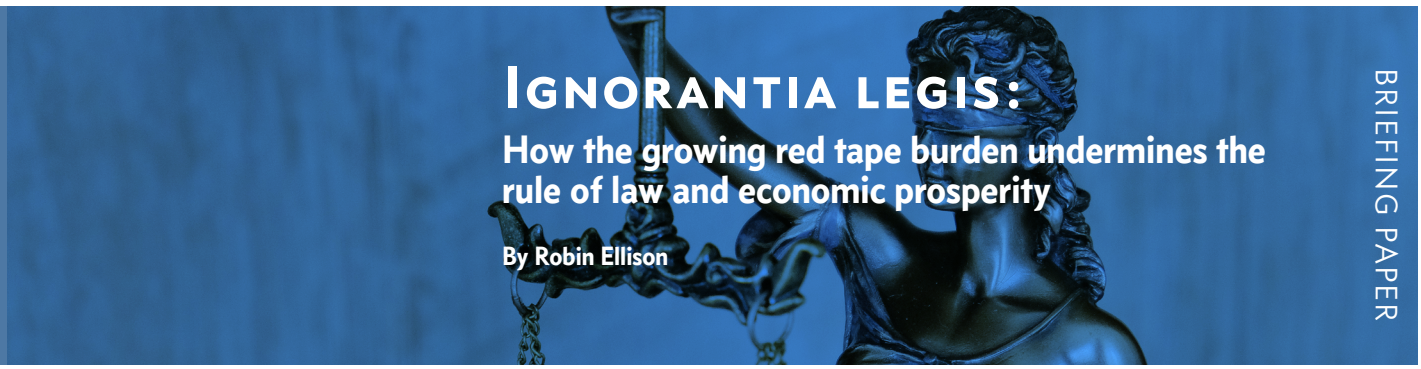

Ignorantia legis:

How the growing red tape burden undermines the rule of law and economic prosperity

By Robin Ellison

BRIEFING PAPER

EXECUTIVE SUMMARY

- The law is constantly changing and growing — increasing in length and complexity — placing growing burdens on citizens and businesses.
- Citizens must comply with an ever expanding array of legislation, regulations known as 'statutory instruments' (of which there were over 1,000 in 2020), imported European Union legislation, and tens of thousands of pages of materials issued by dozens of regulatory agencies.
- The United Kingdom lacks a depository of all laws and regulations. We are all expected to follow the law, yet there does not exist a proper list of the legislation and regulations that citizens must abide by.
- The lack of single regulatory source undermines the rule of law, severely burdens business and leads to the creation of more red tape.
- Judges and lawyers, let alone citizens and businesses, often complain about the difficulty ascertaining the state of the law. The inability to identify the law has led to unfair application including common sentencing mistakes.
- Businesses spend thousands of hours attempting to find and interpret the law, employing costly external regulatory consultants and professional legal advice.
- The extent of legislation and regulation creates substantial economic costs, including pushing up prices for consumers, reducing wages for workers and creating disproportionate burdens on small businesses.
- The estimated annual cost to businesses of regulation is £100 billion a year, a substantial portion of which is spent simply searching for the law.
- In addition to clearly cataloguing laws, regulations, and departmental guidance, there is a need to reduce and simplify the burdens on citizens to a point at which the legal responsibilities of citizens is comprehensible and clear.
- Previous efforts to reduce regulatory burdens have failed; a new approach is required to ensure the law is easily identified and is no more burdensome than necessary.
- If the Government wishes to maintain the rule of law and reduce burdens on citizens and businesses they should:
    - Adopt the Australia/New Zealand system of holistic law publication;
    - Introduce standard methods of intelligent rulemaking to remove unnecessary legislation — including requirements for one-in-three-out (also to be applied to regulators), embracing the RegData (US) methodology, extending the use of sunset clauses — and continuing consolidation and codification exercises;

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- Apply a code of behaviour and practice for lawmakers;
- Declare that 'Henry VIII clauses', allowing departments to amend primary legislation, are no longer to be introduced;
- Improve drafting of laws and rules;
- Introduce personal accountability for senior lawmakers, who should put their names to new rules;
- Provide additional support for *legislation.gov.uk*;
- Require all rules to have externally validated cost calculations;
- Require government agencies to provide time-travelled codified rules;
- Require regulatory authorities to publish compliance with government policies on better regulation including, for example, 'one-in three-out' etc.; and
- Introduce training and qualifications for lawmakers and rulemakers.

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> ***"Men are loyal in proportion as they are law-abiding; they are law-abiding in proportion as they understand and enter into the spirit of the rules by which they are governed. Uncertainty begets doubt; doubt is the parent of discontent, precipitation and fear."***
>
> **- Sir Henry Tring**[1]

Every schoolboy knows that ignorance of the law is no excuse.[2]

But today even judges struggle with knowing what is the law. And it is hardly surprising. There is a great deal more of it than ever before, it is growing exponentially (ironically especially post-Brexit), and the quality of the drafting of the new rules and regulations is widely criticised.[3]

So if even experts find our law difficult to find, and challenging to understand, it may be unfair to require even the interested citizen to be governed by it with just implied consent. Covid-19 has emphasized these concerns: there have been frequent complaints that it was difficult for individuals to know at any one time exactly what the restrictions are or were in the local area. On many occasions the regulations specifying behaviour were published mere minutes before they were due to come into effect. The complaints were often less about the existence of the rules than of their complexity and frequent change.[4] In relation to Coronavirus alone, for example, a search on the Government website *legislation.gov.uk* shows over 600 sets of regulations plus primary legislation in relation to Covid-19 — plus, of course, explanatory memorandum and uncountable government guidance. This was all made within less than a year. To work out how to comply is understandably hard for many people.

