Antony Allott

The Limits of Law

Butterworths

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London · Butterworths · 1980

England Butterworth & Co (Publishers) Ltd
London 88 Kingsway, WC2B 6AB

Australia Butterworths Pty Ltd
Sydney 586 Pacific Highway, Chatswood, NSW 2067
Also at Melbourne, Brisbane, Adelaide and Perth

Canada Butterworth & Co (Canada) Ltd
Toronto 2265 Midland Avenue, Scarborough M1P 4S1

New Zealand Butterworths of New Zealand Ltd
Wellington 77–85 Customhouse Quay

South Africa Butterworth & Co (South Africa) (Pty) Ltd
Durban 152–154 Gale Street

USA Butterworth (Publishers) Inc
Boston 10 Tower Office Park, Woburn, Mass 01801

ISBN Casebound 0 406 55242 8
Limp 0 406 55243 6

Typeset by Butterworths Litho Preparation Department
Printed in Great Britain by Billing & Sons Limited
Guildford, London and Worcester

Introduction

Of the making of books about the nature of law there is no end. 'What is law?' is one of the most popular questions on the lips of the academic, though not the practising, lawyer. From Plato and Aristotle down to Hart, Fuller and Dworkin, not to mention the Scandinavians and all the other jurists toiling away at answering the great unanswerable question, the list stretches, like Banquo's line of kings, to the crack of doom. And this is to ignore the work of the historians, the political scientists, the philosophers, the moralists, and (most notably today) the sociologists and social anthropologists. These latter tend to be answering a related question, 'How is law?'; but they stray, like everyone else, onto the broader, richer-seeming, and ultimately less nourishing alps of 'What is law?'.

There are books, too numerous to count, about the making of law: who makes the law; what is the role of the judges; and so on. There are books, again too numerous to count, about who enforces the law, and who breaks the law. But there is a great gap, to which one may respectfully point, in all these studies – and that is an investigation of the usefulness and uselessness of law, about the *limits of law*. Race Relations Acts are passed to change the way we think and behave – do they succeed? African countries seek a way out of under-development by use of the legal weapon – can it work? The statute book grows, so that the average motorist would have to fill his back seat with statutes and commentaries on motoring law as well as with tools and spare wheel if he wishes to be safe – to what end?

Codification, law-making in a systematic way, is all the rage; the Law Commissions of England and Scotland, in their quiet ways, illustrate this trend. The European Economic Communities attract blame, not for their lavish spending on butter mountains so much as for their spending of time and paper on laws and regulations, the jural mountain.

It is in reaction to all this that I write. I started off with a concern with African customary laws, legal systems in which the community makes law, and changes it by its changing practice without help from the legislator. I carried on into a study of law and development, and the

desperate attempts of Third World countries to spend their way out of poverty and into riches by over-reliance on legislation: social engineering through law. Then I developed a comparative concern with the role of the ordinary people, the subjects of the law, not only in the making of the law through representative institutions and the like, but also in the unmaking of the law through ignorance, passive resistance, or institutional means such as trial by jury. The law clearly has limits of effectiveness and even of existence: what are they, and what are the causes of them? To discover and dissect the working of such limitations could surely do nothing but good, both to the legislator tempted by the legislative option and to the citizen fearing yet more law. Maybe the legislator today is searching for the new Philosopher's Stone, the alchemy which will set everything right, searching for ways to Eldorado, that golden land where all is tidy and regulated by law. Is there a path which leads to this goal?

