

REVIEW ESSAY

THE LIMITS OF "THE LIMITS OF LAW"

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A Review of Antony Allott, The Limits of Law. London, Butterworths, 1980.

Professor Allott's books of 1960 and 1970 were pioneering accounts of the laws of Anglophone African states, exploring aspects of their customary, statutory and received English laws, and employing the techniques and insights both of the lawyer and of the anthropologist.<sup>1</sup> Many students have benefited from this reporting and analysis, and much writing has been based on the foundations he laid. (A high proportion of us have also benefited from his personal advice and tuition.) Now in 1980 he ranges world-wide, exploring with the aid of examples from Kenya to the Soviet Union, from England to India, a question concerning legal systems of every ancestry. The Limits of Law examines the extent to which law is effective in directing human behaviour, and the reasons for its frequent failure to achieve that purpose.<sup>2</sup> In this study of the instrumental potential of law the lawyer's skills remain in evidence, and indeed are shown to be essential in the first stages of the investigation. But the work is primarily of social philosophy, calling on the anthropological, sociological and political sciences.

Allott considers that to define the universal concept of law (which he writes as LAW) is not possible, and that to attempt to do so is not helpful.<sup>3</sup> He is concerned with actual, effective legal systems (which he calls Laws). They consist of norms, institutions and processes.<sup>4</sup> The principal element among these for the present purpose is norms (for which he reserves the term "laws"). Statements of norms are analysed as "'hypothetical-conditional', in which the hypothesis or assumption represents a pattern or model of behaviour or action or events...; while the conditional specifies an assigned consequence."<sup>5</sup>

A legal system is viewed as a communication system, in which the norms are the individual communications. Legal norms cannot bind or force the recipients to adopt particular courses of action, but they have the purpose of persuading them to that end. To try to identify the originators of legal norms would be to embark on a quest as impossible and unhelpful as the search for a concept of law.<sup>6</sup> But norms, as communications, have 'emitters', who can be identified: having declined to postulate a sovereign-originator, we are not reduced to postulating independent imperatives.<sup>7</sup> It is the emitters who, Allott

says, have the purposes of persuading the recipients to particular forms of behaviour. When the subjects, the intended recipients, of a law are successfully persuaded, they comply with the purpose of that law, and the law can be said to be effective. To determine the limits of the possible and actual effectiveness of law, therefore, it is necessary to examine how far compliance can be, and is actually secured. The book is thus an illustrated guide to an empirical method for the assessment of laws and legal systems, one which might interestingly be compared with the traditional mode of measuring laws and legal systems against moral standards.

The bulk of the book is an examination of the ways in which emitters of norms may fail to achieve compliance. The idea of law as a form of communication, while not original,<sup>8</sup> suggests a classification of modes of failure by analogy with other communication systems. Allott lists, for example, failures in transmission, in expression, and in implementation by other norms, orders, institutions and processes.<sup>9</sup> The classification stimulates useful questions. Thus Allott suggests that effectiveness may be impeded by interference caused by other, competing signals, or by misunderstanding of a received message.<sup>10</sup> However, the main discussion, developed through a wealth of carefully detailed examples from actual legal systems, is organised in other categories of possible modes of failure, chosen no doubt because of their convenience for extended discussion, although they are not mutually exclusive.

Only one possible cause of failure is rejected on the evidence. Under the heading "Limits on Law from the Nature of the Society" Allott examines H. L. A. Hart's famous account of the 'primitive' community which lacks secondary rules, and is "without a legislature, courts or officials of any kind."<sup>11</sup> Employing evidence from a number of African societies, Allott provides a devastating critique of Hart's account.<sup>12</sup> (As Allott points out, Hart refers to "many studies", thus denying himself the defence that he was posing an imaginary construct.) Unfortunately it was not within Allott's scope to examine the implications of this weakness for the remainder of Hart's discussion. It might be concluded that it leaves the rest of Hart's argument untouched, just as the pure theory is not invalidated by Kelsen's ignorant reference to the Asante as a "tribe under the leadership of a despotic chieftain".<sup>13</sup>

Allott describes a number of true modes of failure. Some instances he finds to arise from excessive ambition of a legislator, who makes too many and too unpopular laws.<sup>14</sup> Others are caused by the subjects' ignorance or non-acceptance of the laws.<sup>15</sup> Some laws fail through being out of fit with their social and environmental contexts, for example through having been made to fit social conditions of an earlier period or a different place.<sup>16</sup> Laws may lose effectiveness through competition with the normative system of a religion, a morality or a set of mores.<sup>17</sup> Laws which have the purpose of social transformation may seek to impose programmes, but "there is practically no example of a programmatic law which has been entirely successful", because usually "the social transformer has no time, he is unwilling to resort to persuasion, he displays no responsiveness to people's feel-

ings and desires, he is not prepared to make any accomodation.<sup>18</sup> Laws which set models of conduct, compliance with which is sought through persuasion, are more likely to succeed.<sup>19</sup> The penultimate chapter examines the state system of the Soviet Union to determine whether, as Solzenitsyn suggests, it is a "no-law state", and concludes that it has law.<sup>20</sup> Finally there is an account of the growing recognition by English law of the de facto spouse (or common-law wife [sic], or "house-mate" as Allott names her or him), as "an example of the competing contributions of state, courts and people in the making and un-making of law."<sup>21</sup> This last shows the possibility of social change successfully influencing the content of law, whereas the message of the previous chapters has been that attempts to produce the reverse process generally fail.

