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1

Introduction

> Laws are like cobwebs, which may catch small flies but let wasps and hornets break through.[1]

1.1 The Challenge of Balance

We all want laws and rules. If we play football, we need the rules of the game. If we drive a car or ride a bike, it can be life-saving to have a Highway Code. If we live in a flat, it is critical to have building regulations to ensure that the risk of the block being engulfed in flame is minimal. We of course need rules and conventions to oil the wheels of social intercourse, to protect the weak against the strong and to limit the need to inquire about everything. In general we can expect that our packaged food does not poison us, or that people do not drive on the road who whilst drunk might kill us or that the washing machine does not electrocute us the first time we load it. Laws (and regulators, a modern form of policeman) can not only protect us but also make our lives easier and save us time and effort.[2] The existence of the rules and of the policemen does not provide a guarantee that we are protected, but it improves our chances of a comfortable life.[3] We need laws and policemen.

[1] Jonathan Swift, *A critical essay upon the faculties of the mind*, 1707 (contributed by John Boyd).

[2] As explored in William Goldman's novel *The lord of the flies*, Faber, 1954.

[3] For a balanced articulation of the dilemmas of regulation, see e.g. speech by Nick Clegg, then UK Deputy Prime Minister, *DPM announces plans to cut red tape for small business*, 25 October 2011, on the DPM website. And for a more dispiriting analysis of regulation, see John Seddon, *The Whitehall effect*, Triarchy Press, 2014, Chapter 14: *Regulation is a disease*, which considers in particular how the vision of the Camphill Village Trust dedicated to supporting people with mental health disabilities was destroyed by well-meaning regulation. For an amusing and mostly sensible rant, see Ross Clark, *How to label a goat: the silly rules and regulations that are strangling Britain*, Harrisman House, 2006. A more academic review is Martin Lodge and Kai Wegrich, *Managing regulation: regulatory analysis, politics and policy*, Palgrave Macmillan, 2012.

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In modern times we can see very clearly what happens where there are few or inadequate rules. For example, one of the first requirements for the newly liberated Russian state in the 1990s was the introduction of a system of commercial law that would make it easier for trade and industry to prosper. Understandably, Western companies were reluctant to engage in trade with and establish businesses in, and provide capital to, the new Russia unless their interests were protected. There needed to be honest courts where rights could be enforced and a general benchmark of commercial standards under which businesses could trade. All societies need a system of law, and sometimes, as social and economic affairs become more complex and sophisticated, they need a more complex and sophisticated system of law.[4] And in countries, such as Zimbabwe, where the rule of law has all but evaporated, the population dreams of more and better law – or more probably at least a just and effective application of the existing law. The rule of law is a mark of a civilised society.[5]

The question this book attempts to deal with is whether we can have too much of a good thing. Trying to comply with the employment laws (whether employer or employee), or trying to understand the rules for tax relief on pension contributions or trying to organise a school trip whilst complying with the safeguarding and health and safety rules can sometimes feel overwhelming. And there is no doubt that there are many more rules than there used to be, affecting much more of what we do. Few, apart from anarchists, hermits and fundamentalist libertarians, think we can manage without at least some rules, but there seems to be a general consensus that we may have overdone it a touch in recent years. Even the least grumpiest amongst us regale each other with stories about legislative and regulatory excess, some of which may perhaps be urban myth (or *Daily Mail*/Fox News myth) but many of which seem grounded in reality and experience.

[4] Navroz Dubash and Bronwen Morgan, *The rise of the regulatory state of the south*, Oxford University Press, 2013, discusses economic regulation in developing countries, two aspects of regulation not covered by this book. For economic regulation generally, there is a vast literature, but see Christopher Decker, *Modern economic regulation*, Cambridge University Press, 2015.

[5] The UK has one of the more robust systems, but see e.g. Tom Bingham, *The rule of law*, Allen Lane, 2010, for a jaundiced analysis of where the state of England and Wales currently is in relation to the rule of law. Lord Bingham was Lord Chief Justice and one of the most admired justices of modern times; the book is both one of the most penetrating analyses of the situation and one of the most readable. It won the 2011 Orwell Prize for literature.

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Are we indeed over-regulated? To try to answer this question, it might be sensible to ask some basic questions:[6]

- whether there is in fact an *excess* of regulation, and how we might decide that is the case, and in particular
- whether we need the *quantity* of the rules and regulations that affect us on a daily basis,
- whether the *quality* of the rules that we do need is satisfactory,
- whether the rules sometimes do us *more harm than good*,

and, if rule making is badly implemented,

- whether there is anything that can be done about it, and if so
- what should be done?

