

Summary

The concept of 'regulatory burdens' appears to be omnipresent nowadays. It turns up in many places and in various meanings. There is, however, still no consensus about a proper definition, let alone one right interpretation of what causes regulatory burdens. Against this background the purpose of the current study was to explore how the international literature deals with the idea of regulatory burdens to further our understanding of the process of regulatory accretion and regulatory creep and contribute to the practical application of the concept in our regulatory policy. Four research questions have been guiding in this study:

- Which concepts and definitions of regulatory burdens do appear in the international literature? Is there overlap between the definitions or do they displace each other?
- Which theoretical starting-points are considered to be relevant in relation to the interpretation of the term regulatory burdens?
- To what extent are there other concepts that resemble the phenomenon of regulatory burdens and what could we learn from these in the field of legislative studies?
- What might be practical lessons for the legislature in the attempt to reduce regulatory burdens?

The first phase of the research consisted of an orienting study of the existing literature (a so-called quick scan). Next, we have used various electronic search methods and databases to collect as much relevant documents as possible. At the same time we have obtained advice from a number of international experts in order to discover relevant sources of information. Finally, all our information has been catalogued and put into a central database on the Internet, only available for those conducting the research. It soon became clear that not all the international literature could be studied intensively in the course of this project. Therefore a selection has been made of countries that appear to be most interesting for further research. In the selection process we focused on differentiation instead of looking for similarities in policy approaches. Both in terms of the location of countries and the way in which the problem of regulatory burdens is being handled in the selected countries, we focused on differences in perception concerning problems related to regulatory burdens. The selection of countries reads as follows:

- The Netherlands
- Germany
- Great Britain
- The United States
- The European Union

At the end of this project a small-scale expert meeting was held (see annex 2). During this meeting the preliminary results of the literature study have been presented to a panel of experts. After that a first draft of the report has been discussed with the supervisory board.

We have studied the international literature on regulatory burdens from different angles. First of all, we did not limit ourselves to a study of the Dutch literature. We also analyzed German, British, American and EU publications, including policy documents.

This study was, in the second place, first and foremost problem-oriented instead of discipline-driven, which means that the research was not centered on one particular scientific discipline. We studied literature that might be helpful in providing answers to the different research questions, regardless the field of expertise. This has led to the fact that we have used insights from different fields of expertise, like law, political sciences, law and economics, policy studies, sociology etcetera).

Thirdly, we did not restrict ourselves to a study of literature that takes a quantitative approach as a starting point, indicating that the number of rules is considered to be the central problem. We also gave attention to publications that focus more on the perception-side of regulatory burdens.

The Netherlands

One could say that in the Netherlands there have been three different deregulation waves in the past. During the first wave, in the early eighties of the 20th century, a plea for a drastic reduction of regulatory burdens resulted from macro-economic concerns about the increasing problems in the Dutch economy due to the recession that took place during those days.

After Hirsch Ballin came into office as minister of Justice at the end of the eighties, the ideas about the best way to reduce regulatory burdens and to stop regulatory accretion changed dramatically. Under his policy the awareness grew that the answers to problems of regulatory creep had to be found by looking at alternatives for and in regulation, like the promotion of the idea of self-regulation, which was embedded in a more comprehensive policy to enhance the quality of legislation.

The third and, for the time being, last operation to reduce regulatory burdens was instigated by former minister of Justice Donner. He introduced a regulatory reform program, called: towards a 'Practical legal system'. The philosophy behind this program was to empower citizens and create a social infrastructure that enables them to live together. The cornerstone of this program is without any doubt to improve the implementation and enforceability of legislation. While it is still too early for an adequate

evaluation of the current reform program, one may conclude that much of the alternative regulatory mechanisms that have been introduced are less new than they appear to be at first sight.

Germany

It is easy to find out that reducing regulatory burdens – which appears under several different headings – is a hot topic in Germany today. Compared to the literature in the Netherlands, German scholars are keener to discern between various factors that could influence an increase in regulatory burdens. Roughly three different levels of study are considered to be essential in the German literature, namely: the legislative process itself and the type of rules it gives birth to (Verfahrensfehler), the implementation and application of laws through bureaucratic organizations (Implementations Defizite) and enforcement agencies, and, finally, the rule-perception by the addressees (Adressaten Resistenz).