Other jurisdictions have tried to manage the problem of keeping track of the law as well as its length and complexity in different ways. Napoleon (and Justinian 2000 years before him) thought that a code might fix it. The world's oldest surviving parliament, Iceland's Althing, founded in 930, required each session to begin with the Speaker reciting from memory all of Iceland's statutes since there were no written records — and any statutes he forgot were no longer laws.[5]

The UK has flirted with mini-codes in the past through attempts at both codification and consolidation. Geoffrey Howe, a former Foreign Secretary and Chancellor, thought it worth spending £25 million on simplifying the tax code, although

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1 Sir Henry Tring, Simplification of the Law, 1875.

2 Ignorantia legis neminem excusat. The use of courtroom Latin has been illegal since 1732 (Proceedings in Courts of Justice Act 1730). Lord Woolf declared that such phrases as in camera (in private), ex parte (without notice of the hearing) and subpoena (witness summons) are now banned.

3 See e.g. Tim Ambler, Legislators should legislate; governments should govern, Adam Smith Institute blog, 23 November 2020.

4 Jennifer Brown, Coronavirus: a history of English lockdown laws, House of Commons Library Briefing paper, No 9608,3 December 2020,

5 Tim Ambler, Legislators should legislate; governments should govern, Adam Smith Institute blog, 23 November 2020.

the project had limited impact, since as it was simplified at one end, fresh rules complicated it at the other end.[6]

The Sentencing Act 2020, introduced following a Law Commission report on codification of sentencing law, consolidated around 50 pieces of legislation into a single statute, comprising 420 sections and 29 schedules, and reduced sentencing law from 1300 pages to 600. Its regulatory impact assessment suggests, on uncertain assumptions, that it would save £256 million over ten years because of a reduction in mistakes.[7] A 2012 analysis of 262 randomly selected cases in the Court of Appeal found 95 (36%) involved unlawful sentences, which the court should not have made.[8] Even post-consolidation, if sanctions are intended to have a deterrent effect on aspiring miscreants, it is hard for them to work out what the penalty might be by first reading 600 pages.[9]

Governments (of all denominations) have also tried their best to reduce the explosion in rules and their complexity. Today there is the Office of Tax Simplification, the Better Regulation Executive and each government department has a Better Regulation Unit. The Regulatory Policy Committee acts as a form of scrutiny committee.[10] The current Government is also reportedly consulting business leaders on cutting European Union red tape.[11]

There are also government policies ('one-in, three out').[12] There are occasionally deregulation acts. And from time to time the Law Commission, as mentioned in relation to sentencing law, proposes consolidation of discrete subjects (criminal law, contract law, companies law). Within legislation itself there are sunset clauses (rare), RIAs (regulatory impact assessments) (broadly ineffective), SaMBAs (small and micro-business assessments) (untested) and post-legislative reviews (negligible). At the same time many legislative provisions are expressly excluded from these checks and balances.

But even if the challenges of quantity and quality were resolved, the problem still remains that there is no single place where citizens or experts can find out the current state of the law (or what the law was when some infraction was alleged to have taken place in the past). The problem is made worse because even where there is an Act about something pretty straightforward, it is likely to be amended frequently

6 https://webarchive.nationalarchives.gov.uk/20100202111102/; http://www.hmrc.gov.uk/rewrite/index.htm

7 Catherine Baksi, Concise Sentencing Act gives judges clearer guidance, Times, 14 January 2021.

8 The Sentencing Act 2020 was amended on the day it came into force, 1 December 2020 by statutory instrument, see The Sentencing Act 2020 (Commencement No. 1) Regulations 2020 SI 2020 No. 1236 (C. 35).

9 And the Sentencing Act is still not a useable 'Code' as it was intended to be: see e.g. s170 in relation to driving disqualifications which requires reference to other acts. And try to understand s20(1)(g) if you are an 'incorrigible rogue' under the Vagrancy Act 1824.

10 A quasi-independent body sponsored by DBEIS.

11 https://www.thetimes.co.uk/edition/news/boris-johnson-consults-businesses-on-plan-to-become-europes-singapore-mktg5mtx2

12 Or see e.g. Department for Business, Energy and Industrial Strategy, Better Regulation framework, Interim Guidance, March 2020. Cf the deregulatory objectives of the Small Business, Enterprise and Employment Act 2015.

after enactment. The changes make it hard for all of us, whether citizens or practitioners, to work out the current state of the law.

This paper focuses on just one of the problems of regulation, namely the lack of a simple single source of current rules (and, where there are changes, what the rules used to be).

The problem in practice

Tom Bingham, one of the most highly regarded Lord Chief Justices of his generation, relates the following story:

> "A defendant was accused of a tobacco smuggling offence and pleaded guilty in 2007. A community sentence was imposed, and application made for a confiscation order. His liability to a confiscation order depended on his having evaded payment of duty to which he was personally liable to pay. To show he was liable, the prosecution relied on some 1992 regulations. The trial judge was satisfied he was liable, and ordered him to pay £68,120 or serve 20 months in prison if he did not. He appealed. The appeal came before three senior judges in the Court of Appeal, who heard argument and announced they would give their judgment later in writing."[13]

They concluded that the defendant was liable to pay the duty under the 1992 regulations and circulated a draft judgment upholding the confiscation order. On the eve of formally delivering judgment, however, they learnt that the 1992 regulations no longer applied to tobacco products, as a result of different regulations made in 2001. Neither the trial judge, nor the prosecutor, nor defending counsel, nor the judges in the Court of Appeal knew of these later regulations, and they were not at fault.