In pursuing this theme I am, I believe, to a certain extent innovating.[1] Certainly there has been no previous attempt to pull together and analyse the resultant composite of data from many different societies in which law prevails, works, and does not work. But, outside the legal sphere, this investigation seems to me to resemble other developments in meta-scientific thinking (by 'meta-scientific' I mean thinking about science, rather than thinking or doing science). Physicists stop in their work of exploring and defining the structure of the physical universe and ask themselves the question, 'Can we really know?'. Heisenberg among others answers, 'No, you cannot.' Doctors stop in their work of building more hospitals, devising ever more costly and elaborate machines for diagnosing or treating patients, or of inventing ever more powerful wonder-drugs, and ask themselves, 'In the end, is it worth while? Will it work? Will the bugs eventually be immune to every wonder-drug; will

1. In her very recent study of *Dispute and Settlement in Rural Turkey* (Leiden, 1978), which looks at the way in which a Turkish village deals with legal conflicts in the light of its ancient customs, the rules of Islamic law, and the precepts of the applied Swiss Civil Code, Professor June Starr comprehensively (and, with respect, correctly) summarises the state of play so far as studies of legal transformation of society are concerned:

   'Laws are being passed in almost every modernizing country of Asia, Africa, and Latin America with the intent of changing behavior and attitudes of the less modern sectors of society (the Turkish Village Law of 1924 is one example). Yet, except for initiating statistical records on the cases heard in courts and agencies, there has been little attempt in any country to evaluate how a specific law affects those individuals who come under its jurisdiction. Particularly neglected is the empirical investigation of how diverse ethnic groups and rural populations in a country are reacting to legal innovation. Research on how new laws and procedures alter the behavior and attitudes of groups – especially those which are not members of the modern sector of the country – would seem necessary if governments and their advisors are to assess correctly the impact of their programs.' (at pp. 3–4)

   To which one can only add a very loud Amen!

the machines and the treatments cause disease and disorder rather than cure them?'

We live, then, in an era of healthy self-doubt, when the former certainties yield to introspective enquiry. The doubt is healthy, because there is nothing which is ultimately more dangerous than to rely on a technique or an analysis or a treatment which will not work, or which will finally cause harm. 'The operation was successful, but the patient died', is a common medical quip; 'the Rent Acts worked to protect the tenants, but the tenants disappeared', might be a legal parallel. Obsession with law-making seems a twentieth-century phenomenon, product of the prolonged Age of Enlightenment which stretches down from the eighteenth century to the present day, fed by Bentham and Napoleon, watered by the Germans, and now spreading over all, everyone, and everywhere, like a great green mould.[2]

The causes of this spread are open to speculation. The humanist sentiment that 'Man is the master of all things', even of himself and his companions, Victorian optimism and faith in science, has had something to do with it. But top of the list as cause of legislative spreading I would put, not authoritarian governments (whether of the pseudo-democratic or frankly dictatorial varieties), or even exuberant rationalism, but the mechanical means of producing laws. The printing press, the typewriter, and now the Xerox machine have a great deal to answer for. You want to prevent soil erosion in Africa? Nothing easier. You don't have to hire a single soil expert; all you need do is slip a piece of paper in the legislative typewriter, headed 'Soil Erosion Eradication Decree. 1980'. send it along to the appropriate legislature – if there is one. It will be passed, and the job will be done. Almost equally responsible must be the great academies. Laws need lawyers to devise and press them. Law schools and universities spew out lawyers who are potential draftsmen or operators of the laws they produce; while the devil gives work for idle academic hands by stimulating them to invent new and resounding projects for reform of the law. Each is more ambitious than the last; each has sound arguments to support it; each will reach the statute book – and then? Will it work? The answer is often, No, it won't. The limits of the effectiveness of the law have been reached; but by then the legal reformer, the law-maker, is on his next draft law, like the heart surgeon on his next patient; and he is unlikely to pause in his headlong progress to see what happened to his last effort.

I begin my enquiry into the limits of law by looking at the theoretical nature of law, and asking whether there is anything in the nature of

2. Readers who think that this view is exaggerated, or peculiar either to the author or the United Kingdom, should consult a very recent article by Roger Granger, discussed in the *Guide to Further Reading* at p. 294, which tells exactly the same story of the lawyer and the citizen being 'suffocated' by an excess of legislation in contemporary France.

law which limits its effectiveness and makes it incapable of being fully applied. Discussions of the nature of 'law' have, I believe, been confused by the inadequacies of the available terminology. Pre-eminently unsatisfactory, because used in several different senses in juristic writing, has been the term 'law' itself. *One* term will not do to cover all the functions without confusion of thought and analysis: I accordingly propose *three*, distinguished typographically as LAW (law in the abstract), *Law* (an existing legal system), and law (a particular rule or provision of a *Law*). Rejecting the possibility of ever determining the essence of LAW in the abstract (a task I abandon to the metaphysicians), I look at *Law* as an actual functioning system.

