

THE LIMITS OF LAW: A REPLY

Antony Allott

By the courtesy of the Editor I am permitted to make a brief rejoinder to Gordon Woodman's very interesting and challenging, and yet in some ways depressing, analysis of my book. I welcome the opportunity to do so, because I believe firmly that understanding and analysis (and the latter must precede the former) can only be advanced in this difficult field by a process of dialogue and discussion. My own work was merely an attempt to initiate such a discussion. Limits thus does indeed have its limits: but in so far as these limits are alleged to be failures of approach or treatment, I feel it vital to stress in response that we are all--operators as well as theoretical analysers--subject to limits, of space, time and endeavour. One of the repeated comments made by Woodman at various points is that I do not spend enough time on this problem or that, on analysing this term or that, on appreciating this factor or that, on proving this point or that. I agree. I would have been delighted to do so; but it is the curse of all authorship, but most notably of writing on legal theory, that one is not allowed to dilate as fully as one would wish, to establish every point and justify every approach. Just look at any of the standard classic works on legal theory: they are riddled with unexamined terms, unsubstantiated propositions, unjustified conclusions. Even those who from nationality or the generosity of their publishers are permitted to indulge in prolixity and multi-volume works do not escape this criticism. Weber's writings, for instance, can be shown to contain many such examples of corner-cutting.

So I appreciate greatly the keen attention and the welcoming words which Woodman's review embodies, while feeling depression, not just at the charges of "superficiality" at some points--a criticism difficult to rebut, because superficiality is often in the eye of the beholder--, but at the places where there seems to have been a genuine failure of communication on my part, or of perception on Woodman's part. To be accused of what one is is bad enough; to be accused of what one is not, of what one is vigorously opposed to, is worse. This I can demonstrate only by taking up a selection of Woodman's comments and criticisms. (I emphasize that it is only for reasons of space that I cannot reply to them all.)

Let us start with the general aim of the project which the book seeks to advance. It is to examine the limiting factors, whether from society, from the form of law-making, the nature of law, or extraneous non-human causes, which restrict the capacity of laws to achieve what they are intended to achieve, their "purpose" or purposes. In other words, I am interested in the effectiveness of laws. In contradistinction to those earlier jurists who concentrated on the

transmitting (or, in my words, "emitting") end, I direct the attention of my readers to the receiving end, the recipients or subjects of the law. It is they who have to conform to or make use of the law if we are to judge it to be effective. This programme is attacked by Woodman at various points: (1) He denies that a law has an identifiable purpose or purposes. If a law has purposes, he argues, they tend to be many and complex, and go beyond the alleged or expressed intention of a "legislator", if any. (2) He alleges that I see a law as a machine, and am concerned only with the moment of making of such a law. (3) He avers that I fail to see law-making in its societal context, and hence fail to appreciate the total effects of a law in society.

#### I. THE "PURPOSES" OF LAWS

We are dealing here with particular normative rules or sets of rules in a legal system, dealing with a given subject-matter, rather than with the legal system itself. We can presumably start with the easier cases, and proceed to the harder ones. Search for purpose in laws is easiest when they are formally made by a legislator, and that legislator has set himself a programme or objective which he seeks to realise by law. A social engineer is by definition one who seeks through law to procure some substantial change in the structures or functioning of society. Modern legislators commonly publish the Objects and Reasons of their legislation. Woodman would argue here that such statements of objectives do not necessarily tell the whole story. What a legislator states as his purpose may not be his real purpose: I agree. The "legislator" is often not one person, but a group, structured or unstructured, with a variety of purposes perhaps: I agree again. Two examples can be looked at. A legislature composed of many persons, advised by professional draftsmen, prompted by civil servants, can embody many persons and many purposes in the legislative process. One clearly needs a classification of "purposes", similar to that which I attempted with "norms", which would distinguish between the various sorts of purposes found in such an instance, and their relevance for an examination of the effectiveness of a particular law. I do not make such a classification in Limits. It certainly lay behind my thinking; but I am grateful for Woodman's pointing out of one area where further classification, as well as further investigation, is needed. However, in discussing particular instances I do try to disentangle the contributions of formal and informal bodies to the legislative process and to the definition of its purposes.

A second example is to be found further down the law-application chain. At the same time this brings us on to the second criticism. A law is originally generated; it is then transmitted, applied, moulded. The transmitters and moulders are law-makers too. How can one rationally talk about their purposes in moulding or altering the law?

My answer to all this is two-fold. On the one hand, one can isolate a hierarchy of purposes which may be associated with a particular law or norm. This hierarchy stretches from those who origin-

ally propounded or pushed the law, to those who formally enacted it, and therefrom to those who authoritatively apply it or re-formulate it. On the other hand, to say that there is a variety of purposes--sometimes not on all fours with each other--is not the same as admitting that a law has no purpose. A law or norm encounters law-subjects in the form of normative statements. The original emitter or formulator of such a normative statement (accepting that the singular of "emitter" is used for brevity only) had, as I argue, a purpose or set of purposes which he was seeking to implement. Subsequent transmitters and appliers of the law or norm generally purport to be implementing, not their own purposes, but the purposes of the law-generator. They may qualify, stray from, or even contradict the original purpose(s) of the law or norm. I stress that this is one of the many reasons why a law may fail to achieve the objectives which were sought by the original maker of the law. This reason is one, then, of the possible answers to the question: "why do some laws fail to achieve the objectives set for them by their makers?".