As Lord Justice Toulson said, giving judgment allowing the appeal:

> "There is no comprehensive statute law database with hyperlinks which would enable an intelligent person, by using a search engine, to find out all the legislation on a particular topic. This means that the courts are in so many cases unable to discover what the law is, or was at the date with which the court is concerned, and are entirely dependent on the parties for being able to inform them what were the relevant statutory provisions which the court has to apply. This lamentable state of affairs has been raised by responsible bodies on many occasions..."

The lack of a single regulatory source undermines the rule of law, severely burdens business, can result in injustice and leads to the creation of more red tape. A single

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13 Tom Bingham, The rule of Law, Allen Lane, 2010, p41-42; R v Chambers [2008] EWCA Crim 2467, 17 October 2008. Similar stories are related in The Sentencing Code Volume 1: Report, Law Commission HC 1724 Law Com No 382, Law Commission, 22 November 2018, p57.

regulatory source is not simply a nice-to-have, but a necessity, even when there are so many other deserving competitors for the public purse. A citizen who is unrepresented in court (increasingly common because of restrictions on legal aid) will be bewildered if he tries to conduct research on the present state of play of the legislation under which he is charged.

Where the quantity of legislation is limited, it is possible the concerned citizen could manage, even with some inconvenience, as a millennium ago with the Althing. But where there is the amount of rule-making that is currently being introduced it is increasingly unmanageable — resulting in advice being expensive and injustices emerging. Nor does the compound impact of rule-making make itself evident; if it were, there would be a constraint on the volume and complexity. As former prime minister Tony Blair noted:

> "There is usually a seductive logic to any new regulation. There is almost always a case that can be made for each specific instrument. The problem is cumulative. All these good intentions can add up to a large expense, with suffocating effects. Sometimes, we need to pause for a moment and think whether we will not do more damage with a hasty response than was done by the problem itself."[14]

Costs to business — and the consumer

Red tape has substantial economic costs. Businesses spend thousands of hours not only writing reports and applying for licences and permits, but also attempting to determine the state of the law. This often requires employing costly external regulatory consultants and commissioning professional legal advice.

This has broader economic ramifications for Britain's economy and productivity. Red tape creates a structural bias against newer and smaller businesses, who lack the regulatory compliance units or the resources to hire expensive external consultants.[15] Larger businesses can also employ lobbyists to influence the creation of the regulation, receive advanced notice of changes, and favourable treatment.[16] Indeed, the higher the quantity of regulation, the stronger incentive for businesses to lobby to influence the design of the regulation.[17] The associated barriers to entry and bias against smaller businesses reduces market competition, making existing firms less productive — reducing wages and increasing prices.[18]

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14 Tony Blair, Speech on the compensation culture, 2005, cited in Harries and Sawyer, How to run a country: the burden of regulation, ResPublica, December 2014.

15 Nicole V. Crain and W. Mark Crain, The Impact of Regulatory Costs on Small Firms (DIANE Publishing, 2005); Nicole Crain and William Crain, "The Impact of Regulatory Costs on Small Firms," Federal Regulatory Costs: Estimates and Analysis, April 1, 2011, 41–100.

16 Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," Economic Inquiry 5, no. 3 (June 1, 1967): 224–32; Sam Peltzman, "Toward a More General Theory of Regulation," The Journal of Law and Economics 19, no. 2 (August 1, 1976): 211–40.

17 Christopher Boudreaux and Randall G. Holcombe, "Economic Institutions and the Durability of Democracy," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, January 6, 2016)

18 See, for example, Lacy Glenn Thomas, "Regulation and Firm Size: FDA Impacts on Innovation," RAND Journal of Economics 21 (December 1, 1990): 497–517, https:// doi.org/10.2307/2555465; Richard Williams and Mark Adams, "Regulatory Overload" (Arlington, Virginia: Mercatus Center, George Mason University, February 2012).

It is notoriously hard to estimate the costs of regulation and in particular the costs of discovery of the law. Most impact assessments are based on specious and spurious assumptions, and are not later tested. It may be impossible to accurately measure the cost of red tape to businesses.[19]

The total cost of regulation in the UK has been estimated at £100 billion.[20] Searching for what are the applicable rules in any given situation will be a material part of the total regulatory burden. This includes the cost of compliance officers, legal advisers, subscriptions to services such as WestLaw, LexisNexis and Halsbury, and compliance support organisations. The costs of determining the rules of Great Britain/Northern Ireland commerce, for example, are clearly substantial.[21]

Delegated legislation

Delegated legislation comprises the power of departments to make law under the authority of an Act of Parliament. There are checks and balances to ensure that such powers are not abused, but there are long-standing complaints that these are ineffective.[22]

One recent study by the Hansard Society concluded that:

> "It is a basic feature of the rule of law that law must be open and clear. People need to be able to know what their rights, duties and obligations are in order to plan their lives... While primary legislation is by no means perfect, our system of delegated legislation is capable of descending into confusion and even absurdity. For instance, the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020 amended 32 other laws. Understanding a regulation such as this requires something of a legal quest. It pushes the reasonable limits of accessibility."[23]

And then noted. . .

> "The Animal Health, Plant Health, Seeds and Food (Amendment) (Northern Ireland) (EU Exit) Regulations 2019 proposed amendments to a law that had not yet been laid before parliament."[24]

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19 See e.g. the Sentencing Code Impact Assessment, Lawcomm0066, 21 November 2018.

20 National Audit Office, A Short Guide to Regulation, September 2017.

21 This is based on experience with internal knowledge management system costs in major law firms, but there are no reliable cost studies.

