COMPLEXITY AND OBSCURITY IN THE LAW, AND HOW WE MIGHT MITIGATE THEM

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May I begin by giving my thanks to the PNBA for the invitation to deliver this lecture and for your welcome. It is an honour to be here. I have looked back to see who were my predecessors in giving the lecture over recent years, and they are a very distinguished group: Lord Walker, Lord Hope, Baroness Hale and Lord Justice Jackson are amongst the recent speakers.

This has put me in mind of the words of Lord Lane when he became Lord Chief Justice. The Midland and Oxford Circuit gave him dinner, and in thanking them he told them he had looked into his copy of Campbell's Lives of the Chief Justices to discover that the first Chief Justice was called Odo. "And now" he said "you have got Thicko". In his case, misplaced modesty, but not in mine.

Complexity and obscurity are not the same thing. A topic may be inevitably complex with many factors requiring reconciliation, although in any given case not all of those factors will be determinant. Indeed sometimes lawyers create complexity in order to achieve certainty and avoid obscurity. That is a proposition which might amaze the ordinary reader. Elaboration can be necessary.

Let us begin with a little fun. I must give an honourable mention to the PNBA's own Simon Wilton, who has sent me this from: *Symonds - Mechanics of Law Making* (1835):

> "If" he said "a man would, according to law, give to another an orange, instead of saying "I give you that orange," the phrase would run thus: "I give you all and singular my estate and interest, right, title, claim, demand of an in that orange, with all its rind, skin, juice, pulp and pips, and all right and advantage therein, with full power to bite, cut, suck, and otherwise eat the same, or give the same away as fully and effectually as I, the said AB, are now entitled to bite, cut, suck or otherwise eat the same orange, or give the same away, with or without its rind, skin, juice, pulp, pips, anything herein before or herein after, or any other deed or deeds, instrument or instruments, of whatever

> nature or kind soever, to the contrary in anywise notwithstanding.""

There is no arguing with that.

Now I want to go back to basics. Many learned treatises have been written on the development of the common law. You do not need to read far into them, or indeed read many early modern English case reports, to observe certain characteristics of that body of law. The legislature met rarely, sporadically. There was a limited range of statute, augmented sometimes by royal decrees. Social policy was sometimes given the force of law in statute and decrees, but legislation in general did not intrude too far, and was often expressed broadly. The bulk of law was judge made and arose from specific disputes and particular circumstances. Legal learning required a prodigious memory. New cases threw up inconsistencies or tensions, which had to be resolved when those new cases arose. The law grew coherent – where it did so – because there was a centralised body, or bodies, of judges looking at the great swathe of precedent.

It seems likely, does it not, that that approach to law was consistent with and perhaps helped to form the English cast of mind which in philosophical terms has been described as "empirical", in distinction from the supposed theoretical approach of continental philosophers. The term "British empiricists" is said to be the traditional label for Locke, Berkeley and Hume "and for sundry lesser or later figures regarded as sharing their outlook"[1]

In modern terms such an approach to the formation of law and to decision-making might be termed "granular". If you look into the English reports it cannot have been hard to understand each case. (If you could read law French. If you could read). No doubt, as in all places and times, many of those who complained they could not understand a given decision were simply expressing their disagreement with the outcome. The principles of law were really the means of reconciling the particular decisions taken and relied on.

As you will all know, by Tudor times the common law, and more particularly the processes of the common law courts, had become technical. Remedies were inadequate, access could be limited and outcomes often said to be unfair. And thus,

[1] *A Dictionary of Philosophy*, A.R. Lacy, Routledge and Kegan Paul, 1976

fathered by the Lord Chancellors of the day, notably Sir Thomas More, was born equity. Whether More or the other Lord Chancellors of that time were consumed by an altruistic impulse to do justice or were, as principal ministers of the Crown, engaged in extending royal power and curbing the power of the courts, may still be open to historical analysis. However, the fact is that a body of principle grew up which interfered with established law, and courts emerged in which it was possible to challenge and indeed subvert the decisions of the law courts proper. Principle was deployed against precedent. I wonder if you recognise any modern parallels?

