by the Home Office which *"generates a need for frequent amendments in a cycle of 'detail begetting detail'"*. [40] As William of Ockham said, *"entities should not procreate themselves"*.[41]

Another example of the genre is social security legislation which Lady Hale said is supposed to be understood by "anyone who has or may make a claim on it", which is in practice "almost everyone".[42] But we know, the reality is somewhat different – even the lawyers have difficulty. The statutes are unconsolidated and complex in structure. The primary legislation often provides only a skeletal framework to be filled in by secondary legislation.[43] Both suffer from frequent amendment. In his entertaining memoires, *Chance, Cheek and Some Heroics,*[44] Frederic Reynold QC recalls doing a case about a piece of social security and benefits legislation which involved a *triple* negative which neither he, nor his opponent one John Laws (the then Treasury Devil) could understand.

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[31] *Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019*, UK Parliament Research Briefings. 51 in the 2017 – 2019 Parliamentary session

[32] *Ibid*

[33] *Dangerous Trends in Modern Legislation,* Daniel Greenberg, formerly Parliamentary Counsel

[34] *Acts and Statutory Instruments: the volume of UK legislation 1850 to 2019*, UK Parliament Research Briefings

[35] *Complexity of parliamentary legislation 'undermining the rule of law'*, The Guardian, https://www.theguardian.com/law/2013/apr/16/parliamentary-legislation-too-complex-report

[36] *How complex is UK Immigration law and is this a problem?,* https://www.freemovement.org.uk/how-complex-are-the-uk-immigration-rules-and-is-this-a-problem/

[37] Getting Married (2015) Law Commission Scoping Paper, ch 1

[38] Getting Married (2015) Law Commission Scoping Paper, ch 2.1

[39] The case law is consistent stressing the "urgent need to make the law and procedure clear and comprehensible" as recently reiterated by the Supreme Court. *Robinson v Secretary of State for the Home Department* [2019] UKSC 11 per Lord Lloyd-Jones

[40] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 5.

[41] William of Ockham (1287-1347), scholar, philosopher and theologian (who used a preference for simplicity to defend the idea of diving miracles).

[42] Hinchy v. Secretary of State for Work and Pensions [2005] UKHL 16

[43] Complexity, Law and Social Security in the United Kingdom, Neville Harris, European Journal of Social Security, Volume 8 (2006), No 2

[44] Wildy, Simmonds & Hill Publishing (2018), pp.150-151.

Finding the right balance between the prescriptive and permissive is not easy. Too much of the latter risks the arbitrary exercise of discretion by decision-makers. Too much of the former means there is less scope for the application of common-sense in accordance with the policy and purpose of the rules.[45]

Audience of Legislation
It is worth reminding ourselves of the audience of legislation. Formerly, legislation was principally accessed by lawyers; but over the last 20 years legislation has become far more accessible. *Legislation.gov.uk* has between 2 and 3 million visitors per month. This group of people will range from small businesses trying to understand their regulatory environment, to litigants in person who are bringing a small personal injury claim to students who volunteer in Citizen Advice Bureaus. All these users have the same needs: that legislation is simply drafted and easy to understand.

Clear, accessible and effective legislation is fundamental to the health and good-functioning of democratic government.

To be fair, there have been some admirable examples of simpler legislation recently. For instance, first, the *Equality Act 2010*, which harmonised and simplified anti-discrimination law and distilled nine pieces of primary and secondary legislation.[46] Second, the *Consumer Rights Act 2015* which replaced existing consumer protection legislation and provided consumers with new rights and remedies. The Act consolidated eight pieces of primary and secondary legislation.[47]

Office of Parliamentary Counsel Report 2015
In March 2013. the Office of Parliamentary Counsel published an important report entitled *When laws become too complex*.[48] In his powerful foreword, Sir Richard Heaton, First Parliamentary Counsel, wrote*: "[W]e should regard the current degree of difficulty with law as neither inevitable nor acceptable… Excessive complexity hinders economic activity, creating burdens for individuals, businesses and communities. It obstructs good government. It undermines the rule of law. … [A] striking theme of this report is that while there are many reasons for adding complexity, there is no compelling incentive to create simplicity or to avoid making an intricate web of laws even more complex. That is something I think we must reflect upon."*

Good Law Initiative
In April 2013, the Office of Parliamentary Counsel launched the *Good Law Initiative* with the aim of making statutory law *"necessary, effective, clear, accessible and coherent"*. As Sir Richard Heaton said, *"we need to establish a sense of shared accountability, within and beyond government, for the quality of what (perhaps misleadingly) we call our statute book, and to promote a shared professional pride in it. In doing so, I hope we can create confidence among users that legislation is for them."*

I share Sir Richard's hope that we can establish *"a shared sense of accountability"* in this important endeavour. It is time to refresh these ideals and make 'good law' for the 21st Century.