22 Alexandra Sinclair and Joe Tomlinson, A legislative horror show: abuse of delegated legislation makes a mockery of lawmaking, Prospect Magazine (The Rule of Law, p16), January 2021. See also Alexandra Sinclair and Joe Tomlinson, Plus ça change? Brexit and the flaws of the delegated legislation system, Public Law Project, 2020.

23 See https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard.

24 'Proper scrutiny of delegated legislation is not just a procedural nicety, it can impact the clarity and overall quality of our laws. In this way, scrutiny, when done well, can promote the rule of law. A major issue in the current system is the parliamentary time assigned to examine and debate delegated legislation. The Aviation Safety (Amendment etc) (EU Exit) Regulations 2019 are 146 pages long and were debated for 21 minutes in the House of Commons. The Product Safety and Metrology etc

The tobacco duty case, mentioned above, suggests the kind of injustice that can take place in such confusion.[25]

The Covid 19-related statutory instruments represented about a third of all SIs during 2020, using powers from 109 Acts of Parliament including the Saint Helena Act 1833, the British Settlements Act 1887 and the Colonial Probates Act 1892. Two hundred and twenty six were made under the 'negative procedure', so that they became law unless a motion against them was carried, which in any event requires the Government to grant time for such a motion to be debated. One hundred and forty five of the instruments breached the 21-day rule and came into force less than 21 days after they were laid, and 42 came into force even before they were laid.

Furthermore, some of them were prepared so quickly that they had to be corrected within days. The Statutory Sick Pay (General) Regulations 1982 were amended twice within four days. On 2-3 September 2020 the 'protected areas' covered by the Health Protection (Coronavirus Restrictions) (Blackburn with Darwen and Bradford) Regulations 2020 were amended twice in 12 hours. The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 were amended by three different SIs made in two days on 22-23 September 2020.[26]

In total there have been 329 Coronavirus-related Statutory Instruments laid before the UK Parliament in 2020. There have been an average of eight per week since 6 March. Between late January 2020, when Britain left the European Union, and the end of 2020 there were 1,014 statutory instruments covering a wide array of subjects. Overall, there is no way anyone could understand or advise on the totality of these instruments.

Quasi-legislation

Not only does the citizen have to face statutes, statutory instruments, and imported European Union legislation, most of which is likely to apply to us for the foreseeable future (some of which is UK-implemented and some of which is not), but they also need to comply with the tens of thousands of pages of regulatory materials issued by the many agencies: the FCA, TPR, Health and Safety, etc. Many regula-

(Amendment etc) (EU Exit) Regulations 2019 are 619 pages long and were debated in the Commons for 52 minutes and the Lords for 51 minutes. The Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019 are 26 pages long and made 36 different amendments to existing legislation, which Labour peer Denis Tunnicliffe described as having "no themes or interrelationship." They were debated for 11 minutes in the House of Commons.' Alexandra Sinclair and Joe Tomlinson, A legislative horror show: abuse of delegated legislation makes a mockery of lawmaking, Prospect Magazine (The Rule of Law, p16), January 2021.

25 This is nothing new; a report in the 1930s, when the volume of rules was fraction of those today, was scathing about the misuse of delegated legislation and in particular, before the advent of the internet, demanded modernisation of the publication of regulations (under the then Rules Publication Act 1893) including a recommendation that there should be publication in the Gazette, without which they would be unenforceable (see Report of the Committee on Ministers' powers, HMSO, 1936, Cmd 4060, section II, Chapter 15). See also Lord Hewart (Lord Chief Justice) The New Despotism, Ernest Benn, 1929.

26 Chris Bryant MP, Parliament in a national crisis, History of Parliament Trust Annual Lecture 2020, Hansard Society, 19 November 2020. C.f. Ruth Fox and Brigid Fowler, Delegated Legislation in Brexit and Beyond, C.f. Ruth Fox and Brigid Fowler, Delegated Legislation, in Brexit and Beyond, Hansard Society, November 2020 for similar comments in relation to Brexit (around 960 Brexit-related SIs in 2020, with virtually minimal scrutiny).

tors only publish the current version of their codes on a website. This means that citizens and businesses cannot track changes made over time.

Matters have improved somewhat since the tobacco duty case decision; after several false starts, *legislation.gov.uk* helps now rather better than before, and there have been for many years publications such as Halsbury's Statutes which covers general law, and IT systems such as LexisNexis, WestLaw (which cover most primary and secondary legislation) or Perspective (which covers a specific topic and includes parliamentary materials, consultative documents, law reports and regulatory materials) which allow those with paid access to find the law.[27] The government website, *legislation.gov.uk*, however remains imperfect, and despite its best endeavours is hard to use and search.[28] It does not cover the tens of thousands of pages which are not in the statute book, but which impose liabilities on the citizen, emanating from agencies such as HMRC and FCA. The pensions office of the HMRC alone publishes around 5,000 pages of 'guidance' which operate as though it were law, which is only available on the web, and which can be and is changed without notice and with no ability to time-track. The FCA rulebook is over 8 feet tall if printed out, and is subject to incessant revision; it benefits from limited time-track for its Handbook, although not its other materials.[29]

Parliamentary proceedings

For many years legislation and rules have been interpreted in line with assurances given by ministers in Parliament and elsewhere as to the intent and application of the rules, where, for example, regardless of the clear wording, the intent was to apply the legislation in a moderate form.[30]

Accordingly, it is sensible if not essential to know whether there have been debates or ministerial statements when interpreting legislation; this may be even more important when looking at regulatory rules or statutory instruments. There is no database which makes such discussion available in a holistic fashion. Australian legislation, by contrast, is often published together with its consultative documents and parliamentary debates in one volume, which makes life much easier for the user. No such facilities exist in the UK.