Law I see as a *communications system*, and hence subject to the same problems of transmission and reception of messages as any other communications system. The distinctive character of *Law* is in its being a function of an autonomous and distinct political society or community. It is generated by, or authenticated by, those who have competent and legitimate authority in that community, as possessing positions of power or influence. A legal system comprises not only norms, but also institutions (including facilities) and processes.

In analysing 'laws' (= the rules or norms of a particular system), which are the messages of the legal communications system, a distinction is made between *articulated* and *inarticulate* norms. An inarticulate norm is *latent*, if it has not yet been articulated but provokes *acts of compliance*. In this it is distinguished from *phantom norms* ('norms?' never emitted by any authority) and from *frustrate norms*, norms emitted in valid form but attracting minimal or zero compliance.

From the formal point of view, normative statements (i.e. statements articulating norms) are seen as hypothetical-conditionals; and application of a norm involves the 'matching' of the actual fact-situation to the model fact-situation specified in the 'If' part of the statement. From its nature such matching cannot be accurate. Can we say that facilities and institutions, processes, constitutive acts, and implementing orders within a legal system are 'norms'? How does one distinguish legal from other norms? What are the respective spheres of *Law*, morality, religion and mores? All these are important questions if one is to identify legal norms and their sphere of operation, as well as possible reasons for their ineffectiveness. 'Sanction' is not seen as a defining characteristic of a legal norm, but as a possible means of ensuring compliance. Legal norms are such, not because they are 'binding' (the term is rejected as having no correspondence with any actual phenomenon) or create 'obligations', but because of their source, their context, and their aim. They are seen as essentially *persuasive*.

In discussing limits on the effectiveness of *Law*, we are firstly impeded by the difficulty of measuring effectiveness quantitatively. Effectiveness is assessed in terms of the degree of *compliance* with legal norms; there are problems in deciding what is the measure of compliance for

permissive, as well as for mandatory or prohibitory, norms. Sources of weakness and non-compliance in the emitting, transmission and reception of norms are identified. A principal weakness lies, naturally, in the language, in the statement or expression of a norm. In contradiction of jurists who adopt the position that linguistic terms have fixed meanings or point to particular 'things' in the real world, I treat the question, 'How should I use a given term in an English sentence?', as requiring the specification of the *function* of the item in its *verbal* and *social contexts;* this is the 'meaning' of the item. No term, and not merely no legal term, has a fixed and determinate function.

An equal source of weakness is seen in the deficiencies of *monitoring* the reception and implementation of norms, due to the absence of sufficient *feedback* in legal systems.

There has been considerable juristic discussion of the limits of *Law* imposed by the nature of the society in which it operates. Are there societies which are too small or too unorganised to have *Law*, or to have express mechanisms for the making of *Law*? This is the problem of so-called 'primitive' societies. These and related questions are seen as examples of *applied juristics*, that is, the study of the *Laws* in operation, with which the rest of the book is concerned. Hart's hypothetical treatment of a society too small and primitive to have legislature, courts and legal officials of any kind, so that it has only primary, and not secondary, rules of obligation, is measured against the observed facts of simpler societies. I conclude that Hart's theoretical strictures (and those of Ross) that the rules in such societies would be uncertain, static and inefficient, or indeed that such societies lack functional equivalents of law-makers, law-enforcers, and role-bearing institutions, are contradicted by the evidence, and that this casts doubt on his theoretical assumptions at this point. (Similar allegations against international law – often made by positivist lawyers – could have been, but are not, analysed from want of space.) If there are weaknesses, it is legal systems of the English type that come out worse from the comparison. One reason is that the ambitions of the legislators are less extreme in traditional societies; another is that there is much greater reinforcement of the legal message by the concurrence of moral and conventional precepts.