Many specific empirical studies of legal systems have aimed at particular conclusions in this field. Allott now draws them together in the grand project of a general analysis of the obstacles to be avoided if law is not to fail in its purposes, and so of providing a guide to the making of effective law. (The enquiry does not exclude the conclusions that some purposes cannot be achieved by law-making, a conclusion reached by Allott.) The project is in part the summation of law and development studies--the lawyer's contribution to development studies--but it is also much else, because development is not the only goal of lawmakers, even in the third world. The book's discussions of particular obstacles, and its illustrative examples, will be invaluable to students. However, rather than discuss matters of detail, it is proposed to develop here certain objections to the book's conceptual framework, in the belief that this work displays with exceptional clarity assumptions implicit in many specific studies. Two questionable views seem central in Allott's analysis: that laws are made or emitted with fairly simple, easily identifiable purposes; and that legal facilities require no special consideration, nearly all laws being hypothetical-conditional norms.

#### I. LAW'S PURPOSES

It is implied that every law has one primary purpose (or intention, or aim). This purpose was in the mind of the emitter,<sup>22</sup> and is quite easily discoverable. The distinction between the originator and the emitter of a law, which might have revealed a complex bundle of purposes behind the law-making process, is not pursued. The emitter is referred to also as the "legislator", "law-maker", "lawgiver" and "commander", and it seems to be assumed that he also is easily discoverable. Thus there emerges a simple, mechanistic model of a process in which a person or group first forms a particular purpose, and then makes, or emits, a law by an act of will directed towards achieving that purpose.

From the first page, where it is said that "Race Relations Acts are passed to change the way we think and behave,"<sup>23</sup> this process is taken to be unproblematic. It is subsequently said that "a Law [legal system] is a set of acts of communication directed to a particular purpose";<sup>24</sup> that "each discrete emission of a legal norm...bears the

message intended by its emitter";<sup>25</sup> that "Parliament speaks" to "intended recipients";<sup>26</sup> that "Law is seen as a system with a purpose";<sup>27</sup> that "the apodosis (the 'Then' clause) [of a legal norm] is the affirmation of an intended (not a predicted) consequence";<sup>28</sup> and that there is a "commitment or purpose of [a] legislator in making [a] particular law."<sup>29</sup> Admittedly a distinction is drawn at one point between cases in which "the law-giver, the commander, positively and strongly wishes that which is commanded, intrinsically", and those in which "he is intrinsically indifferent" between alternatives, but then it is said that in the latter cases he "commands" that which is chosen not only "to affirm the validity of the action required", but also "to secure its effectiveness".<sup>30</sup> The emitter is personified: "the presuppositions and understanding of the law-maker are largely controlled by his own formation and background"; and while it is accepted that he may be a class of persons, this class is regarded as always homogeneous.<sup>31</sup> The view of laws as designed to promote personally held purposes is continued in the argument that "the individuals or small elite group who introduce legislative programmes" for social transformation are typically impatient and arrogant in seeking to remake society according to their vision;<sup>32</sup> and that in Britain there is "a continuing failure of the race relations laws to meet the purposes set for them by their sponsors."<sup>33</sup>

The accuracy of this picture of the law-making process is vital to the inquiry. A law is effective (or successful, or efficient) if its emission produces compliance. Compliance means that conduct which it is the purpose of the law to produce.<sup>34</sup>

There is a recognition of difficulty when it is said that "the apparent personification of the legal system could be objected to", especially in a customary system, "because 'purpose' must imply a person or persons with an intention." The answer given is that the subjects of a system recognise specific persons as authorised emitters of laws, and that the latter are not "either silent or unaware always of what they are doing."<sup>35</sup> But for an objective assessment of the effectiveness of law it is inadequate to use as a measure the intentions of those who are merely believed by subjects, perhaps mistakenly, to be the sole participants in law-making; nor is it enough that the law-makers are "not always unaware" of their objectives if there is no analysis of the cases where they are indeed unaware.

The "purpose" of a law cannot mean the legislative intent as understood and determined by lawyers, because the discussion is not limited to statutory law. Moreover, Allott considers that the emitted norms may fail to express the emitter's intention,<sup>36</sup> so the purpose cannot in all cases be simply that the action specified in the norm be done. Thus a formal analysis does not necessarily reveal the purpose.

At several points Allott speaks of the purpose of a legal system in general. He says: "The ultimate function [i.e., presumably, purpose] of Law is invariable, viz the shaping of behaviour in society to correspond to the goals set by those having influence within it,"<sup>37</sup> and: "To us, as jurists, the main purpose of a legal system is to

give and express the structure of a society, and to permit the harmonious working of that structure."<sup>38</sup> Such purposes are too general to provide perceptible criteria against which to measure the effectiveness of any particular legal system, and were not stated for this purpose. However, in so far as they have any precision, as in the reference to harmony, they are not self-evidently always the purposes of all law-makers, and seem to reflect a conservative bias.<sup>39</sup> On the other hand, the purposes of sets of norms within legal systems, such as those of a civil code, or individual norms, which must presumably be more specific, are generally assumed to be obvious.<sup>40</sup>

It is submitted that this notion of purpose is not merely inadequate. Three interrelated arguments suggest further that it is likely to produce error.