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27 Subscription costs are usually over £10,000 pa.

28 It is good for example in relation to occupational pension schemes (usually) but less good in relation to say adventure activities. Or see on its website the Civil Jurisdiction and Judgements Act 1982.

29 And largely unreadable when you do find it: see ' . . . In the 1980's Staughton J pleaded with lawyers and judges to abandon the old fashioned and obscure language of the law and to write in plain English, as most judges now at least try to do. That trend has been met by a countervailing trend in the world of administration and regulation to write in an increasingly obscure style, often using superfluous words or words of uncertain meaning. The word 'thematic' used for a review or assessment, for example, seems to add nothing to the noun 'review', just as describing a summary as an 'executive summary' rarely implies more than is conveyed by the simple noun the word 'executive' precedes. The expression 'high level' used by the FCA gave rise to a lively debate about what it might mean. I thought it meant 'of a high standard' or 'thorough' or something like that, but that meaning did not work in the context in which it was used. Ms Jones thought it might refer to something carried out by a senior member of staff. Legal cases often involve going over the meaning of words (and in this case even punctuation). The more straightforward the language the better, is the general rule in my view. If regulators do in fact read this judgment I would ask them to note and act on my plea for them to use ordinary plain English wherever possible.', per Baister DJ, The Secretary of State for Business Energy and Industrial Strategy v Evans [2020] EWHC 3519 (Ch).

30 *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, [1993] AC 593, [1992] 3 WLR 1032.

Multiple jurisdictions

A relatively recent added complexity is the development of multiple jurisdictions in the UK; the UK, the Scottish, Welsh and Irish assemblies all have separate law-making powers, meaning the quantity of law is increasing.[31] Scotland, for example, now has 317 statutes of its own together with over 9,000 statutory instruments. So far there seem to have been few cross-jurisdictional issues, such as apply in federal jurisdictions such as Australia and the United States, but they cannot be far away. Some intimations of this were evident during the varying cross-border Covid-related restrictions, for example.

EXISTING SOLUTIONS

Some of the solutions have been mentioned above. Legislation in process of being enacted can be roughly tracked through Houses of Parliament websites, and it is eventually published, when enacted on *legislation.gov.uk*. But the interested citizen still needs to know where to go to find it — and needs to be given notice when amendments are made. Even on the database, while amendments are often made as they are introduced, the changes are imperfectly tracked. The managers of the website have done an astonishing job with modest resources, but seem unable to cope with the sheer volume of change; and practitioners cannot use it reliably, either to track and date changes, or to search. Nor, if changes have not been recorded, or there are errors, is it proof against the world.[32] And while legislation and delegated legislation itself is tracked, even if rather clunkily, there is nothing that covers the very much larger quantity of quasi-legislation.

Information memorandum

The government attempts to make life easier by sometimes issuing information or explanatory memoranda, and the House of Commons library often has background information prepared for parliamentarians; while often very useful, they are helpful rather than authoritative. There are also Explanatory Notes, and regulatory impact assessments, issued alongside bills, whose efficacy, reliability and independence remain in doubt. As one study noted:

> "For instance, the Home Office laid an explanatory note with the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 which was initially longer than the 75 page instrument itself. The Secondary Legislation Scrutiny Committee in parliament describe the note as 'impenetrable' and asked the Home Office to re-lay it... Even after the Home Office tried again, the committee still found that the note was not adequate."[33]

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31 James Wolffe QC, Devolution and the statute book, The Renton Lecture, Statute Law Society, 2020.

32 Jonathan Rayner, Net-surfing lawyers warned of compliance risk, Law Society Gazette, 2 July 2008.

33 Alexandra Sinclair and Joe Tomlinson, A legislative horror show: abuse of delegated legislation makes a mockery of lawmaking, Prospect Magazine (The Rule of Law, p16), January 2021.

As mentioned above, even the judiciary struggles to keep on top of the law. A former Lord Chief Justice in a study of English law made the point while arguing for continence in lawmaking that it was also hard to follow:

> "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."[34]

And the former head of the Family Court made a similar point:

> "The Family Procedure Rules, like their civil counterparts, are a masterpiece of traditional, if absurdly over-elaborate, drafting. But they are unreadable by litigants in person and, truth be told, largely unread by lawyers. They are simply not fit for purpose. The Red Book, like the White Book, is a remarkable monument of legal publishing but, I fear, fit only for the bonfire. Rules, to the extent that we still need them, must be short and written in simple plain English. But in reality, much that is currently embodies in rules will in future simply be embedded in the software of the digital court…

34 Lord Judge, The Safest Shield, Bloomsbury, 2015, p. 97.

> "The thickets of numberless court forms – I speak literally; no-one knows how many there are, though in the family justice system alone they run into the hundreds – must be subject to drastic pruning… Court orders must be standardised… with standard templates, self-populating boxes and drop down menus designed to ease and shorten the process of drafting."[35]

For many people the problem has become more acute since the withdrawal of legal aid, even in criminal cases. If an individual is being interviewed under caution, for example, it is hard to find out what the rules and public safeguards are (apart from the standard note that it is advisable to have a solicitor with you — which may be a counsel of perfection). The various agencies sometimes have a guide (in the case of HSE for its own staff, but which is fair and balanced and can be read by a literate citizen) or do not (in the case of TPR).