While the questions may be simple, the answers are not always easy to find, largely because any legal system depends on balancing the rights and obligations of the individual and society. Getting that balance right is an art, and it is inevitable that sometimes we will get it wrong. The issue is not whether we are in fact getting it wrong but whether we are getting it more wrong than we should.

There are obvious dilemmas (and unintended consequences) in the operation and design of laws and regulations. In some cases what may be bad or unnecessary law to one may be critical to the existence of another. It is not always clear whether law is good or bad, and rather messily, the truth may sometimes lie in the mud of no-man's land.[7]

1.1.1 Good Law

New laws can do an astonishing amount of good, albeit not necessarily always the good intended.[8] For example the UK Protection from

[6] Complaints about the legal system are explored in more depth in Chapter 2. And see Jason Hazeley and Joel Morris, *The Ladybird book of red tape*, Michael Joseph, 2016, and Josie Appleton, *Officious: rise of the busybody state*, Zero Books, 2016.

[7] See e.g. the debate in the US in January 2011 about the alleged need to protect copyright which led to a one-day 'strike' by Wikipedia in relation to proposed US legislation SOPA (Stop Online Piracy Act) and PIPA (Protect Intellectual Property Act) (20 January 2012). And see *Over-regulated America: the home of laissez-faire is being suffocated by excessive and badly written regulation*, The Economist, 18 February 2012: 'Every hour spent treating a patient in America creates at least 30 minutes of paperwork, and often a whole hour. Next year the number of federally mandated categories of illness and injury for which hospitals may claim reimbursement will rise from 18,000 to 140,000. There are nine codes relating to injuries caused by parrots, and three relating to burns from flaming water-skis.'

[8] Rory Sutherland, *How good laws change our ways*, Spectator, 19 July 2014: 'Good laws can make a habit easier to adopt by making it universal (the Greek word for "law" – nomis – also

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Harassment Act 1997 was introduced to protect women (mostly) from sexual harassment in circumstances where the existing legal protections seemed insufficient. And it seemed to be a useful law for that purpose.

Its use was soon expanded in practice to protect employees in the workplace against bullying – and later to prevent individuals being hassled for money by large corporations whose computers were unable to accept that no money was owed. This later extension was largely the work of one woman, Lisa Ferguson, who ran a small business and who decided to change her gas supplier from British Gas to nPower. She paid her final account with British Gas, but between August 2006 and February 2007, British Gas sent Ms Ferguson bill after bill and threatening letter after threatening letter.

Nothing she could do would stop them. There were three threats: to cut off her gas supply, to start legal proceedings and, a matter most important to her as a businesswoman, to report her to credit-rating agencies. She had written frequently to British Gas, pointing out that she had no account with British Gas, and she had also made numerous fruitless phone calls (with the usual difficulty of getting through). Mainly her letters received no response, although sometimes she received apologies and assurances that the matter would be dealt with.

Meanwhile the bills and threats continued. So she tried other means. She complained to Energy Watch, an official consumer protection body. She wrote to the chairman of British Gas, twice, with no response. Even when her solicitor wrote on her behalf about an unjustified bill in January 2008, no response was received. There seemed little she could do. Then she or her legal advisers had a brainwave.

She issued proceedings in her local court to claim that British Gas's course of conduct amounted to unlawful harassment contrary to the Protection from Harassment Act 1997. She was open about her reason for bringing the proceedings. It was mainly not to claim damages for herself – she said she would give a substantial proportion of any sum awarded to charity.

British Gas were worried; they asked the local judge, before he decided on the merits of the case, to refer the matter to the Court of Appeal to

means "custom" or "social norm").' See also David Colander and Roland Kupers, *Complexity and the art of public policy, solving society's problems from the bottom up*, Princeton University Press, 2014, which explores the case of the German *Reissverschlussverfahren* (traffic zipping), which directs traffic merging where there is a constriction, which is adopted by German drivers but has proved impossible to enforce in the Netherlands, perhaps because of cultural norms.

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decide whether the local judge could in fact use the act for this purpose. She succeeded beyond all expectations despite having to face British Gas's impressive legal arsenal and their fragile defence that it was all the fault of the computer.