Firstly, the notion of the purpose of a law entails an oversimplified view of law-making. No law is made with a single, easily perceived purpose. It is apparent that a norm of customary law or of case law typically evolves from a complex interplay of social relationships in which the various actors who influence the form of the norm have many different purposes. Even if the enquirer disregards all but the emitters of the norm, he still has to consider a substantial number of human beings, every one of whom has a number of not fully compatible purposes. The statutory norm may result from a less complex set of purposes, but even here observation of the workings of legislative bodies suggests caution in any discussion of the "purpose" of law-makers.<sup>41</sup>

Allott's own examples and observations hint at the complexity of purpose behind laws. Thus he asks, not entirely tongue-in-cheek, whether the twentieth-century "obsession with law-making" is in part a product of "the printing press, the typewriter and now the Xerox machine," and of the need for work of the lawyers which the law schools and universities "spew out".<sup>42</sup> If there is any truth in this, it follows that norms are not made purely for the purpose of producing the conduct which they specify. He suggests that British magistrates make law, that "in their daily lives [they] are open to all the popular and extra-judicial influences represented by their circles of friends and contacts:, and that "their views...are...not those of the law-making establishment."<sup>43</sup> But a law which emerges after hundreds of magistrates have in effect amended by a dialectical process the text of "the establishment" is surely not likely to have one simple purpose. Again, when the final chapter gives an account of the influence of "state, courts and people" on one area of law, it does not contain an analysis of the purposes of the new law.

On the other hand, when Allott specifies the purpose of a law, he seems to assume that the law-making elite is a monolithic group and that it is never compelled, by class conflict or otherwise, to make laws with purposes at variance with its own. Thus he says, of "those who pushed" the English Divorce Reform Act 1969, which has been followed by a continuing increase in the number of divorces, that "either they knew what would happen, did not care, and concealed

it--the knave option; or they did know and could not foresee--the fool option."<sup>44</sup> But it seems more likely that they were not of one state of mind, although in so far as some of them were mistaken, this might be regarded as normal and human. Similar comments could be made of the makers of the antidiscrimination statutes already mentioned, of whose intelligence or integrity again Allott seems to have a low opinion.<sup>45</sup>

It would seem preferable to avoid hastily attributing purposes in this way to law-emitters, but rather to bring to the law-making process the same social-scientific mode of investigation which we attempt to follow when investigating the social effects of laws. We should certainly avoid accepting without question statements by persons involved in law-making about their purposes. Even when these are not public-relations posters consciously papered over the rough, fissured wall of political controversy, there is a probability that they will be retrospective rationalisations of decisions which were reached by more chaotic means. We need to develop a body of specific studies and general theory concerning the historical processes whereby laws are made. These need to be derived from empirical studies. They will need to contravene the tradition of English legal historical scholarship, which has favoured doctrinal studies.<sup>46</sup> It may well be helpful to look for underlying economic factors in the process.<sup>47</sup> The socio-political factors should be expected to be more complicated than is suggested by the norm-emitter's-purpose model.<sup>48</sup> It is quite possible that the process will be found to be dominated in each particular period by a definable class, but it should not be assumed that classes are ever totally uniform, nor domination ever perpetual.

Secondly, the notion of the purpose of a law assumes wrongly that there is a moment when a law is made. Allott's approach, shared with a number of students of law and development, regards a law as a machine: it is made for a particular purpose; once made, it is finished, a completed construct. It is only on this premise that one can study the effectiveness of a law over a period of time subsequent to its making. This the book does in a number of cases. The project is to measure the efficiency of the machine.

References to the judicial interpretation of laws point towards the objection.<sup>49</sup> Further reference to history shows that the making (or validation, or emission) of a law is one step in a process which has no end earlier than the point when the law ceases entirely to produce consequences. The formal making of a law is accompanied simultaneously and followed immediately and unremittingly by interpretation, given not only by judges but by everyone who hears or reads it. These interpretations can produce perceptions of the law's content radically different from those of any or all of its makers. In English law the fee tail was confirmed by the Statute De Donis 1285 but the estate's character was formed by the lawyers who invented and validated methods of barring, and then methods of impeding the barring of entails.<sup>50</sup> From the enactment of the Statute of Frauds 1677 it took but a few years for the profession to invent the doctrine of part performance.<sup>51</sup> These are but dramatic, well-documented examples

of the inevitable changes in perceptions and attitudes regarding the factors which first produce any authoritative norm. Laws never are, but always are being made: we falsify if we try to freeze on one frame.<sup>52</sup> Therefore the empirical studies of the law-making processes should be continued beyond the moment of first promulgation.

Thirdly, the notion of the purpose of a law produces a concentration on "compliance", which prevents an accurate perception of the law's total effects. Allott examines a supposed unilinear process: a purpose produces a law, which in turn produces, or fails to produce, compliance. This scheme can lead to an attribution to laws of events which they did not cause, and a failure to attribute some of their consequences.<sup>53</sup>

Consequences are likely to be falsely attributed because the scheme ignores the possibility that those factors which produce laws may also directly produce the behaviour which is labelled compliance. A new law follows on decisions by members of the law-making class that certain changes in behaviour are desirable and will if possible be induced. That class normally influences social behaviour by a number of means, of which law-making is but one. It is not justifiable to assume that, if the desired changes occur, they result from the law, rather than the historical circumstances which led to the decisions, or other manifestations of the decisions.<sup>54</sup> Such other explanations of changes seem especially likely to be true when there has been widespread public debate, for example within a mass party with efficient lines of communication between grass-roots and leaders. These explanations can be tested only by full studies of the internal relations of the law-makers and of their activities in the society.