Former Justice of the High Court, Sir Richard Henriques, in his recent memoirs noted:

> "Mr Justice Mitting, a judge of great experience and ability, in a judgment in the Administrative Court, made it clear that the statutory obligation to explain the effect of consecutive sentences accurately was impossible, saying, 'Indeed so impossible is it that it has taken from 12 noon until 12 minutes to 5 with a slightly longer adjournment than usual for reading purposes, to explain the relevant statutory provisions to me, a professional judge. . . it is simply impossible to discern from statutory provisions what a sentence means in practice."[36]

INTERNATIONAL EXPERIENCE

The issues facing citizens in the UK are not unique; they are common throughout the world. They pose a particular problem however in jurisdictions like the UK where there are many regulatory agencies (70) with law-making powers — and in common law countries where case-law is important. Particular jurisdictions with similar concerns are mentioned below; none have found a perfect solution, but each may offer lessons for our own system.

United States

The citizen in the United States may need to deal with the legislation both of the state they live or work in, as well as federal law. The federal arrangements require central publication of both statutes and agency rules in the Federal Register, including proposed rules, final rules, public notices, and presidential actions.[37] Given

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35 Sir James Munby, President of the Family Division of the High Court, Speech, Annual Dinner of the Family Law Bar Association, 26 February 2016.

36 Sir Richard Henriques, From crime to crime, Hodder & Stoughton, 2020, p317.

37 For a history of the quality of legislation, see https://uploads.federalregister.gov/uploads/2020/08/31144639/pagesPublished2019-1.pdf. And www.federalregister.gov.

a decent search engine it is in theory possible for a user to track public changes to government requirements, policies, and guidance. The information includes:

- Proposed new rules and regulations
- Final rules
- Changes to existing rules
- Notices of meetings and adjudicatory proceedings
- Presidential documents including Executive orders, proclamations and administrative orders.

Both proposed and final government rules are published in the Federal Register. A Notice of Proposed Rulemaking (or "NPRM") typically requests public comment on a proposed rule and provides notice of any public meetings where a proposed rule will be discussed. The public comments are considered by the issuing government agency, and the text of a final rule along with a discussion of the comments is published in the Federal Register. Any agency proposing a rule in the Federal Register must provide contact information for people and organizations interested in making comments to the agencies and the agencies are required to address these concerns when it publishes its final rule on the subject.

The notice and comment process, as outlined in the Administrative Procedure Act, also in theory at least gives people a chance to participate in agency rulemaking. Publication of documents in the Federal Register also constitutes constructive notice, and its contents are judicially noticed.

More helpfully, the final rules promulgated by a federal agency and published in the Federal Register are ultimately reorganized by topic or subject matter and republished (i.e. codified) in the Code of Federal Regulations (CFR), which is updated annually.

There are similar systems for many of the States. The Federal Register was, when introduced, partly modelled on the London Gazette which was intended, until the burden became too great, to make public government information. As discussed below it might be sensible to re-invent an electronic London Gazette, but with a more user-friendly structure than the .gov website, which is too unwieldy for almost any user. It also deals with some of the problems encountered by UK users of the UK system, namely the problem of tracking frequent changes. And there remain continual complaints about the complexity of the US system.[38]

Australia

Australia also maintains a federal register.[39] It also maintains a website with legislation in force.[40] In some ways Australia stands out as a model: its legislation must be in plain English, and often major pieces of legislation are published in a single

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38 See e.g. https://www.govtrack.us/congress/bills/statistics; https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/

39 See https://www.legislation.gov.au/. It is part of The National Archives collection.

40 See https://www.legislation.gov.au/Browse/ByTitle/LegislativeInstruments/InForce/0/0/Principal/

volume with supporting materials. But any normal individual would be confused by the website, built for use by civil servants rather than by general users. In addition of course, each separate state will maintain its own database. Publisher LexisNexis Butterworths produces the Federal Statutes Annotated for legal specialists.

Canada

Canadian lawmakers have made moves towards codes, easier given that the country is governed by a mix of common-law and civil law systems. The federal criminal law is encoded, for example, and its dual language hard copy prints out at 1,260 pages. The Justice Laws Website provides an official consolidation, or updated version, of the federal Acts and regulations maintained by the Department of Justice as a convenient way for the public to view the state of the law, without having to carry out research and put together the various amended provisions.[41] Its time-travel feature is basic, and there is no reproduction of parliamentary materials or regulatory materials. But its central website provides user-friendly access to the Canadian legal system, possibly the best of its equivalents and there is like elsewhere a gazette.[42] But trying to find the current state of the law on cannabis (legalized since 2018), for example, remains a challenge, although there are many good secondary guides issued by departments.

India

India is notorious for its excessive and complex legislation; UK tax legislation has often been compared in length with that of India, in a form of measure analogous to comparing countries to the size of Wales. Its court systems suffer long delays. Like the UK it enjoys an online database of legislation which slightly mirrors the UK system, but without an effective timeline and often simply with unsearchable PDF copies of laws.[43] It does at least dream of the system being codified; the website is entitled Code of India (which it is not). It is made more complex by possessing different codes in different states and for different faiths. Legislation is also published in the official gazette but is not designed for easy use.[44]

Many years ago the Supreme Court discussed whether a foreigner who was arrested whilst airside in a plane that had touched down to refuel could be guilty of a breach of Indian law, even though there was no way he could have been aware of domestic Indian legislation. He lost his defence of ignorance, but the decision in *State of Maharashtra v Mayer Hans George* explored the issue of *ignorantia legis* as a defence to criminal liability.[45] It is normally accepted that ignorance is no excuse; a dissenting opinion of Justice Subba Rao did not question the fairness of the doctrine but carved out an exception to it, holding that in cases where there is no statutory compulsion to publish the law in the official gazette, the maxim cannot be invoked. In such cases the prosecution should prove that the accused could have had the knowledge if she were not negligent, or if proper inquiries were made. Though