Why is that very potted history (Professor Maitland will be revolving in his grave) relevant to the themes of complexity and obscurity? Because a complex pattern of established decisions, clear in each case, relatively predictable, settled, "granular", became uncertain, unpredictable, and altered in outcome or at least potentially so. Then it was worse: a context of jurisdictions, of courts. If you don't like the result, go round the corner to the Lord Chancellor. Naturally much of this arose in connection with property and the transfer of property. Thus the common lawyers' response, seeking to achieve certainty and finality, was to make ever more elaborate and specific the language defining legal rights. And thus, with one bound, we return to the Conveyance of the Orange. Elaborate and complex language is there for certainty, for particularity. But the ordinary citizen is baffled, dismayed, cynical.

So let us now talk about the Civil Procedure Rules. The landmark report by Lord Woolf on civil procedure reform was published on 26 July 1996. I note in passing that the critical intelligence and, one might guess, much of the energy behind the report came from one Rupert Jackson QC, as Lord Woolf made clear in his introduction.

The Civil Procedure Rules in their first iteration came into force on 26 April 1999.

The rules of the Supreme Court which the CPR supplanted – my copy of the last edition rests venerated on the shelf in my room – was in two volumes, totalling 4287 pages, plus Indices and tables.

The 95th update of the Civil Procedure Rules came into force on 6 April of this year: 95 updates in 19 years. Counting the supplements, the Civil Procedure Rules now extends to 6488 pages. To be fair, that includes the indices. The volumes are no bigger but the paper much finer.

Is the CPR any easier to follow than were the rules of the Supreme Court? Is the language more accessible for the litigant in person? Is the overriding objective a bright light shining into every corner of procedure? Or do we more often encounter the overriding objective as a tired old nag lumbering or trotting into view, depending on the energy (or perhaps the desperation) of the advocate? Did any plaintiff not understand that they were a claimant?

In truth, I do not mean to be cynical. The structure of the CPR is a marked improvement on the RSC, and the Practice Directions are genuinely helpful. But the process has been an expansion, with increasing particularity, and increasing "granularity": the process of elaboration to avoid doubt has produced rules of a length and complexity exceeding that of the RSC. As we all well know, litigants in person still flounder. There is still the same tension between the elaboration and particularity helpful to practitioners, especially given the increased level of specialism in legal practice, and the elaboration, detail and difficulties of distinction and language which cause problems for litigants in person (or indeed the inexpert and inexperienced lawyer). I have a suggestion as to how this might be mitigated, to which I will come later.

I turn to statute and regulation. Lord Bingham was a very great judge and his short, masterly book *The Rule of Law*[2] should be by every lawyer's bedside. More to the point, we should all have read it and made our children and friends read it.

In Chapter 3 of his book, Lord Bingham emphasised the need for the law to be "accessible and so far as possible intelligible, clear and predictable". He was absolutely right. He gave his favourite example of regulation made difficult in the attempt to avoid uncertainty[3]. As of course you will all recognise, it comes from the Banking Act 1979 Appeals Procedure (England and Wales) Regulations 1979, which provide that: "any reference in these regulations to a regulation is a reference to a regulation contained in these regulations". As Lord Bingham wrote, no room for doubt there. Of course, the same effect could have been achieved by the drafter when referring to a regulation by using the phrase "in these regulations".

[2] *The Rule of Law*, Tom Bingham, Penguin Books Ltd, 2011
[3] *Rule of Law (ibid),* p.7

Just in case you assume such drafting is a thing of the past, let me quote another example. You may remember that HMG lost some litigation about the so-called "bedroom tax" in 2015[4]. The Department needed to redraft the relevant regulations. They added two new categories to Regulation B13(5) of the Housing Benefit Regulations, by means of the Housing Benefit and Universal Credit (Size Criteria) (Miscellaneous Amendments) Regulations 2017, those being:

> "(3a) a member of a couple who cannot share a bedroom;
>
> (3b) a member of a couple who can share a bedroom."

By way of definition for the purpose of those new categories, a new sub-paragraph (6) was introduced into Regulation 2 of the Housing Benefit Regulations:

> "(6) For the purpose of these Regulations, reference to a member of a couple who can share a bedroom is to a member of a couple where the other member of the couple is a member of a couple who cannot share a bedroom".