In a different respect the unilinear scheme produces an underestimate of laws through a failure to recognise all their true consequences. Compliance is only one of the possible effects of a law. Although the possibility of other effects is well established,<sup>55</sup> they receive little attention from Allott.<sup>56</sup> It might be replied that compliance is a legitimate topic for investigation, and may be usefully isolated for study. However, if the study is intended to assist law-makers, it should be noted that they need information not only on how to secure compliance but also on the probable "side-effects" of projected laws.

It follows that the empirical investigation of the continuing law-making process, suggested above, needs to be carried forward to encompass comprehensively the social effects of each part of the process. A wider canvas than Allott's is needed, and consequently a different technique. If we abjure the notion of a purpose behind each law we cannot even speak of "intended" and "unintended" effects. That must give way to the uninteresting contrast between expected and unexpected effects (referring to the expectations of some observer).<sup>57</sup> The wider investigation demands a method analogous to Bentham's "exhaustive method" for the analysis of possible laws.<sup>58</sup> Until that has been devised, we can rely only on our experience of history and a fertile imagination to suggest places to look for the effects of particular laws.

These three criticisms all refer to Allott's mechanistic conception of legal systems.<sup>59</sup> This conception is exemplified in various comparisons. Some, such as that between law and other communication systems, seem fruitful, but others seem unhelpful. For example, he says: "We say that, because our society is complex and large, we can afford better and more effective medical care, food transport, and so on. In what is law different?"<sup>60</sup> "To us, as jurists, the main purpose of a legal system is to give and express the structure of a society, and to permit the harmonious working of that structure... Disharmony, disagreement... will be evidence of ineffective functioning;"<sup>61</sup> and "I blame the law-making elites for the excess of laws and overload of the system."<sup>62</sup> On these I would comment that it is not necessarily appropriate to compare law-making with the making of hospitals, etc., harmonious music, or electrical circuits.

This mechanistic view of law-making and its effects perhaps accounts for a number of analyses and conclusions which seem superficial.<sup>63</sup> It is manifested also in a tendency to speak of public opinion as if it were as much a single, unified factor (perhaps an input pipeline to the machine?) as is supposedly the law-making elite.<sup>64</sup> The total result is a modernised view of law-making as social engineering, but without the guide to social understanding provided by Pound's notion of conflicts between interests.<sup>65</sup>

## II. LEGAL FACILITIES

Hart has shown the difficulty in viewing the rules of a legal system as entirely commands or entirely commands and other imperatives. Some rules confer powers, whether public (for example, to adjudicate and legislate) or private (for example, to create contracts and marry).<sup>66</sup> Allott stipulates one form for all legal norms, in the terms already quoted.<sup>67</sup> The category is broader than that of Austin or Kelsen: in Allott's hypothetical-conditional the consequence is not necessarily a sanction or a state act of compulsion, nor does he consider that legal norms are all addressed primarily to officials. But all are "imperatives", "in the imperative, and not in the indicative, mode".<sup>68</sup> Some other elements of a legal system are found, on examination, to be further imperative hypothetical-conditional norms, or aspects of them. Thus an act constituting an institution is "an assertion about an element in norms". So an appointment of a judge is an assertion about the meaning of a phrase in the norm: "If an order of the judge, within his competence, is disobeyed, then the person disobeying shall suffer the following consequences..."<sup>69</sup> An implementive order issued by an authority in a legal system (e.g., "leave this house") can either be cast into the hypothetical mode of a norm ("if you do not leave this house, then...etc."), or it implies a set of norms (about the consequences of disobedience to homeowners, judges, bailiffs, etc.)<sup>70</sup> On the other hand facilities, such as judges, and marriage, are instances of that other part of a legal system, the institution.<sup>71</sup> These "cannot be stated or cast in the form of norms; but they are normative," because their meaning, functions, validation and effectiveness imply or require norms.<sup>72</sup>



Thus Allott's ordering of the elements of a legal system cannot be faulted on the ground of self-contradiction. All legal norms have the imperative, hypothetical-conditional form. Statements and imperatives which lack this form are in some cases portions of norms. In other cases they are not in the category of norms, but in that of institutions. They define or describe aspects of the structure and operation of courts, legislation, contract, marriage, divorce, property (including nearly all conveyancing, wills, settlements, trusts and landlord and tenant law), commerce and corporations. An ordering such as this cannot be criticised as erroneous. It may however be suggested that it is unhelpful and even misleading, on three grounds.

Firstly, this ordering of the elements of a legal system is too remote from usual and popular views of legal systems to provide a useful analysis. It is possible to force accounts of legal systems into various new patterns. Laws can even be regarded as composed entirely of commands, or of Kelsenian norms, if the extensive areas of facilitative law are regarded as vast interpretation sections of the law, operating adjectivally and as adjuncts, defining terms used in the central area of law. But, as Hart points out, this results in a description which is at wide variance from the point of view of those who operate and who are affected by the rules. It leads us to "treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society" as imperative, hypothetical-conditional norms.<sup>73</sup>

The immediate purpose of a formal analysis of a legal system is to increase our understanding. Prominent and familiar parts of such systems are verbal expressions. An analysis must do more than simply repeat these expressions. A novel description of an object, making previously unconsidered contrasts, juxtapositions and comparisons, can cast light from fresh angles, and show that hitherto accepted views were false. This is the object of a great deal of Jurisprudence. But an analysis which suggests that a large part of the familiar expressions must be abandoned is likely to confuse and produce error. An analysis which requires us to re-phrase the books on the structure and operation of courts, legislation, and all the other facilities, should be approached with scepticism. We customarily speak of legal facilities as areas of law which consist of rules. Marriage law, for example, is said to be a body of rules about the formation, incidents, termination, and so on, of marriage; and the "institution" of marriage is said to be defined by some of these rules. The rules are generally expressed as statements in the indicative mode, not as imperatives.<sup>74</sup> "Rules" are generally regarded as norms, or a class thereof. Norms are thought to have various forms, only one of which is the imperative hypothetical-conditional.