Strikingly enough, while the constitutional framework in which the primacy of the legislature and the principle of legality play a prominent role, almost nobody in Germany is willing to question these constitutional principles. This might be a little different when it comes to the relationship between regulatory burdens and the way the democratic process seems to work. From several sides complaints are being raised against the way the parliament functions as a driving force behind regulatory accretion in the German federal structure. As far as the attempts to reduce regulatory burdens are concerned, German scholars put a lot of emphasis on the revision of regulatory instrument and techniques to improve the quality of legislation, such as regulatory impact assessments (ex ante evaluation), withdrawal of outdated laws and temporary legislation.

Great Britain

The British literature on regulatory burdens, which has been studied in the course of this project, appears to be focused on criticizing deregulation policies by the British government. Both in terms of policy and science most attention seems to go to the development of sound methods for cost benefit analyses of new regulations. During the days of the conservative government a lot of attention has been paid to a serious reduction of the number of laws, whereas the Labour government appears to be more interested in improving the overall quality of legislation. We found out that most British literature is rather skeptical about the opportunities that Regulatory Impact Assessments might offer as a means to reduce regulatory burdens. On the one hand the shortcomings in impact assessment methodology are being stressed. On the other hand attention has been called for a new way of thinking about legislation and the necessary adaptations in the regulatory process in order to develop 'smarter regulation' mechanisms.

United States

Much of the American literature handles about the debate between those who are in favor of an economic approach towards regulatory reform and those that have another opinion. In this debate political controversies are quite important, as shown by the polemic between the EAI-Brooking Joint Center for Regulatory Studies and the Center for Progressive Reform. The American law and economics literature on cost benefit analyses in the field of regulatory policy is rather extensive. However, this does not implicate even a beginning of scientific consensus about what have to be considered the most appropriate methods and techniques to conduct cost benefit analyses in practice. Attention is also drawn to the shortcomings of the economic analyses of lawmaking. Critics, for instance, point to the influence of 'economies of scale', which makes it, for instance, necessary to distinct between small and larger companies. Another source of criticism is that most types of cost benefit analysis do not take account of cumulative effects, also known as 'system burdens'. These are caused by the addition sum of regulatory burdens that originate from different sources that come together to the detriment of a single norm-addressee. Parallel to this regulatory reform literature American experts in the field of sociology of law also pay attention to the effects of rule-perception on regulatory burdens under the overarching theme of 'legal consciousness' research.

European Union

At the European Union level policy makers and advisory bodies seem to dominate the debate on regulatory reform. Nevertheless in some areas there is also some scientific interest for specific subjects, like: the importance and practical relevance of the subsidiarity principle in order to control the pace of regulatory accretion, the added value of regulatory impact assessments and the possibilities and constraints of co-regulation and self-regulation as alternatives for statutory legislation. It is remarkable how much the debate on regulatory reform in Europe ends in stereotypical positions. As soon as a European law threatens to become successful member states rush to the scene to claim a victory, whereas in case the same law meets with criticism, national leaders can hardly wait to blame 'Europe'. Subsequently, nobody takes the trouble to find out who initiated the proposal for a new law (was it the Commission or was it a member state?) and what exactly causes the complaints about increasing regulatory burdens. Perhaps this explains the reason why regulatory impact assessments have recently appeared on the scene at the EU-level. Notwithstanding the fact that most literature stresses the fact that these impact assessments cannot displace political decisions in the process of lawmaking, a more thorough ex ante evaluation of proposal for European laws and regulations are of the utmost importance to combat unnecessary and unconscious increases in regulatory burdens.

Five 'deficiencies' in the current literature on regulatory reform

From our explorative study it follows that current studies on regulatory reform reveal a rather instrumentalist view. In most countries the legislature itself plays an important role in the reduction of regulatory burdens. Besides this, there seems to be an almost constant quest to discover new tools to quantify and, subsequently, reduce these burdens. In general we have discovered five major deficiencies in the existing body of international literature:

A historic deficiency

Most literature we studied almost seems to have an a-historic character. While in most countries regulatory reform programs have taken place, most of the literature does not pay much attention at looking back to evaluate what has (not) worked and why. As a consequence, important questions concerning the background and causes of uncontrolled regulatory creep often remain unanswered.