What are the reasons for complexity and obscurity in statute and regulation? I suggest there may be three important causes: the volume of legislation; the consequent limits of scrutiny on legislation and regulation; and the multiplicity of sources of law.

As to the last, I promised myself that I would get through this lecture without using the "B" word. I will content myself by saying there is a big change coming – almost certainly coming – which, whatever you may think about some of its other effects, may bring some diminution in the external sources of our law. Some might seek to call this "regaining control". I think it would be unwise to assume that this will bring much in the way of simplification or streamlining of the sources of our law.

Even following departure from the European Union, EU law is likely to enter into our law, and to influence it in a number of ways. Areas such as trade agreements and security may well retain EU law as their governing law in more than one way. The boundaries of EU law are likely to be fertile ground for dispute. EU law will still be available as advisory precedent: a good example would be that decisions on the European Charter may be thought relevant to the application of the European Convention on Human Rights. It seems we will retain membership of the Council of Europe and thus adherence to the European Convention and the maintenance of the jurisdiction of the ECtHR. EU directives will, I think, be likely to be cited on a range of

[4] *Mathieson v Secretary of State for Work and Pension* [2015] UKSC 47

policy issues. Thus it would seem probable that we will have at least two streams of European law continuing to influence our empirical, pragmatic, granular tradition.

The subject of complex statutes is addressed in an impressive paper entitled *When laws become too complex,* published by the Office of Parliamentary Counsel in March 2013[5]. In his foreword, Richard Heaton, First Parliamentary Counsel, wrote:

> "But in my view, we should regard the current degree of difficulty with law as neither inevitable nor acceptable. We should be concerned about it for several reasons. Excessive complexity hinders economic activity, creating burdens for individuals, businesses and communities. It obstructs good government. It undermines the rule of law.
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> … there is no single cause of complexity, but many. That is perhaps not surprising. But for me, 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."

The paper analyses the causes of complexity and the (negative) effects. Sir Richard points out that government bills (and some other bills) are drafted by Parliamentary Counsel, but the great majority of regulations are never seen by Parliamentary Counsel. They are drafted by lawyers in the Government Legal Department. There are 50 Parliamentary Counsel and around 1800 barristers and solicitors in the Government Legal Department.

The volume of legislation is staggering. This is the subject of a recent House of Commons briefing paper entitled *Acts and Statutory Instruments: the volume of UK legislation 1950 to 2016*[6]. Let us first deal with actual statutes, Acts of Parliament. From Table 1b the picture initially looks rosy. In 1992 there were 61 Acts of Parliament, and by 2011 it was down to 30. But, O incautious and optimistic reader, look on! The 80 Acts passed in 1965 took up a total of c1000 pages. In 1992, 61 statutes totalled over 2,000 pages. And in 2014 the 30 Acts took up a little more: still over 2,000 pages. In 2006, the 50 Acts given Royal Assent occupied around 5,000 pages.

As for regulations, well! In 1960, 850 regulations extended to 3,020 pages. In 1980 2,110 regulations extended to 5,440 pages. In 2006, 4,911 new or revised

[5] Obtainable from https://www.gov.uk/government/publications/when-laws-become-too-complex
[6] Obtainable from: www.parliament.uk/commons-library

regulations took up 11,440 pages. The relevant table gives up a page count after 2009 (11,888 pages). Perhaps it was too embarrassing.

Parliamentary scrutiny over this volume of statute law is in truth mostly fictional, and where not fictional, then mostly nugatory. The House of Commons paper[7] reveals, for example, that in the session 2014/2015, 1,378 statutory instruments were laid before the House. These figures, of course, exclude the majority of regulations which were never laid before Parliament. Of these, 27 were considered in the House, and 315 were considered in Committee. It follows that 1,036 out of 1,378 were never considered at all. The same paper reveals[8] that from 2010 to 2016 Parliament never spent more than 33 per cent of sitting time considering legislation at all. The reality is that the burden of ensuring the quality of drafting in regulation and to a large measure in statute depends on the Parliamentary Draftsmen and Government Legal Department. This is an immense burden because of volume, because much of the law is drawn from European instruments, or international instruments, representing sometimes inevitably crude compromises necessary for agreement. Moreover the drafting can be rendered more difficult where political objectives, perhaps particularly populist political objectives, come into play.