Allott suggests we should think differently. Norms have by definition an imperative hypothetical-conditional form. The books about courts and all those other facilities, which we thought were full of norms, are in large part descriptions of another, different part of law, institutions. We are entitled to ask: what insights do we gain from this reorientation? Possibly, if it were accompanied

by a complete analysis of the nature of institutions, it would be useful. Instead, the sphere of hypothetical-conditional norms is extended, by a nibbling-away of factors which might have been thought to appertain to institutions. Thus institutions are said to be constituted by hypothetical-conditional norms, since these norms employ terms which refer to institutions, and the terms are defined in statements explanatory of the norms. Institutions "imply norms, in the senses that they rest on norms for their meaning or function, or are themselves for the implementation of norms", and "they require norms for their validation or effective action".<sup>75</sup> It is difficult to determine what is left of institutions if we subtract the norms which constitute them, give them their meaning, function, validity and effectiveness, and are implemented by them. If there is anything, Allott does not describe it.

I would conclude that a more helpful approach to the conceptual analysis of legal systems is to view them as composed entirely of norms, only one form of which is the imperative hypothetical-conditional, and the other forms of which require individual examination.<sup>76</sup>

Secondly, this ordering of the elements of a legal system hinders the enquiry. The investigation of "compliance" requires that each part of a legal system, as isolated for examination, should have a "purpose". Even if we were to accept that each selected bundle of hypothetical-conditional norms had a purpose or purposes, there would be great difficulty in accepting that facilities had purposes. Allott seems to give no answer to this difficulty, but as he discusses facilities it is revealing that he reaches indeterminate conclusions. He writes of marriage: "Compliance for the parties is conformity with the regulations, the responsibilities, imposed by the relationship; compliance for third parties is respect for the relationship... Divorce may be treated as evidence of non-compliance."<sup>77</sup> But "regulations", "responsibilities", and third parties' duties are accretions, which assume the existence of the facility of marriage. The principal question is, what is meant by compliance with those central norms which provide the facility of marriage, the use of which is optional? Allott seeks to answer this by saying: "We are tempted to say that a facility which is not used is 'useless'. This goes beyond the question of compliance, or opens up a new perspective of it."<sup>78</sup> One may remark: it would have been instructive to have a conclusion rather than a note of what one is "tempted" to say; a facility which is not used is unused, not useless; and it would be crucial to know what is found when we "go beyond the question of compliance", or acquire "a new perspective".

Later Allott refers to the Islamic jurists' classification of acts as commanded, recommended, permitted, reprobated and forbidden, suggesting that marriage is in the category of permitted acts. He thinks that at present marriage in England perhaps receives strong or hortatory permission, "where the law-giver is interested in encouraging or discouraging any activities. If we did, we would find it difficult to explain the pluralist legal system which offers two or more alternative types of marriage; and even more difficult to explain the purpose of the facilities of divorce, powers of forfeiture, or governmental emergency powers. The Islamic classification is really applic-

able only to hypothetical-conditionals. The provision of a facility may be evidence that some people expected it to be used, but not necessarily that they desired its use. In particular instances no doubt the desire is there. When Allott speaks of marriage as a "model status relationship" provided by some systems of law with the purpose that it shall be universally adopted, this is not entirely an error.<sup>81</sup> But its partial correctness can be shown only by extrinsic evidence.<sup>82</sup> Moreover, the provision of a facility cannot in itself provide encouragement to use it. The encouragement is derived from other laws, which for example confer advantages on users.<sup>83</sup> These cannot be taken for granted. Allott says that "failure to comply with [a facilitative norm] will be to your detriment, in that you will not acquire rights, privileges and protection which you would otherwise acquire."<sup>84</sup> But it is not the case that failure to acquire these rights, privileges and protection is always detrimental or thought to be so. No-one imagines that the unmarried suffer continual detriment, even less that this is the intended result of the law.

Thirdly, this ordering of the elements of a legal system leads to an underuse of the illustrative value of facilities. Despite his concern with the facility of marriage, Allott fails at a number of points to test his conclusions against facilitative laws, presumably because of a belief that law is primarily a body of hypothetical-conditional norms. Reference to facilitative laws would have been illuminating.

