

Too many laws

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We created three times more new crimes in 20 years than all those of the preceding six centuries. The proof, says Jeremy Horder, is in the number of pages in Halsbury's statutes of England and Wales. 3000 new crimes since 1997. Professor Horder headed the team for the recent Law Commission report 'Criminal Liability in Regulatory Contexts'

To get a sense of the scale, in the C19th parliament would debate and pass a few statutes in a year. In 2008 300! Each of which might provide for departments or quangos to create Statutory Instruments and some of those SI's could include multiple new offences. The Transmissible Spongiform Encephalopathies (No 2) (Amendment) Regulations creates 103 new offences; DEFRA's answer to BSE.

The flood of new crimes are directed not to harm or serious risk but 'compliance', giving teeth to the equally large number of new regulations. Examples of SIs: The Apple and Pear Orchard Grubbing Up Regulations 1998, Mink (Keeping) Order 1987, Imitation Dummies Regulations 1993, Heads of Sheep and Goats Order 1996, Baking and Sausage Making (Christmas and New Year) Regs 1985 etc.

Some causes

Jeremy Horder thinks part of the cause is simply the number of departments with regulatory functions. 60 agencies have power to create new offences. He looks for objective measures like the number of lawyers retained by government, in 1901 there were just 2, now 59. He perceives a rising tide of managerialism and quotes from the Audit Commission 1996 report, 'Misspent Youth', recommending "Inter-agency co-operation, an overall strategic plan, key performance indicators, and active monitoring of aggregate information about the system and its functioning". Prof Horder drily remarks that in a university you do not expect the Vice Chancellor to be the innovator.

The rate of change of ministers would be another factor. 7 Home Secretaries since 1997, each wanting to make a mark. Chris Huhne denounced Jacqui Smith's Self Defense law as PR and posturing. That was just one section (s78) of the Criminal Justice and Immigration Act 2008 simply duplicating what was in the Common Law. These vast Criminal Justice bills had become almost an annual phenomenon.

Is not all this encapsulated in simple principles in the Common Law? The Golden Age of the Common Law, says Horder, was a myth, part of a reaction

against the French Revolution. Regulation always existed in areas that the Common Law did not cover. The moment you step inside the walls of a mediaeval town in the C14th everything was regulated down to what you must wear. And minor offences could carry the death penalty.

European codes

On the other hand, codification of was the founding charter of the Law Commission in 1965 (along with freeing up divorce). So a Commissioner might be expected to be sympathetic to Napoleonic codes. And if Labour cannot be entirely blamed for a flood of regulation that begins at least in 1988, it is tempting to wonder whether perhaps the Single European Act 1986 is? Only 15% from Europe, says Horder, EU red tape is a tempting target for national politicians anxious to find a scapegoat for economic underperformance.

Prof Horder does not see the answer in the Common Law. And perhaps in that he might call Lord Denning as an ally. In 'Freedom Under The Law' he remarks: "*The utmost that the judges have been able to do is to lay on every man the negative duty that he ought not to injure his neighbour without just cause or excuse. They have not been able to lay on him any positive duty to help or benefit his fellow-men. The law therefore falls far short of the Christian precept that you should love your neighbour. But if the hands of the judges are tied, the hands of Parliament are not.... Whereas in the past the balance was much too heavily in favour of the rights of property and freedom of contract, Parliament has repeatedly intervened.*" That was 1949.

Apologist?

The picture today painted by Professor Horder with example after example of seemingly absurd over-regulation could only engender dismay. Yet his purpose seemed to be to present a number of justifications for the system. It is good, he said, to be a Ruly society. Many specific laws give clearer guidance than vague general ones, like the old Common Law crime of 'Public Nuisance'. They save the expense of testing every detail in the courts. As he put it, We do not want the courts embroiled in defining what is a sausage. Also, if something goes wrong, people often demand strict regulations.

Bargaining in the shadow of the law

Indeed, many are not enforced or have few or no convictions under them. A DEFRA inspector can give order some improvement. And have tough sanctions available as a resort. Finally, with notable



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exceptions, these laws are focussed on firms and specific activities. Relatively few affect people generally although those get attention. Jeremy Horder agrees that Criminal Record Bureau checking goes too far and recommends a distinction between voluntary and professional – we might expect a firm making profits from supplying nannies to CRB applicants.

Civil Penalties

Finally he offers a solution of sorts. That is to replace criminal sanctions with civil penalties, like the parking fine. It is a penalty that must be paid upon non-compliance. It has the merit of certainty and less cost and delay than going to Magistrates' or Crown court.

Objections

All the justifications and efficiencies could not dislodge the lingering sense of dismay at the obesity of the statute book and the sense of loss of our tradition of freedom. The law has a role to educate but does so much detail educate people or turn them into tick-box automata? Is it easier to know what the law is if it is codified in great detail in statutory instruments? And even though no one knows how many there are? Too many departments are making law but which came first the desire to legislate in detail or the departments and lawyers to do it? What is the underlying cultural change? Is a cult of managerialism the cause of prolific regulation or in fact just another name for the impulse to regulate? We instinctively agree that we do not want courts defining sausages. But do we want an SI doing it either? Do we need a definition if it tastes good? Civil penalties sound like simplification but they are not a prescription to reduce the volume of law, only to process it faster.

Does the professor perhaps protests Europe's innocence too much? The EU he says is responsible for "only" 15%. That is not a trivial proportion. DEFRA came in for gentle lambasting for contributing "only" 10%. And given the EU interest in agriculture, how much of that might not be EU driven? Or indeed could it be that the habit of Roman codification from Europe has led a broader cultural change over here, as it were, by osmosis?