A good example which came my way recently arises from the Immigration (EEA Nationals) Regulations 2006. The point concerns the right of appeal to the First tier Tribunal for extended family members ("EFMs") of EEA nationals who have had their residence card application refused by the Home Office[9]. These sought to give effect to Directive 2004/38/EC, within the domestic immigration law context. Regulation 17(4) provided that the Secretary of State "'may issue a residence card" to an EFM, whereas they "must" do so for family members. There was therefore a discretion in relation to EFMs. Regulation 26(1) provided there was a right of appeal against an EEA decision. An EEA decision was defined in Regulation 2(1) as a decision which "concerns" a person's entitlement to be issued with a residence card. The Regulations contained at least three different bases on which the Secretary of State could refuse an application, though it was often unclear how these interrelated. There was a surfeit of cross-references, rather than an absence.

[7] Table 6.
[8] Table 7.
[9] *Khan v SSHD* [2017[EWCA Civ 1755 and *SM (Algeria) v Entry Clearance Officer, UK Visa Section* [2018] UKSC 9

Regulations determining the rights of individuals in the immigration context may sometimes be necessarily complex, but we must ask whether they could not be drafted in a manner which makes them less obscure. In the end, the case turned on none of that, but on the meaning of the English phrase "concerns an entitlement", as the Supreme court subsequently agreed.

Article 8 of the ECHR provides for the right to family and private life. Through Appendix FM to the Immigration Rules, the Secretary of State has sought to prescribe how the Courts should interpret and apply Article 8. The Supreme Court has held that, while the Rules are a relevant consideration, the ultimate question is one of proportionality[10]. The consequence is that tribunals and courts must take account of numerous often overlapping Rules which are complicated and often obscure, but then apply an over-arching principle. Even when the Rules are not met, the individual may still have a valid Article 8 claim. When does the transition occur?

Another example is s.54 of the Immigration Asylum and Nationality Act 2006 which sets out a definition of what constitutes an 'act contrary to the purposes and principles of the United Nations'. Yet it is established law that the provisions of the UN Charter have an autonomous meaning[11], and the House of Lords has said that "it cannot be the case that individual member states are free to adopt their own definitions".

Such attempts at prescribed interpretation bring us directly to what I believe to be the next source of complexity and obscurity, that is to say the current hydra-headed approach to the interpretation of statute and delegated legislation. Again reverting to the historical position, interpretation of statutory language was straightforward, at least in theory. A judge had to discern from the statutory language the presumed intention of parliament, but in a narrow sense. As Lord Reid said in *Black-Clawson International Limited v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, 613:

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words Parliament used. We are seeking not what Parliament meant, but the true meaning of what they said."

In practice, that process can be complicated enough.

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[10] *R (Agyarko) v Secretary of State for the Home Department* [2017] UKSC 11

[11] See Lord Steyn in *R v Secretary of State for the Home Department ex parte Adan* [2001] 2 AC 477 and *Al-Sirri v Secretary of State for the Home Department* [2013] 1 AC 745, at paragraph 36

Since 2000, as a consequence of the Human Rights Act 1988, there arises the question of conformity with the ECHR, meaning that the court will seek an interpretation of a statute or regulation which is consistent with the Convention, and indeed may have to strain to do so, before contemplating a declaration of incompatibility under s.4 of the 1998 Act.

Interpretation of statutory language is then qualified by the principle of legality, as adumbrated by Lord Hoffmann in the famous passage from *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, when he said:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document".

Further, principally drawing upon the civil law traditions in European jurisdictions, we have accepted and developed the "purposive interpretation" of statutory language, looking at the *travaux préparatoires*, and seeking to do exactly what Lord Reid in *Black-Clawson* said we should not do: try and divine what Parliament actually intended, as opposed to the true meaning of the language they used.

As Ronald Dworkin emphasised in his book *Law's Empire*, "law is an interpretive process"[12] a conclusion underscored by the writings of the interesting American judge Richard Posner[13]. For the moment, let us accept the thesis that judicial responses to statutory language will always be interpretive, reflecting not merely the facts of the individual case but the surrounding values of the society within which the

[12] *Law's Empire*, Harvard University Press, 1986, p.87
[13] *How Judges Think*, Harvard University Press, 2008

judge operates. The process is certainly rendered more complex by the multiplicity of interpretive approaches drawn from different legal traditions, and not always well-related to each other. When should one look for a purposive interpretation? How remote may a question be from the language of the ECHR while yet it may validly be argued that a convention right is nevertheless engaged?