If we pursue our investigation of the effectiveness of *Law* into English society, a grave condition of *anomia*, or lack of knowledge of and responsiveness to *Law*, is diagnosed. Unknown law is ineffective law. English *Law* is little known by its subjects, as there is no effective communication of its requirements and innovations to the citizens at large, and little understanding of *how* and *why Law* is. This state is seen as unnecessary, avoidable, and remediable. Non-compliance with the *Law* is partly due to unwitting failure to comply, partly to deliberate defiance. Industrial relations law is a prime example of the latter case, demonstrating a tenuous respect for *Law* as a controlling mechanism.

But there are many other examples: road traffic law, street offences, divorce law, squatting. This widespread non-compliance must be partly attributable to the non-democratic nature of present legislative realities in Britain. What would happen if there were much greater popular involvement in the making of law, one wonders; almost certainly one result would be less law, another would be fuller compliance.

Laws do not work well if they are out of fit with their social context. In a country like England such lack of fit may be due to *who* made the law, *when* the law was made, and *to whom* the law applies. The adjustment of the *Law* to changing social conditions is partly the work of the *courts*, through their *re-definition of instrumental legal terms*, like the 'reasonable man' in *British Railways Board v Herrington,*[3] and through *contextual interpretation of statutes*, like 'family' in the Rent Acts as re-interpreted in *Dyson Holdings Ltd v Fox.*[4] *Legislation* too is naturally used to adjust *Law* to changed social conditions, though in a step-wise fashion. The *people* too adjust *Law* to their views of what is right and reasonable, and to their ways of living, through *catanomic* (law-conforming) and *paranomic* (law-disregarding) transactions and arrangements, in other words by using their law-making power to make new institutions. Popular disregard of laws does not repeal them directly (except for customary *Laws* properly so called), but it exerts an osmotic pressure on the agents of law-administration in the direction of variation or non-application.

One of the most fascinating examples of popular law-making is currently under way in England, with the development of the relationship of 'common-law wife', which I have christened the 'house-mate'. Developed in parallel with legitimate marriage, and originally in defiance of the norms of morality, convention and *Law*, the house-mate system is now achieving increasing recognition from courts and legislature. Eventually it may emerge as a separate legal status, in which case the triumph of custom as a generator of effective law will be complete. Legislated law is usually treated as excluding or limiting the effect of custom; but custom, as this example shows, can limit the effect of law.

When one turns to the phenomenon of *translocation of laws* (the shifting of a complete legal system or part of it from its home country to new ground), it is predictable that there should be a lack of fit between *Law* and society. African countries formerly under British colonial rule are prime examples of such translocation (though many countries in the Third World got their *Law* in this fashion, and there is now translocation of laws between developed legal systems as well as from them). Such translocation goes far back in time, as with the spread of Roman *Law*. It can be dramatic in its social effects, as with the translocation of Swiss *Law* to Turkey; or it can be more cautious and insidious, as with the

3. [1972] AC 877, [1972] 1 All ER 749, HL.
4. [1976] QB 503, [1975] 3 All ER 1030, CA.

domestication of English *Law* in Africa, where the translocated law had to compete with indigenous customary *Laws*.

Does justice limit *Law*? An old question, but worth looking at afresh, in view of the contradictions between the view (put forward by the positivists) that it is not the business of the *Law* to legislate morality – hence the attack, inspired by Bentham and Mill, on laws which seek to lay down private morality, however generally it may be accepted – and the evident attempt to legislate the new morality (of non-discrimination against races, sexes or religions) into law. If justice, or striving towards justice, is part of the essential definition of a legal system, this is a severe limitation on the possibilities and the validity of *Law*.