Of course, the reason that British Gas fought back so strenuously was not only that they would have to expensively upgrade their staff and their computer software to provide a more humane service if she succeeded – and maybe compensate many other similarly aggrieved customers or former customers – but that if they failed to rebut Ms Ferguson's charges, the main board of directors would be vulnerable to criminal convictions for harassment. Harassment under the act is both a civil and criminal offence. If British Gas were convicted of harassment, its directors could face fines, they would be prohibited from travel to the US – and they might even serve short terms of imprisonment.

It is possible that the three judges of the Court of Appeal who allowed Ms Ferguson to pursue her claim had also in their time suffered at the hands of large corporations; Lord Jacobs in one of those Denning-like orations that are nowadays rare in judgments held,

> It is one of the glories of this country that every now and then one of its citizens is prepared to take a stand against the big battalions of government or industry. Such a person is Lisa Ferguson, the claimant in this case. Because she funds the claim out of her personal resources, she does so at considerable risk: were she ultimately to lose she would probably have to pay British Gas's considerable costs.[9]

The Court of Appeal in the end decided that the local judge could indeed use the act to protect Ms Ferguson – but very sensibly, British Gas settled out of court before he had the chance to send the directors to prison. Those who had initially promoted the introduction of the act could never have dreamt that their efforts would be applied in employment cases or to control the practice of major corporations using their disproportionate powers against an individual; indeed, had they anticipated it, it is likely that the act would have been amended to restrict it to non-commercial areas of activity. It is a prime example of the almost inexorable

[9] Lord Jacobs in *Ferguson v British Gas Trading Ltd* [2009] EWCA Civ 46, 10 February 2009, para. [1]. The Protection from Harassment Act 1997 was reviewed by the Home Office in 2000 to explore how often it was used – but did not anticipate its use, as in the *Ferguson* case (*An evaluation of the use and effectiveness of the Protection from Harassment Act 1997*, Home Office Research Study 203, 2000).

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application of the law of unintended consequences with a (not to British Gas) beneficial ending.

1.1.2 Bad Law

While there are many examples of laws helping people, and righting wrongs or fixing problems, there are also examples of laws which are less successful. Anecdotally (there are few academic studies on the point), many examples of new legislation involve unintended consequences with malign or certainly counter-productive endings.[10] There is any number of serious examples of such legislation. One minor though equally illustrative example is that of government policy on the provision of garages in homes; it partly depends for its impact on an understanding that cars, unlike computers, have added weight over the years. A current MINI is much larger than an original Mini.

In 1999 the government required housebuilders to discourage car ownership by making it difficult to park and in particular by providing undersized garages, not by law but by fiat, a guidance equivalent to law in many respects. In 2009, however, a study by Essex County Council found that 78 per cent of garages were not being used to store vehicles, largely because a trend towards larger cars and 4×4s meant that many did not fit comfortably inside the space. Rather than reducing car usage, the policy turned modern housing developments into obstacle courses for pedestrians and cyclists, who routinely found pavements and cycle paths occupied by cars with nowhere else to park.

In 2009 Essex rejected government requirements and issued its own guidelines that required larger garages and driveways, more parking spaces per dwelling, bigger on-street bays and at least 25 extra spaces for visitors for every 100 homes. The new parking standards were treated as a minimum rather than, as before, a maximum, and developers were made free to offer as many spaces as they believed their customers sought. The minimum was increased to seven metres by three metres (23 feet by 10 feet), as opposed to the former guidance of five metres by two and a half metres – and any home with two or more bedrooms required at least two spaces.

[10] See e.g. in relation to the otherwise much-lauded Companies Act 2006 Arad Reisberg, *Corporate law in the UK after recent reforms: the good, the bad and the ugly*, in *Current legal problems*, Oxford University Press, 2011; and Nick Gould, *Common sense – the dark matter of business law*, paper given at University College London, Centre for Commercial Law, February 2011.

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The council found that planning guidance issued between 1998 and 2001 had created a severe shortage of spaces in many developments. Families had responded not by giving up their second car but by parking on narrow residential roads, blocking access for emergency services and refuse collection lorries. There were more than one and a half cars per home in 35 per cent of council wards in Essex; nationally, there were more homes with two or more cars than there were homes without a car. Indeed, the proportion of carless households fell from 45 per cent in 1976 to 24 per cent in 2006, while over the same period, the proportion of homes with two or more cars rose from 11 per cent to 32 per cent.