One interesting area, where the development of our law in response to such stimuli can be seen, is the nature and extent of the review of administrative or public action. There is no time in the course of this talk to explore the question fully: it has been the subject of learned writing by Sir Jack Beatson[14]. As we know, the common law approach to review of administrative action was to test official action by whether or not it was reasonable, the test classically formulated in the *Wednesbury* case[15]. By contrast, the approach, advancing and increasing even in the civil law jurisdictions of Europe, has been to question whether the action or decision was proportionate. On the face of it that is a much more invasive test. There are some indications that the courts have seen these tests as converging: see Lord Sumption in *Pham*[16]. For present purposes whether that suggested convergence is correct or not is not the point. The variability of the approach is in point.

Let me take stock a little. I suggest that the sources of complexity and sometimes of obscurity we have touched on include the complexity of our procedural rules, difficult statutory and regulatory words derived from the volume of legislation, the lack of scrutiny, the variety of sources and of legal traditions which lie behind the statute and regulation, and difficulties arising from the various approaches to interpretation of statute. All of those factors can form formidable barriers to the increasing numbers of litigants in person. There is a deep irony that, at a time when our law has become more complex, far more voluminous, subject to wider influences and sometimes conflicting approaches, and when the law has for many reasons become more intrusive in the regulation of society in Britain, we have simultaneously far more litigants in person, arising from the severe curtailment of legal aid and also, in my own view, to some degree from progressive curtailment of recoverable costs. I do not intend to embark on a discussion of the merits of restricting costs for lower value clinical negligence claims, but it seems certain that a fair proportion of such claimants will henceforth go unrepresented.

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[14] *Human Rights: Judicial Protection in the United Kingdom*, Sweet and Maxwell, 2008
[15] *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223
[16] *Pham v Secretary of State for the Home Department* [2015] UKSC 19, paragraphs 103-109

Incidentally, it is surprisingly difficult to find official statistics as to the numbers, and the increase in numbers, of litigants in person. Some figures were given in a recent lecture by the Master of the Rolls. Between January 2017 and January 2018, 42% of applicants (i.e. not appellants) to the Court of Appeal were litigants in person. The comparable figure in 2007/8 was 28%[17]. In the Family Court, there were 13,029 applications between April and June 2017.[18] In 36% of these cases, neither party was represented. The Ministry of Justice releases quarterly statistics with a wide range of information on those bringing claims in the County, Crown, and Family Courts. This includes data on parties' representation, or lack thereof. [19] Notably, there is no breakdown by subject area of claim. The MoJ has promised a review of the effect of LASPO which may provide far more detailed statistics, but that has been postponed, and the Lord Chancellor recently announced he thought they would be hard pushed to publish the report before the Summer Recess.

But there is one further important source of complexity and obscurity I have not yet mentioned. It is both a cause of the problem and should provide much of the cure. It is the current approach to advocacy. Here too I begin with the problems, before suggesting the mitigation.

The excessively long and complex skeleton argument is a curse. You know who you are. My clerk writes your name in the black book, held in the archive of the Junior Ganymede Club. Advocacy really is – or it really should be - the art of persuasion. A skeleton argument is not an opportunity to ruminate on the subject in hand, formulating gradually what your case might be. Nor is a skeleton argument properly an opportunity to include passages from that pleasing win you had in front of Mr Justice Over-Generous. Nor to include all those cases in your standard skeleton which might be sort of relevant: a kind of "pick-n-mix" of authority, just in case the other side say something awkward. Nor is the skeleton argument the place to include all those points that might just work if the tribunal is not especially alert on a Friday afternoon close to Christmas. Perhaps especially important, the skeleton

[17]Cited by Sir Terence Etherton MR at paragraph 19 in 'Civil Justice after Jackson', a speech of 15 March 2018 for the Conkerton Memorial Lecture 2018 (https://www.judiciary.gov.uk/announcements/speech-by-sir-terence-etherton-mr-civil-justice-after-jackson/)

[18]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/647323/fcsq-apr-jun-2017.pdf

[19] The latest dataset is at https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2017, Table 1.6

argument is not a place to include a whole range of points advanced by your instructing solicitor or your corporate client, but which you know in your heart of hearts will never succeed.