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41 See e.g. https://laws-lois.justice.gc.ca/eng/acts/

42 See https://www.canada.ca/en/government/system/laws.html

43 See www.indiacode.nic.in

44 See www.egazette.nic.in

45 State of Maharashtra v Mayer Hans George, 24 August 1964 1965 AIR 722 1965 SCR (1) 123

not explicitly stated, the opinion of Justice Rao was an attempt to incorporate the 'reasonable person' test to the doctrine, in such limited cases where notifications or by-laws were involved.[46]

STATUTE LAW DATABASE

Legislation.gov.uk is the official web-accessible database of the statute law of the United Kingdom; it contains all primary legislation in force since 1267, and all secondary legislation since 1823. In theory it incorporates legislative changes and is fully updated and searchable. In practice, the revisions are ad hoc and it is not always easy to follow the changes. That reflects limitations of the website and the complexity of amending legislation.

The majority of revised legislation is now held in two forms: in 'as enacted' and 'revised' versions. Revised or amended legislation is maintained as far as possible with limited resources but is sometimes a struggle for the user to be confident that 'Tables of Legislative Effects' information have been fully incorporated. There have been links since 2002 to the affecting legislation meaning that it is possible to view the amendments more easily. There are also buttons to help in relation to geographical effect and there is a timeline and 'start date' information so as to give the ability to navigate through the legislation at specific points in time.

The Hansard Society noted (in 1992):

> "[a]t present the accessibility of statute law to users and the wider public is slow, inconvenient, complicated and subject to several impediments. To put it bluntly, it is often very difficult to find out what the text of a law is – let alone what it means. Something must be done."[47]

This is now less of a problem than before; nonetheless, just looking for example at the Covid-19 corpus of law it is hard if not in practice impossible to discern the current state of the law, never mind the law at a previous date.

The database contains the text of primary legislation since 1267 and secondary legislation issued after 1823, some 80,000 texts. The database is not fully up to date and there is no estimate for when it will be fully up to date. Acts are targeted for updating according to a system of priorities based on demand ascertained mainly from Webtrends reports showing which Acts are viewed most frequently.

A 'table of effects' has been published every year since 2002 which lists all the legislation repealed and the effects of primary and secondary legislation brought into force since 2002 on primary legislation in the database.

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46 See Shub Arora, Ignorantia Juris Non Excusat? Examining the relevance of the Hackneyed Maxim in the Indian socio-legal terrain, [2020] National Law University Law Review (July 7)

47 Ruth Fox and Joel Blackwell, The Devil is in the Detail: Parliament and Delegated Legislation Hansard Society, 2014. [CHECK REF]

The database content includes the following primary legislation in

- Acts of the Parliament of Great Britain (1707–1800);
- Acts of the English Parliament (1267–1706);
- Acts of the pre-UK Parliaments (1424–1707);
- UK local Acts (from 1991);
- Acts of the Scottish Parliament (1999–);
- Measures of the Welsh Assembly (2007–2011);
- Acts of the Welsh Assembly (2011–);
- Acts of the Irish Parliament (1495-1800);
- Acts of the Parliament of Northern Ireland (1921–1972);
- Measures of the Northern Ireland Assembly (1974);
- Acts of the Northern Ireland Assembly (2000–2002, 2007–);
- Orders in Council made under Northern Ireland Acts (1974–);
- Church of England Measures (1920–).

Other primary legislation that is held in unrevised form includes:

- Post-1991 local Acts (and a small number of pre-1991 local Acts).

The database also contains certain secondary legislation which is mostly updated:

- Statutory Instruments (1948–);
- Welsh Statutory Instruments (1999–);
- Scottish Statutory Instruments (1999–);
- Statutory Rules of Northern Ireland (1991–);
- Church Instruments (1991–).

The system reaches back to early sources; the 1297 version of Magna Carta is available for example — but only as amended, i.e. hardly at all. Subject feeds on accessible RSS are not available. And to find recent changes, the TSO daily list has to be searched daily — and manually.

Whilst the database reflects amendments to primary legislation, its updating is unreliable. Originally subject to Crown Copyright, the material has been publicly freely available for the last 20 years, certainly since 2006. There is a special part of the database available only to government departments — and it does not permit the use of generic email addresses, which departments themselves frequently use (in consultations for example). No reason is given for the restricted availability.[48]

What it does not cover

There are some trivial gaps in the system relating to the statutes and delegated legislation; these include:

- Some of pre-1991 repealed legislation;

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48 https://publishing.legislation.gov.uk/user/register. See also The Stationery Office for printed copies, and the London Gazette. The Hansard Society offers a paid-for service the SI Tracker.

- Most pre-1991 local Acts;
- Secondary legislation pre-dating 1823;
- Orders in Council made under the Royal Prerogative;
- Byelaws.

