READING

'The Rule of Law requires that the law is simple, clear and accessible. Yet English law has become increasingly more complex, unclear and inaccessible. As modern life becomes more complex and challenging, we should pause and reflect whether this increasing complexity is the right direction and what it means for fairness and access to justice.'

Thus did Master Haddon-Cave set out the foundation for his Reading. He went on to observe that from early days English common law had developed incrementally and empirically, but that, over time, 'a complex pattern of established decisions, clear in each case, relatively predictable [had become] uncertain, unpredictable, and altered in outcome or at least potentially so'.
He suggested that the more complex modern life had become, the more important it was constantly to strive to simplify the law; that complexity undermined the Rule of Law; and that accessibility was central to the Rule of Law – law could not be accessible if it was unduly complex or unclear, particularly for the disadvantaged in society.

WHY HAD IT BECOME SO COMPLEX?

A few of the obvious causes were: 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'; an explosion of law reporting (you can find authority for pretty much any proposition); the advent of the digital age; and the ingenuity of lawyers thinking of clever and obscure points.

There was, he said, also an admirable culture of counsel of perfection which had pervaded the development of English law – mostly to its great benefit – but which could, sometimes, be self-defeating and lead in practice to difficulty, obfuscation and uncertainty. Sometimes, the pragmatic and workmanlike was better than the legally perfect, as well as of more use to society in the long run.

THE RISE OF THE REGULATORY STATE

This, said Master Haddon-Cave, had been the most significant cause of the volume and density of laws in this country. The privatisation of key industries and public utilities had led to the growth of regulation. There were new statutory protections against social risks, such as workplace health and safety, consumer protection and pollution. There was a significantly enlarged public administration. But there were good reasons for this – many of the privatised industries were monopolies, the utilities provided essential services, or the industries produced negative externalities. The regulatory state was, however, here to stay.

LEGISLATION

The complexity of legislation had to be set in the context of its increasing volume. While the number of Acts of Parliament passed each session had fallen from over 70 in the 1970s to around 50 in the 2010s, the number of pages per Act had risen fourfold and the average number of clauses had more than doubled. Likewise, the number of statutory instruments had increased from around 2,000 to an average of 3,000 from 2010 to 2019. Between 1983 and 2009 over 4,000 new criminal offences had been created; and it had been reported that immigration rules and guidance ran to over one million words.

Master Haddon-Cave observed that complex legislation came in principally in two forms. The first was outdated legislation. The second was legislation that was born complex and then repeatedly amended to make it even more unintelligible.

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

Formerly, legislation had been principally accessed by lawyers, but over the last 20 years legislation had become far more accessible. Legislation.gov.uk had between 2 and 3 million visitors per month. Clear, accessible and effective legislation was fundamental to the health and good-functioning of democratic government.

POSITIVE SIGNS

There were, however, some admirable examples of simpler legislation recently. The Equality Act 2010 had simplified anti-discrimination law and distilled nine pieces of primary and secondary legislation. The Consumer Rights Act 2015 had consolidated eight pieces of primary and secondary legislation and provided consumers with new rights and remedies.
Master Haddon-Cave also referenced a report by the Office of Parliamentary Counsel entitled 'When laws become too complex' and its 'Good Law Initiative' which

AT BARNARD'S INN

English Law and Descent into Complexity

GIVEN BY MASTER CHARLES HADDON-CAVE

REPORT BY MASTER CLARE NOON

had the aim of making statutory law 'necessary, effective, clear, accessible and coherent'. And he praised the Law Commission, which continued its important mission to recommend changes to the law that would make the law 'simpler, fairer, more modern and cost-effective'.

CIVIL PROCEDURE RULES

In 2013, a working group of the Civil Procedure Rule Committee had 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. 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 had been at least 124 updates. Beyond the procedure rules and practice directions, there were various protocols, guides and practice statements. Unrepresented litigants must also refer to a 160-page 'Handbook for Litigants in Person'.

But a glimmer of light lay in innovation. The Reform Modernisation Programme was 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.

CRIMINAL PROCEDURE RULES

The Criminal Procedure Rules comprised 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, the High Court. Like most bodies of rules, they had been developed and refined over many years. Master Haddon-Cave made mention of them simply to applaud the work being undertaken to make the Rules more accessible and easier to understand.

JUDICIAL REVIEW

The growth of judicial review law, said Master Haddon-Cave, had been one of the remarkable phenomena of English law in the last 50 years. Administrative law now represented one of the largest fields of jurisprudence. While there was much to be admired in the scholastic development of public law remedies, one had to query whether this was a body of public law that had become too complex for its own good, and, frankly, for the good of the public.

Master Haddon-Cave turned to Lord Greene's famous formulation: '*Wednesbury* unreasonableness', when the Court of Appeal held that it could not intervene to overturn a 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 failed to take into account factors that ought to have been taken into account; or that the decision was so unreasonable that no reasonable authority would ever consider imposing it. Not a bad test – simple and practical and easy to understand. Since then, however, the constant refinement and variations and the spawning of a myriad of different public law tests in an attempt to achieve 'perfection' in every scenario had led to a great deal of obscurity and entanglement. Bright lines were no bad thing in the good administration of justice and good government. Not everything could be nuanced.

JUDGMENTS

Judgments had certainly become longer and more complex since the good old days of Chief Justice Marshall or Dr Lushington – partly because many more judgments were given ex tempore then and there were fewer authorities to refer to. But the increase in the length of judgments over just the past couple of decades had been remarkable: the average number of paragraphs in Supreme Court judgments in 2020 appeared to be about 100.

Master Haddon-Cave urged his fellow judges to 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 weren't. Ideally, excessive citation of authority (in particular cutting and pasting large chunks of cases) should be avoided. He did, however, point out that judges often had to deal with a myriad of points and citation of authorities thrown up by counsel, and sometimes a measure of judicial archaeology was necessary to scrape away years of accretions of case law and comment in order to dig down to the foundations and remind everyone of the simple established principles in that area of 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 …' ■