Nor is drafting your submissions an opportunity to impress your solicitor and client with the breadth of your knowledge. Lord Judge is fond of quoting his sixth form history master who, in the face of an unnecessarily prolix essay, would mark a rebuke in the margin: APK. That stood for "Anxious Parade of Knowledge". Every advocate drafting written submissions should have the principle of "no APK" at the front of their minds.

Then, there is a special ring in hell for the advocate who stands up at 10:31 with the words "My Lady, My Lords, I have prepared a Speaking Note which is on the bench". I have cut my way through the undergrowth of your ill-formed skeleton argument, noting as I go. I have crossed-referred to the submissions of the other side. I have reached a provisional view of what might be your good points and a pretty clear view on the duds. In order to be sure of one of the latter, I have read an extensive witness statement that came to nothing. Now you have finally thought your way properly through your case and abandoned the duds, or most of them. But you have thought of two new points, one of which means that the other side have a legitimate reason to take some instructions, and it now may be in doubt whether the matter can go on today. The timetable was already tight. We will not be able to do anything very useful with the 45 minutes they require. You are a viper from the Pit.

If you in the audience detect an enhanced degree of feeling in this part of this talk, you are entirely right. I am not alone. It is worth looking at the recent strong but somewhat downbeat judgment of Dingemans J in *Bokova v Associated Newspapers Limited* [2018] EWHC 320 (QB), paragraphs 8 – 12[20].

Technology is advancing but paper is still with us. No judicial bromide of this kind would be complete without a mention of Sedley's Laws[21].

[20] See also, *InPlayer Ltd v Thorogood* [2014] EWCA Civ 1511 (Rupert Jackson LJ), paragraphs 52-57
[21] Sedley's Law of Documents, first published in *Judicial Review*, Vol 1, p.37, and republished with minor additions in Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice*, CUP, 2011, pp.228-230

Sedley's Laws of Documents are 11 in number. I cannot read them all, but I do commend them to you. Let me give you the flavour. The First Law reads: "Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical". The Fourth reads: "Every document shall carry at least three numbers in different places", and the Ninth: "(a) at least 80 per cent of the documents shall be irrelevant; and (b) Counsel shall refer in court to no more than 10 per cent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate".

Strictly, such failings are not sources of complexity or obscurity in the law, but they do waste time and can confuse. And I have the uncomfortable feeling that the transition to fully-electronic hearings will produce glitches and muddle in about the same proportion.

So, what may be done to mitigate the problems I have indicated? Let me begin with the rules of procedure. I accept that they need to be granular, specific, highly tailored and thus elaborate. Any attempts to shorten them or make them accessible by generalised principle would seem to me simply to introduce doubt and difficulty. Therefore, I am not recommending another rewrite: Heaven forbid. But the drafters and revisers of the rules should be constantly aware (as I'm sure they are) that the rules need to be operated by litigants in person, and therefore that the language must be as clear and straightforward as possible. In addition, I wonder if there might not be a place for an Introductory Note to each part, and potentially to subsections of the parts, much as there are such notes introducing statutes. An introduction in straightforward language to the overall scheme and purpose of a rule, or part of a rule, might do something to set the litigant in person on the right track when coming to the language of the rule itself. Just as with statute, the wording of the introduction should explicitly not have the force of, or replace the language of, the CPR, but it could encapsulate the objectives of the rule and point up any particular difficulties which can be anticipated.

Turning to statute, and perhaps even more importantly to regulation, the volume of statute and regulation, combined with the very limited scrutiny afforded by parliament will be greatly accentuated in their effect for the next period of years by our prospective departure from the European Union. As I have emphasised, these matters throw a huge weight of responsibility on the Government Legal Department. It seems to me this simple fact needs to be acknowledged in public, and Government

and Parliament must surely take this on board. This responsibility will rest not merely on the small number of parliamentary counsel, but on lawyers scattered across government responsible for drafting and revisions. There is here I believe a long-term problem of capacity which will need to be addressed.