Law Commission
I would like to give a shout out to the work of the Law Commission. The Law Commission was established in 1965 as an independent body to recommend changes to the law that will make the

[45] Simplification of the Immigration Rules (2019) Law Commission Consultation Paper No 242, ch 5.
[46] Including Equal Pay Act 1970, Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003[11] and the Employment Equality (Age) Regulations 2006.
[47] New bill of rights to help business and consumers. New bill of rights to help businesses and consumers - GOV.UK (www.gov.uk). Including the Sale of Goods Act, the Unfair Terms in Consumer Contract Regulations 1999 and the Supply of Goods and Services Act 1982.
[48] https://www.gov.uk/government/publications/when-laws-become-too-complex/when-laws-become-too-complex

law *"simpler, fairer, more modern and cost-effective"*.[49] Under the leadership of the recent chair, Sir David Bean, and current chair, Sir Nicholas Green, the Law Commission has continued its important mission. In 2018, the Law Commission, proposed a new *Sentencing Code* which simplified complex provisions and replaced historic legislation.[50] The Law Commission's proposal was accepted by the government and has been implemented in the Sentencing Act 2020. In 2020, the Law Commission published its report, *The Simplification of the Immigration Rules*[51], which highlighted the complexity of the Immigration Rules, the confusion between rules and guidance which resulted in inefficient and error-prone administration.

The Law Commission's *Twelfth Programme of Law Reform* involves reviewing the law applicable in Wales. In its 2015 consultation paper on the form and accessibility of the law applicable in Wales, the Law Commission set out concerns about the inaccessibility of the law and asked questions about how both the quality of the law and access to it could be improved. In its report, the Law Commission made recommendations to the Welsh Government. It has recommended a programme of legislative activity which will be ground-breaking in the United Kingdom. It would lead to Wales creating codified legislation for the future and presenting the law in ways that help citizens to access it.

Procedure

In case you were getting heady with excitement, I want to turn next to procedure.

Civil Procedure Rules

In his 1996 *Access to Justice* report, Lord Woolf said his task was *"to produce a single, simpler procedural code to apply to civil litigation in the High Court and county courts"*.[52] His laudable aim was, in his words, to *"reduce complexity and make the system more amenable to actual users and more acceptable to ordinary citizens, whether litigants or not; it should reduce the learning and processing costs of courts and lawyers."*[53]

How often have good intentions to simplify led to greater complexity?

In 2013, the Civil Procedure Rule Committee asked itself should the rules simpler? A working party reached the conclusion that radical amendment, so as to produce greatly simplified rules, was simply not feasible within the framework of the CPR as currently constructed. As one contributor put it, it is *"beyond the wit of the Rule Committee"* to simplify the Rules. And there was a real concern that a major attempt at simplification would simply lead to greater complexity – as, indeed, had happened in 1999.

In his 2015 lecture in this series *Civil Litigation: Should the rules be simpler?* [54], Sir Stephen Richards gave a compelling explanation as to the reasons why things have not turned out as Lord Woolf expected them to - and what was intended to be a simplified procedural code has turned out to be substantially larger, and more complex, than the body of rules it replaced. Sir Stephen even brandished a copy of Volume I of the White Book.

Volumes I and II of the current White Book run to over 6,000 pages. In only 20 years of the CPR's existence, there have been at least 124 updates. Beyond the procedure rules and practice directions, there are various protocols, guides and practice statements. Unrepresented litigants must also refer to a 160-page Handbook for Litigants in Person.

[49] Law Commission, Who we are | Law Commission
[50] Sentencing Code, Law Commission. Sentencing code | Law Commission
[51] Simplification of the Immigration Rules: Report, Law Commission Simplification of the Immigration Rules: Report
[52] Access to Justice, page 4, paragraph 7
[53] Access to Justice, page 272, Chapter 20, paragraphs 2 and 4.)
[54] Civil Litigation: Should the rules be simpler? (gresham.ac.uk)

As Lord Briggs observed in his Civil Courts Structure Review, an increasing proportion of court users are self-represented who are *"gravely hampered"*[55] by the complexity of civil procedure, which means that equality between wealthy litigants and the under-resourced is still a distant prospect.

In *Barton v Wright Hassall LLP*[56]*,* the Supreme Court considered the plight of a litigant in person who had served his claim by email, which is only permissible under the Rules only if the other party has agreed to service by email. The Supreme Court decided that service without such prior notification was invalid and, therefore, was the claim. There is no special treatment for litigants in person. The need for non-Byzantine rules which ordinary people can reasonably understand and observe is even greater.