Thus he discusses the problem of public ignorance of the law in different societies.<sup>85</sup> Naturally hypothetical-conditional norms addressed to the public will not achieve their (apparent) objects if members of the public do not know of them. In contrast, the use of facilities requires only a knowledge of their existence, not of the detailed norms governing them, because virtually everywhere a citizen who is considering using a facility can obtain expert advice on the legal procedure. The English law of conveyancing is a clear example, but others could be drawn from societies where it is customary to approach an elder for advice on the correct way to carry out important transactions. Again, the discussion of popular acceptance of law might have been further illuminated if there had been discussion of the meaning of acceptance of a facilitative law, and (if the notion has a meaning) of the factors which promote or impede it.<sup>86</sup> The comparison between the four types of normative systems could have been made even more interesting by more mention of facilitative norms.<sup>87</sup> Thus the legal facilities of marriage and contract could have been contrasted with facilities in religions such as marriage, baptism, ordination, and promises, in moralities such as promises, and gifts which call for reciprocation, and in mores such as agreements to use familiar modes of address (se tutoyer, duzen). By giving less attention to legal facilities than was warranted by their significance on any relevant scale, the discussion tends to retreat towards an Austinian view of law, but without a sovereign: which makes it more tempting and easier to assume that effectiveness is compliance, that compliance can be measured, and that the notion of social engineering provides a basis for assessing the success of a law.

This discussion has suggested that there are flaws in the basic analysis of Allott's book, and by implication in other writing on law as an instrument of social control. It has not intended to detract from the value of the book's many and various discussions of particular laws in particular societies. But one must hope that after this tour de force the study of law in society will turn to approaches which are historically and analytically more realistic. This book probably represents the furthest possible achievement of studies which assume that legal systems are composed primarily of imperative hypothetical-conditional norms, each created through an act of will by law-givers with a clearly defined purpose, and thereafter functioning like a more or less efficient machine to secure or fail to secure compliance with that purpose. But its inadequacies cause it to serve as a demonstration per reductionem ad absurdum of that type of study. We should rather regard a legal system as a rich amalgam of different types of norms, which emerge from a vastly complex interplay of social activities, form one ever-changing part of an ever-changing body of social relations, and react in various modes on other parts of that body in the stream of social history.<sup>88</sup>

#### NOTES

<sup>1</sup>A. N. Allott, Essays in African Law, with Special Reference to the Law of Ghana (1960); A. N. Allott, New Essays in African Law (1970).

<sup>2</sup>The meaning of the title and the theme of the book are specifically indicated at pp. v, 287. Hereafter page references in footnotes are to this work, unless otherwise specified.

<sup>3</sup>Pp. 2-5. Cf. D. J. Black, "The Boundaries of Legal Sociology," (1972) 81 Yale L.J. 1086 at p.1092, putting a more extreme form of the view.

<sup>4</sup>p. 7.

<sup>5</sup>p. 17.

<sup>6</sup>pp. 9, 16.

<sup>7</sup>p. 16. Cf. K. Olivecrona, Law as Fact (2nd ed. 1971), pp. 128-33.

<sup>8</sup>Cf. L. L. Fuller, "Human Interaction and the Law," (1969) 14 Am. J. of Jurisprudence 1.

<sup>9</sup>pp. 22-28

<sup>10</sup>p. 33.

<sup>11</sup>H. L. A. Hart, The Concept of Law (1961), pp. 89-96. Allott cites also the similar argument in Alf Ross, Directives and Norms (1968), p. 97.

- <sup>12</sup>Pp. 49-67.
- <sup>13</sup>H. Kelsen, General Theory of Law and State (trans. A. Wedberg, 1945), p. 19.
- <sup>14</sup>Pp. 67-72.
- <sup>15</sup>Chap. 3, pp. 73-97.
- <sup>16</sup>Chap. 4, pp. 99-120.
- <sup>17</sup>Chap. 5, pp. 121-160.
- <sup>18</sup>P. 196.
- <sup>19</sup>Chap. 6, pp. 161-236.
- <sup>20</sup>Chap. 7, pp. 237-258.
- <sup>21</sup>Chap. 8, pp. 259-90; words quoted from chapter sub-title.
- <sup>22</sup>Conversely, "if no emitter, no aim!" (131)
- <sup>23</sup>p. v.
- <sup>24</sup>p. 11.
- <sup>25</sup>p. 13.
- <sup>26</sup>p. 14.
- <sup>27</sup>p. 15. The words are in a conditional clause, but it is clear that Allott agrees with them.
- <sup>28</sup>p. 17.
- <sup>29</sup>p. 47.
- <sup>30</sup>Id.
- <sup>31</sup>See e.g. p. 100, as well as the references in notes 24-30 above.
- <sup>32</sup>Pp. 174-175.
- <sup>33</sup>p. 233. The word "sponsors" has a parallel in the reference to "those who originally pushed" the English Divorce Reform Act 1969 (p. 173). The sponsors and pushers seem to be assimilated to the emitters of laws, or at least their purposes are assimilated to those of the emitters.
- <sup>34</sup>pp. viii-ix, 15, 27, 30.
- <sup>35</sup>p. 28. As illustration Allott refers to Kikuyu society, as

described in H. E. Lambert, Kikuyu Social and Political Institutions (1956).

<sup>36</sup>Pp. 13-14, 46-47. See also p. 31, where, in arguing that the effectiveness of a criminal provision is not to be measured by the conviction rate, Allott says that one would also need to know inter alia the stringency of definition of the offence.

<sup>37</sup>P. 12; see also at p. 14.

<sup>38</sup>P. 29.

<sup>39</sup>Cf. L. L. Fuller, The Morality of Law (1964), pp. 184-185. Hart had suggested that the minimum objective of law was survival (*op. cit.*) Fuller summarises Aquinas: "if the highest aim of a captain were to preserve his ship, he would keep it in port forever" (citing Aquinas, Summa Theologica, I-II, q. 2, art. 5). Without necessarily accepting Fuller's argument as to morality, it is possible to observe that many lawmakers do have purposes which extend beyond survival, and so are not primarily conservative.