A conceptual deficiency

Most of the international literature reveals that the conceptual development of what causes regulatory burdens has not yet reached an advanced stage. Very often a clear-cut definition of regulatory burdens is missing. Furthermore, usually no sharp distinction is made between different types of regulatory burdens. How do different causes of rule-growth relate to each other? Which other concepts are perhaps closely connected with regulatory burdens?

A political deficiency

Most of the international literature seems to justify the impression that tackling regulatory creep first and foremost calls for technical and policy neutral measures. A sound analysis of the phenomenon of regulatory accretion demands that one not only aims for a quantitative approach towards regulatory burdens but also has an open eye for the political agenda behind an uncontrolled increase in regulatory burdens.

An empirical deficiency

Form the literature study it follows that there is a lack of empirical evidence to underpin scientific theories concerning regulatory accretion and regulatory creep. As far as empirical studies are available these are mostly focused on listing the number of rules and the administrative burdens that come along with an increasing body of laws and regulations. Unfortunately the call to measure and quantify regulatory burdens appears to be much stronger than the urge to analyze and explain these burdens.

A contextual deficiency

A lack of contextual background information is the sum of the problems listed above. A lot of measures to reduce regulatory burdens almost seem to arise out of a policy vacuum. Most scientific publications appear to be written with a specific law in mind and not with a perspective on everyday problems, which those who are responsible for the implementation, enforcement and compliance have to face. Because of this, more emphasis is normally put on analogies instead of differences between the norm-addressees.

Conclusions

The four previously formulated research questions can be answered as follows. Close observation learns that in the countries we have studied, there is no clear-cut definition of the term regulatory burdens. Literature study reveals that the concept disintegrates into a large number of closely related subjects, like: bureaucracy, Verrechtlichung, regulatory creep, administrative burdens etcetera. Besides, in the Netherlands, but also abroad, there a lot of attention is being paid for specific regulatory reform mechanisms. Nonetheless one cannot maintain that there is serious competition between different concepts of regulatory burdens, let alone that these are ready to elbow each other out of the picture.

In general it is fair to make a distinction between a 'narrow' and a 'broad' approach of the phenomenon regulatory burdens. Applying a narrow approach leads to the conclusion that there appear to be hardly any sound theoretical basis for an intelligent evaluation of regulatory burdens. The conceptual development still appears to be in its infancy. An exception should, however, be made for the law and economics literature. A more encompassing approach has the advantage that all kinds of related problems can be taken into account. We believe that our study offers an agenda for further interesting research in a number of areas.

One of the interesting concepts that are closely related to the subject regulatory burdens is the idea of 'legal consciousness'. The mainly American literature on this subject show which backgrounds and circumstances are the most relevant when it comes to studying how laws and regulations are perceived by normal citizens. Taken the legal consciousness literature as a point of departure could contribute to our understanding of what causes regulatory burdens. In the field of legislative studies this literature might teach us at least two different things. First it shows that much of the current research does pay a lot of attention to the *object* of regulation, but almost no attention to the *subject* that is under control. A large number of different factors and circumstances might contribute to an increase in regulatory burdens (regulatory burdens because of what?), but often the characteristics and backgrounds of those who experience regulatory burdens (regulatory

burdens for whom?) are overlooked. An important lesson from the American legal consciousness movement might be that the extent of the regulatory burdens and the way in which these are experienced is, amongst other things, influenced by their socio-economic features. A second lesson is that the perceptions of regulatory burdens are for a large part influenced by the normative ideas and expectations about the law amongst the public.

Starting points for the legislature

The most important lessons that originate from this research are translated into the following four suggestions for the legislature:

- 'Regulatory burdens' is an essentially contested concept, which is in its current shape and form, unfit to be used as an evaluation criterion.
- The perception-side of what causes regulatory burdens deserves serious attention.
- The scientific and policy related ability to learn more about regulatory accretion could benefit considerably by making the approach towards the reduction of regulatory burdens more falsifiable.
- For successful future international and comparative research the current concept of regulatory burdens should be split up into a number of subjects.