You may be interested to know that the Swiss Civil Procedure Code is only about 100 pages (*i.e.* under 2% of the length of our CPR). It's like the Swiss Army penknife – compact but it can do a lot of stuff.

Some think that our monolithic White Book has become an embarrassment in a modern jurisdiction.

Simplifying the Civil Procedure Rules
As the Rule Committee has observed, radical amendment within the current framework of the CPR is not an easy gig (to put it mildly).

But a glimmer of light lies in innovation - the on-going Reform modernisation programme. The future of the courts and tribunals is digital. The Reform programme is creating new digital platforms for civil, family and tribunal cases. Reform of procedure should be aligned with this – by combining and simplifying the myriad of procedure rules and rewriting them with litigants in person in mind. We might also usefully look abroad for inspiration as to how best to do this.

On-line money courts
A report published in 2015 by an Advisory Group under the auspices of the Civil Justice Council has proposed a fundamental change in the way the court system handles low value civil claims, by the introduction of an internet-based service known as Her Majesty's On-line Court. The best hope for simplification is in starting again with a new way of conducting litigation, as with the On-line Court, and trying to make the whole *process*, as well as the related rules, as simple as possible from the outset. But we will have to wait to see how that works out in practice.

A creative approach should also be adopted to increasing the public's access to the rules. The government must engage with the public and understand their needs, with a view to presenting the rules in an interactive format which is simple and easy to understand. From blogs to podcasts, there are multiple ways in today's digital environment to generate an understanding of the procedure of our legal system.

Justice requires public confidence in the legal system from citizens of all ages. Only after achieving these successes will we be able to truly be able to say that the civil justice system is simpler, cheaper and less time-consuming.

Criminal Procedure Rules
The Criminal Procedure Rules[57] comprise a remarkably impressive body of work over many years of development covering the whole gamut of criminal procedure in magistrates' courts, the Crown Court, the Court of Appeal and, in extradition appeal cases and the High Court.[58] Like most bodies

[55] Briggs LJ, Civil Courts Structure Review *interim report* (paragraph 1.18.5)
[56] Barton v Wright Hassall LLP [2018] UKSC 12
[57] https://www.gov.uk/guidance/rules-and-practice-directions-2020
[58] The CrimPR owe much to the brilliance of the Secretary to the Criminal Procedure Rule Committee, Jonathan Solly.

of rules, they have been developed and refined over many years. I pause to mention them simply to applaud the work which is being undertaken to make the Rules more accessible and easier to understand.

Judicial Review – Is today Wednesbury, Thursbury and Fribury?

I would like, if I may, turn for a moment to discuss the growth of judicial review law which has been one of the remarkable phenomena of English law in the last 50 years. Administrative law now represents one of the largest fields of jurisprudence. There is, of course, much to be admired in the scholastic development of public law remedies.

However, one has to query whether this is a body of public law that has become too complex for its own good, and, frankly, for the good of the public.

Back in the day, you may recall there used to be a case called *Wednesbury*[59] which set out the standard of unreasonableness of decisions by public-bodies which would make them liable to be quashed on judicial review. It is worth reminding ourselves of Lord Greene MR's famous formulation which became known as *Wednesbury* unreasonableness. The Court of Appeal held that it could not intervene to overturn the decision simply because it disagreed with it. To have the right to intervene, the court would have to conclude that:

- in making the decision, the defendant took into account factors that ought not to have been taken into account, or
- the defendant failed to take into account factors that ought to have been taken into account, or
- the decision was so unreasonable that no reasonable authority would ever consider imposing it.

The court held that the decision did not fall under any of these categories and the claim failed. Not a bad test you may think – simple and practical and easy to understand. Since then, however, the constant refinement and Enigma variations on *Wednesbury* and the spawning of a myriad of different public law tests in an attempt to achieve 'perfection' in every scenario has led to a great deal of obscurity and entanglement. Bright lines are no bad thing in the good administration of justice and good government. Not everything can be nuanced.

In the slightly *Alice-in-wonderland* world of close or anxious or intense or quite intense scrutiny in public law, you will forgive me for asking: Is today *Wednesbury* or *Thursbury* and *Fribury*?

Judgments

Can I turn, finally, to my own domain, judgments.

Short Judgments

The shortest judgment ever written was probably Chief Justice John Marshall's six word opinion in *United States v. Barker* (1817) which read simply *"The Supreme Court never pays costs".*[60] There is no arguing with the simplicity of that! Lord Atkin's seminal opinion in *Donoghue v Stevenson* [1932] UKHL 100 only ran to 7 pages of a modern A4 printout. Lord Bingham regarded the judgments of Lord Cooke[61] as *"shining examples [of] simplicity, brevity and clarity"*.[62]

[59] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, especially Lord Greene MR at 229.