Essex council's then 'Cabinet member for transport', Norman Hume, articulated the dilemma for lawmakers in political-speak: 'This new parking guidance is a radical break from the past failed approach which has seen local communities blighted by parked cars. We are effectively asking people whether we should continue living in neighbourhoods that often have the appearance of disorganised car parks or if instead we should look much more closely at how we accommodate the car to allow a better quality of life for our residents.'[11] The law had been used, in other words, to try to change social behaviour and had failed to respond to the way in which people had worked round it to achieve their own aspirations. The frustration of lawmakers in trying, often hopelessly, to use law to create rather than reflect change is a recurrent theme in many of the recent political memoirs.[12]

[11] Ben Webster, *Limit on garage size reversed to bring drivers back off the streets*, The Times, 17 March 2009. Department of Environment, Transport and Regions, *A new deal for transport: better for everyone, 1988*; cf. Essex County Council, *Regional planning guidance 9 and planning policy guidance 13*, March 2001. There was as ever a different view. The Campaign for Better Transport, which promotes alternatives to cars, said that Essex was undermining a decade of work to help people to become less car dependent. Its director, Stephen Joseph, said, 'Essex will create a new generation of car-dominated estates, causing congestion and pollution. In the guise of offering freedom, people will be locked into car dependency. Homes will be too spread out to make good public transport feasible.' He said that Essex should have adopted the approach elsewhere (e.g. in Cambridge and Kent Thameside) where clusters of new homes were being built close to dedicated bus lanes offering fast, regular services. The then 'Cabinet member for planning' in Essex said, 'Whether you like it or not, you have to live with the car. Rationing parking spaces doesn't stop people owning cars, it just means they park where it is most inconvenient for everyone else.' He later explained that Essex was considering reducing the number of people commuting by car by other means, including imposing a charge on workplace parking spaces. Cf. Essex County Council, *Parking standards: design and good practice, Consultation draft*, March 2009.

[12] See e.g. Chris Mullen, *A view from the foothills*, Profile Books, 2009. Sir Michael Barber, an adviser to Tony Blair, operated a theory of deliverology, later much criticised as making

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1.1.3 *Three Strands of Lawmaking*

Assuming that in fact we do have too much law,[13] and assuming too much law can be damaging,[14] it seems helpful to explore first how we make our law. It is handy to look at three main strands of lawmaking, the legislators, the courts and the regulators, and explore the strengths and weaknesses of each of them in separate chapters.

As Bismarck is famously said to have remarked, 'Laws are like sausages. It is better not to see them being made.' But looking at how dysfunctional our system really is may help to explain why long, complex and inappropriate legislation seems to be the norm. In a post-Bismarckian world, it might perhaps be said that law, like chocolate, can be a delight, but too much can make you sick. Indeed, the system is now such that the legal-sugar overload is causing obesity and ill health throughout the legal body politic – and that lawmaking, like sugar, is addictive.

The book treats law and regulation as separate items, and the later individual chapters on both law and regulation seek to explain some differences between the two and the reasons why regulation seems to have expanded even faster than law. So far as the citizen is concerned, there may seem to be little difference, but to the policy maker, it is sometimes easier and less confrontational to have a regulator impose controls than to employ the machinery of central government. In theory, there are also useful philosophical benefits; a regulator can in theory use discretion, rather than black-letter law, to impose more practical and less heavy-handed controls than a prescriptive legal system needs to do. As we shall see, although the theory seems fine, the reality may be somewhat different.

From time to time it is suggested that concerns about excessive rule making are overdone and that, in a complex society, it is inevitable that we will require sophisticated legal structures. This is self-evident, but even establishment bodies are concerned about excess; the 2015 UK Conservative government introduced a Cabinet sub-committee

things worse by the management thinker John Seddon; see Barber, *Instruction to deliver: Tony Blair, the public services and the challenge of delivery*, Politico, 2007. It explained that while a Prime Minister could attempt to operate a lever for change, policy would not necessarily respond on the ground.

[13] See Chapter 6 on unregulation, where the assumption is illustrated by a description of government initiatives.

[14] See e.g. Bruce Bartlett, *How excessive government killed ancient Rome* [1994] 14(2) Cato Journal 287; Christine Parker, *The 'compliance' trap: the moral message in responsive regulatory enforcement*, [2006] 40(3) Law & Society Review 591.

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dedicated to deregulation, and the UK Law Commission some years ago commented:[15]

> Each year over 10,000 pages of new legislation are introduced either by Acts of Parliament or by orders made under Acts of Parliament. If European directives and regulation are added, the figure is doubled. There is a need to take stock and reflect on the effects of new laws to see if they are working as intended, and if they are not, to discover why. Parliament should be able to address how any problems can be remedied cost-effectively and to learn lessons for the future on the best methods of regulation.