In approaching drafting regulation and statute I hope that the "Good Law Initiative" launched by the Office of Parliamentary Counsel in 2013 may be revived and extended. Now is the moment to do that. There is also good constructive advice in a recent paper by Daniel Greenberg, formerly Parliamentary Counsel, rather dramatically entitled "*Dangerous Trends in Modern Legislation*"[22].

There is room for a real effort to make language simple and to avoid cannibalistic drafting; that is to say where new or revised provision makes reference to a former provision which itself may carry reference to, or language from, a yet earlier formulation. Of course, one can understand why departmental lawyers do this. They are wholly familiar with paragraph 295AE(xvii) of the Poodle and Rottweiler Grooming (Amendment) Regulations 2003 and they wish to carry forward the certainty of meaning which has been achieved, but in the end the process becomes self-defeating. Lay people find the product completely impenetrable. Non-specialist lawyers will make frequent errors. Arguments of a broad nature will frequently be advanced to circumvent the obscurity of the regulation and even specialist tribunals may be pretty unsympathetic to the product. The Immigration Rules provide many classic examples. The Immigration Rules are, in truth, something of a disgrace.

One recognises that ministers will often seek to bring in "political" legislation, sometimes arising from fairly transient, if acute, public concerns of the moment. The Dangerous Dogs Act 1991 is always cited as an example but there are others. Even more than this, attempts by the executive, in legislation promoted by ministers, to enforce particular legal interpretations are best avoided if at all possible. Government lawyers would be wise to advise firmly against such statutory excursions, "Interpretive" provisions which seek to alter or confine the meaning of statutory language, might be thought to come close to a breach of the separation of powers between the executive, the legislature and the judiciary.

[22] Centre for Policy Studies, April 2016 – Obtainable at http://www.cps.org.uk/files/reports/original/160406111534-DangerousTrendsinModernLegislation.pdf

Finally under this topic, it seems to me unrealistic to suggest a codification of the criminal law in current political circumstances. However, it should not be forgotten for the future, for all the reasons given by the Law Commission and the earlier advocates of such reform, including Lord Bingham himself[23]. In due course, codification would be a highly desirable step.

I have touched on the complexity of the canons of interpretation. The courts will no doubt develop their approach to these questions on a continuing basis and in a way that one might describe as "organic". It may be that the formal departure from the European Union will instigate something of a swing back towards more traditional, common law approaches to statutory interpretation. What I believe might be helpful here is some intensive academic focus, and a greater emphasis on statutory and regulatory interpretation in the teaching of advocacy and of those training to be advocates. I am not now so much considering the rather rarefied philosophical considerations addressed by Dworkin and other jurists, but rather the teaching of undergraduates and of those training to be advocates. What is the battery of approaches to interpretation of statute? When should the various tests be applied? How do they relate to each other?

Turning to advocacy, it will have been pretty clear from my recitation of what goes wrong as to how it may be put right. It is not a matter of straightforward mathematical limits on font size, length of submissions and so forth. The heart of it is that advocates should, please, concentrate on the function of advocacy. Written submissions are not permissible which are simply a regurgitation of the memory, either of the advocate or of the word processor. The function of advocacy is to persuade the tribunal. Nothing is persuasive unless it is selective and given emphasis. Advocates must have the courage, having thought through the case, to choose the propositions and arguments which really are important, and which truly have a prospect of success. Selection and clarity, backed up only by the necessary case citation, and by cases which are apt in context, will always aid success. Anything less focussed will irritate and may risk success. Remember Lord Judge's history master and avoid the Anxious Parade of Knowledge.

Moreover, if the case does require a long or longish skeleton argument (let us say more than eight pages), at least begin with your key propositions. What are you

[23] *The Business of Judging*, Tom Bingham, OUP, 2000, p.295 et seq.

trying to establish? If you have the courage and can achieve the clarity to say so simply at the beginning, then the arguments, for better or worse, will fall into place behind.

In his essay on “Judicature”, the great Sir Francis Bacon wrote:

> “Judges must beware of hard constructions and of strained inferences; for there is no worse torture, than the torture of laws.”

I think you have had enough torturing for one evening. Thank you very much for listening.

Stephen Irwin