My own view is that such a definition is a confusion of levels of analysis. *Law* is an observable fact; the compulsions (or better, persuasions) of the *Law* are social facts. We judge whether *Law* exists, or a norm exists, not as a question of value but as a question of fact. Since we have discarded the notion of the 'binding' quality of *Law*, we do not have to answer the question, 'Can a formally valid but "immoral" (in the eyes of the questioner) law be binding?' A formally valid law is valid and persuasive. Whether its recipient is persuaded, or ought to be persuaded, is conditioned by evaluation at a quite different level, and within a different system, that of morality. A sentence can be grammatical but be a lie; a law can be valid but unjust.

What is the relation of religion and *Law*? Each has at different times, as systems demanding obedience, competed for the allegiance of their subjects or adherents. The new wave of Islamic traditionalism in countries like Pakistan and Iran revives the old questions, and destroys the assumption (again too often made by modern western jurists) that *Law* is now and must be a secular phenomenon. Blasphemy trials in England are the dying gasp of a similarly religiously-inspired system of laws.

Nowhere is the crisis of conscience of the citizen more acute, in deciding whether to respect or disregard a law, than when the whole legal system appears unjust, or even, because it lacks what we call *legality*, any claim to be a legal system. Imagine a society where there are no fixed rules of law, where decisions by 'courts' are based on uncontrolled discretion: is this a society with *Law*? Or must one accept the possibility of the 'no-law state'? This accusation has been directed against the Soviet Union by Solzhenitsyn; but though the use of power, dictate and discretion instead of predictable and rationally applied rules of *Law* is more pronounced there, analysis suggests that there are similar features, posing similar juristic problems, elsewhere. Within the context of a legal system, might *is* right. The foundation norm for a society may be power, however acquired or exercised. But any *Law*, whether founded on might or not, eventually depends for its effectiveness on compliance; and the people have the power, by disregard or failure to comply, of rendering any law ineffective and frustrate, even in an absolute polity. *Legalism*, adherence to the formally valid

rules of *Law*, requires compliance at its level; *legality* – a critique of the fairness of aim and provision of laws – authorises non-compliance at a higher level.

Lastly we come to legislators who, though ambitious or overweening, are not necessarily vicious. They seek to procure the social transformation of their society, in whole or part, and to do this use the resources of the *Law* to create and impose radically new patterns of behaviour. Mostly the legislator will do this through *codification*. Some codes have aimed only at *technical transformation* of the laws; though even here there may be major unintended social consequences. Other codes are bolder, and aim at *social transformation*. There are two main ways of procuring such a transformation. The first is slower, more cautious, less assertive, by the creation of *models* which the people may adopt and accept if they choose. Voluntary schemes of land reform, the option of monogamous marriage, parallel provision for conveyancing with written documents, the making of written wills, even marriage itself, and the setting up of framework-laws for co-operatives, friendly societies, corporations, trade unions and the like, can all be seen as model-making laws, where the model is encouraged by the law-maker but adopted voluntarily. These laws are transforming in that these models will, if adopted, radically change the inner ordering and the content of substantial legal relationships.

Such modelling is too slow or uncertain for impatient legislators. Instead they seek to impose a *programme* of compulsory change. The Turkish Civil Code destroyed the old Ottoman family law; Tanzanian legislation has tried to limit private ownership of resources; the Kenya land reforms abolished customary tenure; the Indian codifications seek to impose a uniform, secularist, pattern of family life; British legislation on race relations seeks to transform people's behaviour and attitudes towards citizens of a different ethnic origin or colour. Two legal revolutions hit Ethiopia: the first, under the Emperor and mediated by the Ethiopian Civil Code, sought to transform the country through uniform, secularizing, French-inspired law, displacing customary and religious normative systems; the second, after the revolution which overthrew the imperial system, is transforming the private-enterprise system into the collective economy. All such attempts, whether to offer models or to impose programmes, raise questions about the uses and uselessness of *Law*. Can one, should one, use *Law* to reconstruct a society and its social relations? Can it work; and what reinforcements, by way of education, guidance or feedback, are needed to make it work?