We also need to consider whether the dysfunctionality is fixable, or is merely a necessary evil of a democratic and pluralistic system – and explore some initiatives which may contribute to reform. There is no room for naivety; the inertia of the system, reflected in the difficulty in reforming for example the House of Lords (if it needed reform) shows how difficult it is to achieve reform in such a regulatory culture. Too many political parties either have an interest in the status quo – or are concerned not to expend too much political capital in trying to achieve reform. One possible engine of change is the growing public perception and anger at the

[15] Sir Terence Etherton, Chairman of the Law Commission, *Speech*, 25 October 2006; see also Law Commission, *Post-legislative scrutiny*, Law Com 302, 25 October 2006, Cm 6945, Consultation paper no 178;. cf. Richard Cracknell and Rob Clements, *Acts and statutory instruments: the volume of UK legislation 1950 to 2014*, House of Commons Library, 19 March 2014. And even the judiciary have become exasperated, see e.g. 'Can we possibly have less legislation, particularly in the field of criminal justice. The overwhelming bulk is suffocating. May I take as an example the year 2003. In that year we had criminal statutes with the following titles: Crime (International Co-operation) Act; Anti-Social Behaviour Act; Courts Act; Extradition Act; Sexual Offences Act; Criminal Justice Act. The Crime (International Co-Operation) Act had 96 sections and 6 schedules containing 124 paragraphs. The Anti-Social Behaviour Act had no fewer than 97 sections and 3 schedules containing 8 paragraphs. 97 sections in an Act which is merely making provisions "in connection with anti-social behaviour". The Courts Act contains 112 sections and 10 schedules with 547 paragraphs. The Extradition Act has 227 sections and 4 schedules containing 82 paragraphs. The Sexual Offences Act has 143 sections and 7 schedules with 338 paragraphs. But finally, the great Daddy of them all, the Criminal Justice Act has 339 sections and 38 schedules with a total of 1169 paragraphs. This analysis excludes schedule 37, which sets out no fewer than 20 pages of statutory repeals – and that's not the end of it. No fewer than 21 Commencement and Transitional Savings Orders have been made under this Act – the first in 2003, and the last in 2008. Plenty of provisions have not been brought into force. Many will not be, or so we are told. They will go into some sort of statutory limbo. But this year the Criminal Justice Act 2003 (Commencement No 8) and Transitional and Savings Provisions (Amendment) order of 2009/616 was made, amending the eighth Commencement Order. Each of these orders produced different starting dates for different statutory provisions. All for a single Act.' Lord Judge (formerly Lord Chief Justice) *The Safest Shield*, Bloomsbury, 2015, p. 97.

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current arrangements, which may grow to such a stage that the political system will have to recognise it. That time might not be too far away.

There have been innumerable attempts to roll back the regulatory tide, and they have failed. We also need to review some proposals which might over time be adopted by lawmakers to improve the system. The proposals may probably stand little chance of success of early adoption, if at all; but if they influence the debate in some small way, or prompt one or two regulators and legislators to re-think the occasionally absurd pronouncement, or give food for thought to an irritated citizen, they may have achieved their limited purpose. Some of the suggestions may seem facile, flippant, facetious or simply absurd, but they are seriously made.

Finally, there are a few appendices; one sets out a syllabus for a diploma in legislation and regulation which lawmakers and regulators may want to complete before they make decisions that affect the lives of us all.

1.1.4 Balance and Proportionality

Running as a theme throughout the book is the dilemma of achieving balance and proportionality in rule making: easy to agree to as a matter of public policy, but not quite so easy to achieve in practice. Coupled with that rather theoretical or philosophical notion there is another one, its more pragmatic counterpart, and that is the principle of the law of unintended consequences. Many of the laws that are introduced are done so with good intent and by good people but may actually make a problem worse than it already was.[16]

It is of course not simply a British concern; but the issue does seem to affect Anglo-Saxon legal systems such as those of the US, Canada and Australia more than other, more codified, systems. This book looks at a number of trends that affect these societies in particular, but also at the developing countries, who might be thought to be able to avoid the worst excesses of our system. Other countries' experience is brought into account wherever possible (sometimes they do it rather better elsewhere). The discussion however mostly looks at the UK, although there is no doubt that the problem if anything is worse in the US. Whether there is a structural reason that means that the Anglo-Saxon rule making system is afflicted more badly than the Continental system is not clear. When exploring the growth in law, the book looks not just at (in the UK) the

[16] Plato, *Laws*, Penguin 2005.

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