[60] *United States v. Barker* 15 U.S. (2 Wheat.) 395 (1817)

[61] New Zealand barrister, British Law Lord and Non-Permanent Judge of the Hong Kong Court of Final Appeal (1997-2006).

[62] See also Lord Neuberger, *No Judgment – No justice*, Lord Neuberger, President of The Supreme Court gives First annual BAIILI Lecture (bailii.org)

Judgments have certainly become longer and more complex since the good old days of Chief Justice Marshall or Dr Lushington. This is partly a function of the fact that many more judgments were given *ex tempore* (orally) then and there were fewer authorities to refer to. But it should be noted that the increase in length of judgments over just the past couple of decades has been remarkable. Professor Alan Paterson noted that the number of paragraphs per case in the House of Lords was 68 paragraphs, but the average number of paragraphs had risen by nearly a third to 89 in the Supreme Court by March 2013.[63] That figure continued to rise such that the average number of paragraphs in Supreme Court judgments in 2020 appeared to be about 100.

I put my hand up straight-away and confess to have written some pretty long and discursive judgments. It is easier, sometimes, to do one's thinking on paper – though not always such fun for the reader. It is also easy to get tempted and distracted into writing about interesting points which are not essential to the outcome of the case. It is not always easy to get the balance right between explaining one's reasoning sufficiently and including too much detail and analysis (and sometimes some legal archeology) which tends to obscure the thrust of the judgment – or lead the reader to lose the will to live. I would but I won't quote Pascal's famous maxim.[64]

We should also be astute to exercise the self-denying ordinance of only dealing with the key points in issue and not be tempted to write *exegesis* on points which don't. Ideally, we should also avoid excessive citation of authority (in particular cutting and pasting large chunks of cases into judgments) and seek in simple form to summarise the principles which apply. Easier said than done actually but infinitely more useful and satisfying. A fine recent example of this is Singh LJ's illuminating judgment in *R (Drexler) v Leicestershire County Council* [2020] EWCA Civ 502 which sought to bring much-needed clarity to the 'manifestly without reasonable foundation' test in the context of Article 14 ECHR (which Lady Hale observed in *R(DA and others) v. Secretary of State for Work and Pensions* [2019] UKSC 21 at [152] was a "difficult question" in administrative law).

In its simplest terms, a judgment should tell the parties why the claim has failed or succeeded and what the law is. It does not always have to be an academic treatise.

Sometimes, to be fair to us judges, we are simply having to deal with the myriad of points and citation of authorities thrown up by counsel. Without raising a cut-throat defence, can I echo the words of Sir Stephen Irwin: *"The excessively long and complex skeleton argument is a curse".*[65] Sometimes hunting in a skeleton for the real point in the case hidden amongst many is like *"Where's Wally?"*.

Sometimes, as Sir Stephen Sedley said the nemesis of the courts has been the photocopier.[66] It is now much easier to tip a whole file into the machine rather than select the documents that are important.

Sometimes a division of labour is useful rather than all appellant judges tilling the same field. As Lady Hale recalls, in *R (Ahmad) v Newham LBC* [2009] UKHL 14, [2009] 3 All ER 755, she and Lord Neuberger "parcelled up the issues and co-operated in answering them but delivered separate opinions".

Sometimes, a measure of judicial archaeology is necessary to scrape away years of accretions of caselaw and comment in order to dig down to the foundations and remind everyone of the simple established principles in that area of law. It involves a lot of judicial midnight oil being spilt but it is

[63] The Second Annual BAILII Lecture, Professor Alan Paterson OBE, 9 December 2013
[64] Pascal wrote*"I would have written a shorter letter, but I did not have the time".*
[65] Stephen Irwin, *Complexity and obscurity in the law, and how we might mitigate them*, Peter Taylor Memorial Lecture, Professional Negligence Bar Association (PNBA), 17 April 2018
[66] *Second Time Around*, Stephen Sedley, London Review of Books, 2007

of great benefit to future generations. A fine example of this is David Richard LJ's recent judgment in *Wood v. Commercial First Business Limited* [2021] EWCA Civ 471 in the field of bribery law.

Conclusion

The genius of our legal system, and particularly the Common Law, has been its flexibility, adaptability and durability over many centuries. Let us all rise to the challenges that the algorithms of the modern world present, and do what E.F. Schumacher recommended, namely KISS. Keep It Simple…

Thank you.