The answer, for those of an anarchical temperament, is mildly comforting. Model laws seem to work better than programmatic ones. Popular resistance can destroy or weaken even the most cast-iron laws, however punitively they may be administered. Paranomic (not law-abiding) practices and institutions grow up 'or continue' to weaken allegiance to those prescribed by the formal law.

The reader may notice two things about this book. The first is that at many points it reflects the influence of numerous living and dead jurists, whose thoughts and analyses have been woven into the texture of this particular study. The second is that acknowledgment of this fact is rarely made. The reasons for these two facts should be given.

It is quite impossible to write a book on legal theory, even if it is on an aspect which seems as yet not to have been fully covered, without building on the work of one's predecessors. These are too numerous to mention. Many have been influential on me, and many approaches used here will be reminiscent of earlier work. No modern thinker-out of jurisprudential problems can avoid the influence of Hart; if it would not be impertinent to enlarge on the point, one would say that his *Concept of Law* is a model of what a fundamental book in legal theory should be: clear, short, sharp, incisive, realistic. One writes in his shadow. After that, the work of the Kelsen school, the Scandinavians and their various forms of realism (especially Ross), Dworkin's percipient extensions of existing theory, John Austin himself, writers on linguistic theory and analysis and communications theory, comparative lawyers, students of ethnojurisprudence or legal anthropology – have all contributed their flashes of insight, their useful terminology, their convincing breaking down of the phenomena.

But Hart and Ross and others are models in a different sense. I believe most strongly that a work on legal theory is not to be composed or written like a textbook on the sale of goods. It is not to be a patchwork of citations and of other men's opinions, but a coherent account of one person's attempt to get to grips with legal phenomena. Hence the paucity of footnotes and of acknowledgments of others' work. What I have tried to do conscientiously is to think through my own opinions and to create my own internally consistent analysis. There may be points of novelty in this analysis, there may be old and accepted juristic chestnuts; but in many cases I have put down how I see it first, and then found out that others look at the matter the same way, rather than the other way round. I therefore do not rely on the authority of other and greater thinkers to support my own analysis, which must stand or fall by the conviction which it may carry as such to the reader.

Antony Allott

February 1980

Acknowledgments

The ideas which this book contains and develops have formed over the course of years of teaching and discussing the law with both colleagues and students. The opportunity to learn from them, not merely important facts about other systems but also how to see those facts, has been of the greatest value to me. I accordingly thank them, and dedicate the present work to my past and present colleagues, both in the Department of Law at the School of Oriental and African Studies and in many universities overseas, with whom I have had the pleasure of collaborating. The influence of my colleagues (and not only my legal colleagues but those who teach anthropology, linguistics and similar disciplines) will be manifest; I hope that I have successfully reflected the learning and perception which are theirs. The inestimable advantage of working at a multi-disciplinary centre such as the School will, I hope, be evident in the approach which I take to legal phenomena.

I especially thank colleagues who read and commented on all or part of the present text, in this or a previous form – notably the Department of Anthropology at the School; Professor I. M. Lewis; Professor L. Neville Brown; Professor William Butler. None of the errors which may be found in my book can, of course, be attributed to them. I also thank Philip Baker, who has helped with the preparation of the Index, and Robin Allott, who assisted with the reading of the proofs.

A number of paragraphs in the present work previously figured (in the present or an abridged form) in an article by myself entitled 'The people as law-makers: custom, practice, and public opinion as sources of law in Africa and England', which appeared in the Journal of African Law, at [1977] JAL 1. The pages of the present text which incorporate this material comprise pp. 85–88; 90–94; 101–104; and 261–264. The School of Oriental and African Studies, as publishers of the Journal, and its Editorial Board, are thanked for permission to make use of these passages. Oxford University Press are thanked for permission to quote from *Colour and citizenship: a report on British race relations*, ed. E. J. B. Rose, 1969.

The co-operation and encouragement of the editorial staff of Butterworths should not be allowed to pass without a special mention.

Lastly, and most importantly, I have to thank the authorities of the School of Oriental and African Studies for giving me time off from my academic duties during the session 1978–79, which enabled me to complete the writing of this work.

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