<sup>40</sup>See e.g.: pp. 30-32, following the reference to the purpose of legal systems at p. 29; the discussion of the Turkish legal reforms of the 1920's, pp. 217 et seq.; p. 233, references to the purposes of the British Race Relations Acts 1965 and 1968. In the last two discussions it is difficult to find any precise statement of purposes, although there is discussion of whether the laws succeeded in achieving their purposes.

<sup>41</sup>See e.g.: J. R. Gusfield, Symbolic Crusade (1963); V. Aubert, "Some Social Functions of Legislation," (1966) 10 Acta Sociologica 99 at pp. 108-113; E. P. Thompson, Whigs and Hunters: the Origins of the Black Act (1975). For more general discussion, see also: T. W. Arnold, The Symbols of Government (1935), pp. 34-46, 149-71; R. L. Abel, "Law Books and Books about Law," (Book Review) (1973) 26 Stan. L. Rev. 175 at pp. 205-10, 219-22. Perhaps the only class of propositions about law-makers' purposes which is sometimes demonstrable is that which asserts some particular result to have been desired by no-one who participated in the lawmaking process. Such a proposition is quite uninteresting, except when this particular result has ensued. An example, and its possible causes, is discussed in Woodman, "Dworkin's 'Right Answer' Thesis and the Frustration of Legislative Intent --a Case-Study on the Leasehold Reform Act," (1982) 45 M. L. R. 121.

<sup>42</sup>P. vii.

<sup>43</sup>P. 92.

<sup>44</sup>P. 173.

<sup>45</sup>Pp. 233-234. See also above note 40, and Allott's discussion at pp. 94, 100.

<sup>46</sup>Cf. e.g. the many volumes of the Selden Society; also A. W. B.

Simpson, A History of the Common Law of Contract (1975), a doctrinal study with periodic vigorous attacks on the idea that judges might be influenced by non-doctrinal factors in their making of case-law. The tradition is noted by e.g. S. Anderson, Book Review (1981) 44 M. L. R. 227. The comment does not apply to the separate, recently emerged stream of legal history written by social historians, not lawyers, and largely inspired by E. P. Thompson, op. cit.

<sup>47</sup>Cf. p. 191: "The small-scale peasant farmers of tropical Africa who took up the cultivation of cash crops were led on by the pull of economic opportunities provided by the market; but the tremendous growth of export agriculture could never have taken place had not the legal means been provided for it." Or were the legal facilities provided because the economic developments required them? An empirical study of the lawmaking process would be necessary to answer this, but there have been many suggestions favouring the latter type of interpretation. See especially: (i) work in the tradition of K. Marx, The German Ideology (trans. Dutt, Magill and Lough, 1965); (ii) work of the school exemplified in R. Posner, Economic Analysis of Law (2nd ed. 1972). But superficial and simplistic discussions of law-making in history continue. See e.g. A. H. Manchester, A Modern Legal History of England and Wales 1750-1850 (1980).

<sup>48</sup>Above note 41.

<sup>49</sup>E.g., at pp. 101-9.

<sup>50</sup>J. H. Baker, An Introduction to English Legal History (2nd ed. 1979), pp. 234-236.

<sup>51</sup>Simpson, op. cit. pp. 613-16.

<sup>52</sup>This was a basic axiom of K. Renner, The Institutions of Private Law and their Social Functions (A. Scharzschild trans., 1949). The same point is made, with useful references, in W. T. Murphy and R. W. Rawlings, "After the Ancien Regime: the Writing of Judgments in the House of Lords 1979/80. Part 2," (1982) 45 M. L. R. 34 at p. 61 and n. 14.

<sup>53</sup>Another way of summarising this deficiency would be to say that Allott limits himself to the "gap problem", or to the divergence between legal prescriptions and social behaviour. Cf. Black, op. cit., pp. 1087-90; Abel, op. cit., pp. 187-89.

<sup>54</sup>See also J. Griffiths, "Is Law Important?" (1979) 54 N. Y. U. L. R. 339 at pp. 356-58.

<sup>55</sup>State operational controls over the private sector, for example, may favour larger business concerns (which are likely to be foreign-based), and may produce corruption: see G. Myrdal, Asian Drama (1968), II, Chap. 19. Cf. R. Pozen, Legal Choices for State Enterprises in the Third World (1976). Indeed, state enterprises and state regulation introduced with socialist rhetoric may assist

the emergence of class privilege: e.g. Gordon Woodman, "Land Law and the Distribution of Wealth," in W. C. Ekow Daniels and G. R. Woodman (eds.), Essays in Ghanaian Law (1976), 158.

<sup>56</sup> They are not totally ignored. He speculates that non-compliance with certain British laws may contribute to a general disrespect for the legal system, and so indirectly increase non-compliance with other laws: p. 89. The same point is made generally at p. 39; and see also p. 173. But this speculation could be countered by other speculation, and needs empirical investigation. Cf. Abel, op. cit., p. 218, n. 164.

<sup>57</sup> Cf. Griffiths, op. cit., pp. 355-56.

<sup>58</sup> Discussed in Woodman, "A Basis for a Theory for Law Reform," (1975) 12 U. G. L. J. 1, 7-8, 11.