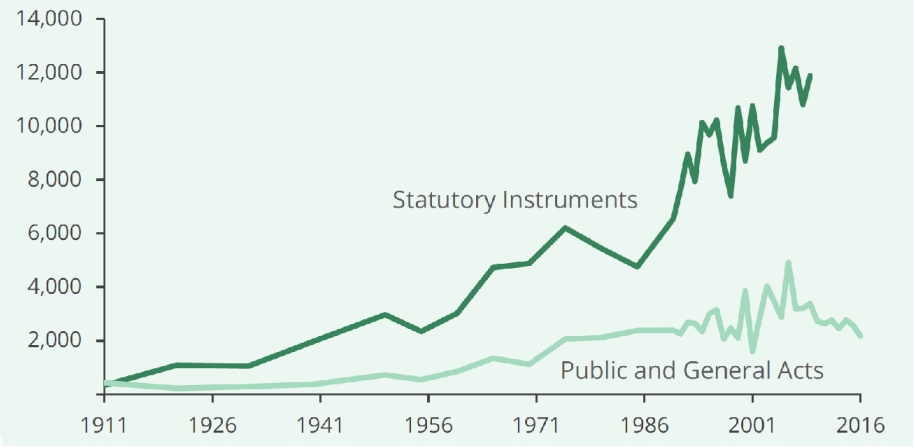
In practice it is also hard to find copies of statutory instruments applicable in Northern Ireland, Scotland and Wales before 1991/9. There are no plans to extend the database to include the missing material. A Select Committee report recommended that the database should be extended to cover secondary as well as primary legislation, which was eventually achieved.[49]

QUANTITY OF LEGISLATION AND STATUTORY INSTRUMENTS

The below graph shows the total number of pages added to the statute-book each year by UK SIs and Public and General Acts for selected years until 1990, and each year from 1990 to 2016. 2006 saw the largest number of pages added to the statute book, of 4,911 through Acts, whilst 1921 saw the lowest of the sampled years (220 pages).[50]

The figures for Statutory Instruments relate to the number of pages in the Stationery Office bound set — this excludes some local and unpublished Instruments and, from 2000, those made by the Welsh ministers. The figures do not include Northern Ireland (Stormont) Acts, Orders in Council or Statutory Rules. Pre-1987 figures are adjusted to current page sizes.

TOTAL PAGES OF ACTS AND STATUTORY INSTRUMENTS
Selected years until 1990, UK legislation only



The largest number of pages added to the statute book in one year by UK SIs was 2005 (12,933), whilst the lowest number added in the sampled years was 1911 (330).

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49 Merits of Statutory Instruments, 7 November 2006,

50 Chris Watson, Acts and statutory instruments: the volume of legislation 1950 – 2019, House of Commons Library, Briefing Paper 7438, 4 November 2020.

There is clearly no single, simple solution to the problem. But the challenge may perhaps best be resolved by adopting over time a series of policies. If the Government wishes to maintain the rule of law and reduce burdens on citizens and businesses they should:

- **Adopt the Australia/New Zealand system of holistic law publication**, where legislation is accompanied by explanatory memoranda, parliamentary debates and other documents designed to help the user;
- **Introduce standard methods of intelligent rulemaking to remove unnecessary legislation — including requirements for one-in-three-out (also to be applied to regulators), embracing the RegData (US) methodology, extending the use of sunset clauses — and continuing consolidation and codification exercises;**
- **Apply of a code of behaviour and practice** for lawmakers including commitment to publication of rules in accessible website, data feed (XML, JSON) and PDF formats, amendments to be dated and time-travelled, penalties for breach not to be applicable without proper publication and obligation to provide user-friendly websites;
- **Declare that 'Henry VIII clauses', allowing departments to amend primary legislation, are no longer to be introduced;**[51]
- **Improve drafting of laws and rules** (including adoption of the principles outlined in Sir Richard Heaton's "*When Laws Become Too Complex: A review into the causes of complex legislation*", Office of the Parliamentary Counsel, Cabinet Office, March 2013);
- **Introduce personal accountability for senior lawmakers, who should put their names to new rules;**
- **Provide additional support for *legislation.gov.uk***, with added user-friendliness by using a more intuitive version of time-travel;
- **Require all rules to have externally validated cost calculations** (RIAs) publicly published, with an assessment of possible unintended consequences provided by a named minister;
- **Require government agencies to provide time-travelled codified rules**
- **Require regulatory authorities to publish compliance with government policies on better regulation including for example 'one-in three-out' etc.; and**
- **Introduce training and qualifications for lawmakers and rulemakers,** including an understanding of issues of proportionality, sanctioning, alternatives to rules and behavioural rule-making.

Adoption of some or all of these steps would involve minimal additional expenditure, contribute to a material saving to business and the citizen and make the UK a safer, fairer and better place to work and live.

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51 i.e. powers for Ministers to amend Acts of Parliament, see Alison Young, Henry VIII powers, in Brexit and Beyond, Hansard Society, November 2020. There has been no vote against delegated legislation since 1979.

It is clearly difficult without, and even with professional resources usually not available to the general population, to discover the present state of the law. There are separate issues of comprehensibility both initially and after amendment. Amendments are hard to follow and trace, timelines are imperfect and contents unreliable.

Although strenuous efforts have been made with the legislation database, in practice the annotations made by commercial publishers are not publicly available. This is not a new problem; the complaint has been repeated almost every generation since the Norman invasion.

Despite, or perhaps because of new technology, the issue is a bigger problem now than before, given the introduction of many thousands of pages of quasi-legislation, often imposing sanctions for breach, which are not contained within a single database, and which can be amended without notice and without the ability to track changes.

This paper has discussed a dual and interrelated problem. There is both no depository of law, which has grown substantially in various forms over recent years, and, because of its growing quantity, the law has become extremely burdensome and difficult to interpret. This is undermining the basic precept of the rule of law by making it very difficult for individuals to discover their legal duties. It is increasing the burdens on business by creating substantial red tape, undermining our economic prosperity.

It is therefore necessary for the Government to take steps to both clarify the state of the law as well as efforts to limit the burden of the law to the absolute minimum necessary.