<sup>59</sup> Allott explicitly accepts that laws do not have mechanical effects in the sense of directly producing behaviour: they do not bind or compel, but can only persuade (pp. 45-46, 152). But this observation is used only as a preliminary to showing that some laws do not secure compliance. It does not introduce a discussion of either the analytical or the empirical issues concerning the effects of law-making.

<sup>60</sup> p. 15.

<sup>61</sup> p. 29.

<sup>62</sup> p. 306. See also at p. 173: man "lightly launches into the atmosphere of society substances (legal models, in this case) which may have a...destructive tendency" similar to ozone and radio-active materials in the physical atmosphere.

<sup>63</sup> See especially Chap. 6. Thus it is stated that the British parliament does not accurately mirror public opinion, and examples of unpopular statutes are given (p. 205). But there is no analysis of the reasons why these came to be enacted. The discussion largely eschews mention of the underlying economic developments in societies, and the six "lessons" drawn from the discussion of law as programme (pp. 212, 213-214, 224, 236) are relatively superficial, even in one case (p. 224) speculative.

<sup>64</sup> E.g., p. 205.

<sup>65</sup> Cf. Allott's positing of harmony as a goal, and Pound's positing of the satisfaction of interests "with the least friction and the least waste," (R. Pound, Jurisprudence (1959), II, pp. 526-547). Allott writes scornfully of those who believe in social engineering (p. 179), but he appears to be attacking only those with an unfounded faith in the capacity of law-makers to effect radical social change.

<sup>66</sup> Hart, op. cit., pp. 27-33.



<sup>67</sup>Above, text at note 5.

<sup>68</sup>See e.g. pp. 17-18.

<sup>69</sup>p. 20.

<sup>70</sup>Pp. 21-22.

<sup>71</sup>p. 7.

<sup>72</sup>p. 22. This section (pp. 19-22) is confusingly expressed. It is entitled "Are facilities, institutions and processes in a Law 'norms'?" Facilities have previously (p. 7) been said to be a category of institutions, so should not be listed separately. The bulk of the section examines "constitutive acts" and "implementing orders", i.e. acts constituting institutions (or perhaps just facilities), and implementing norms. Such acts and orders do not appear to be either facilities, institutions or processes. It is concluded that constitutive orders [sic] and implementive orders are normative. Then it is said, in seven lines, that institutions and processes are normative. The crucial argument promised in the heading seems to be within these seven lines.

<sup>73</sup>Hart, op. cit., pp. 27-41, words quoted from p. 40, where the sentence ends with the words "as duty". Hart says, op. cit., p. 77, that power-conferring rules "cannot, without absurdity, be construed as orders backed by threats." Allott comments that the presumed absurdity must lie in the sanctioning threat. It "cannot refer to the 'order' part: since one answers the question, 'How does one create a legal facility?' by the response, 'By ordering that it shall or may be so,'" (p.19). It is submitted that this is not an adequate response. An "order" that something shall be so is not of the same class as an "order" to someone to do something. The response would simply dress an indicative statement in imperative form. In the context Hart does appear to mean that there is absurdity in the "order" part as well as in the "sanction" part.

<sup>74</sup>For Allott "statements" may be in either the indicative or the imperative mode: pp. 17, 20-23. I would suggest that the more usual terminology would draw a contrast between (indicative) statements and imperatives.

<sup>75</sup>p. 22.

<sup>76</sup>See e.g. A. M. Honoré, "Real Laws," in P. M. S. Hacker and J. Raz (eds.), Law, Morality and Society. Essays in Honor of H. L. A. Hart (1977), p.99.

<sup>77</sup>p. 31. See also p. 248, where he speaks of the normative system created by a marriage, "which the Law furthers by according it recognition and protection." There is a need for analysis of what is meant by "furthering" a normative system, what result flows from "recognition", and what is meant by "protection" of such a system.

<sup>78</sup>p. 32.

<sup>79</sup>Pp. 47-48.

<sup>80</sup>A legal system may adopt for this purpose a ceremony which is already recognised by another normative system. But the facility in question now is that of a legally recognised marriage, which only the legal system can endow with validity.

<sup>81</sup>Pp. 168-169; see also pp. 171, 172.

<sup>82</sup>See e.g. the evidence in K. O. Adinkrah, "Ghana's Marriage Ordinance: an Inquiry into a Legal Transplant for Social Change," (1980) 18 A. L. S. 1.

<sup>83</sup>Thus see the example of the encouragement of monogamous marriage given at pp. 223-224, relying on J. Starr, Dispute and Settlement in Rural Turkey (1978).

<sup>84</sup>p. 138. See also p. 132: "non-compliance [with norms creating facilities] means lack of validity and lack of protection". At p. 77 the question is put why no-one publicises marriage law like, say, rights under welfare law. Surely this is because no person or body sees a particular need to encourage an increase in the marriage rate. At p. 85 it is suggested in passing that "leaving home and living in sin" is action "against the law". In England it is not.

<sup>85</sup>Pp. 73-81.

<sup>86</sup>Pp. 81-96.

<sup>87</sup>Pp. 128-134. There is mention only of institutions with recognised authority in normative systems.

<sup>88</sup>I am grateful to Professor Allott for his care and tolerance in commenting on an earlier draft of this review, and thereby enabling me to remove some misunderstandings and misjudgements. Obviously the usual proviso applies to those remaining.