I agree entirely with Woodman that one should be cautious in discussing the "purpose" of law-makers; but at the same time I consider it imperative that one should enter such a discussion. Why? Because part of our enquiry is into the efficacy of law-making; and the dictionary, as well as commonsense, tells us that "efficacy" means "power to effect the object intended". How can one consider the effectiveness of laws unless one asks what they are intended to achieve? There are special difficulties, which I hope I face squarely, with customary laws; in this case I appeal to those having roles of power and influence within the society and who consequently shape the laws which people are to follow. Much of the application of customary laws in practice consists of the repetition of principles and rules which have now become "ancient", i.e. whose origin is now no longer known with precision. To me it makes sense to inquire in such a case: what is the purpose (or the purposes) of this principle or rule? The answer may be speculative, and will certainly depend on the perceptions of those currently subject to the law in question or who are responsible for its application. What has happened in such a case is an update of the purposes of the law; and it is the updated purposes which have now taken over for our own analysis. There is nothing strange or contradictory in such a process.

I do not, therefore, accept Woodman's criticism that the notion of the purpose of a law entails an oversimplified view of law-making. It all depends on the analyser. Nor indeed am I persuaded that "No law is made with a single, easily perceived purpose." Split hairs as one may, one must still concede that, say, a repealing or amending statute could have the single object of "repealing the Nightwalking Act 1622" or "amending the principal Act by extending the period for submitting a statutory return from 3 months to 6 months".

I believe, then, that a Law is a purposive system, that laws have purposes; that such purposes may be uncertain or ambiguous to the external observer; that judges, people and legislators all contribute to the shaping of laws and the definition of their purposes;

that although in western society laws often evolve from the work and pressures of a law-making elite, this is not to say that there is uniformity of view or of purposes within such an elite; and that one can identify hierarchies of intended, perceived, received or attributed purposes. I readily concede that I have not collected together all my thinking about the purposes of laws in a single passage; thanks to Woodman's comments I now see that this might be useful.

## II. LAW AS A MACHINE

I am astonished by this criticism, which is far from my own way of thinking. I am astonished because there is a number of passages in my book where I expressly try to assert the contrary. For customary laws it is clear that no one--and certainly not myself--could assert that there is a single moment when a customary law is "made", except perhaps in the case of overt legislation. I expressly reject the prevalent notion that customary law is "static and unchanging" (cf. pp. 60ff.). I emphasize that "the meanings of such a principle [= a generally accepted principle of a customary legal system], and the specific norms of behaviour which flow from it, can and will alter as the circumstances of society alter, and as new ideas and practices develop." I further suggest that customary dispute-settlement processes favour "the development of the Law ambulando..." I say that "the process of fixing the ambit of such [= customary] norms is a slow one, and is never completed" (p.60). And so on.

If it is counter-alleged that my view of non-customary Laws is quite different and more mechanistic, I must respectfully disagree. My view of Laws tries to be holistic; in other words, while I accept the dichotomy or multiplicity of legal forms and procedures, I assert that at bottom Laws of whatever type are part of the same genus. So--to cite just one of many instances--on the same page (p. 60) where I make the comment just quoted about the ambit of customary norms, I observe that "exactly the same is true of the well-accepted norms of English common law". For English Law, as for other legal systems, I stress the role of the judge or applier of the laws (cf. pp. 33ff.) in moulding and modifying the norms, so that an Act of Parliament does not consist of the text alone, but of the norms + their interpretation and application (see also pp. 101ff.). I further stress the role of the "people" (i.e. law-subjects) in making and moulding and disallowing laws, both in customary (cf. p. 68) and in non-customary (cf. p. 70) societies. The role of courts and people in law-making is central to my analysis. Judges and people, I say, are purveyors of social circumstances and social attitudes to the continuing process of law-making. It is thus anathema to me to say, as Woodman does, that my approach "regards a law as a machine: it is made for a particular purpose; once made, it is finished, a completed construct." Nor can I accept the logic of what immediately follows, that "It is only on this premise that one can study the effectiveness of a law over a period of time subsequent to its making."

"Why do some laws fail to achieve the objectives which their o-

original framers set them?" is an intelligible and important question, if we are to develop a science of law-making, as I hope we shall. Those who initiate some major legislative project with a view to reshaping society or some part of it will be disappointed if their laws fail to procure the intended result. They will presumably be grateful to analysts who seek to discover the reasons of that failure. The fact that laws are continually altered (or even repealed, as I mention) by subsequent application and by popular behaviour is not a reason for avoiding making such an enquiry; it is an important reason why such a failure may have occurred. It is in this context that some of Woodman's allegations about "superficiality" come to be made. Thus he asserts that in my Chapter 6 I fail to give "any precise statements of purposes" of the Turkish legal reforms, or of the enactment of the Race Relations Acts of 1965 and 1968 in Britain. I am not sure what degree of precision Woodman expects here; it may be that he thinks such a precise statement is impossible. Be that as it may, I discuss the secularising and modernising objectives of the Turkish laws at pp. 186ff. and at p. 217; and I discuss the objectives of the Race Relations Acts as including the maintenance of public order and the enforcement of better racial relations (p. 226), the prevention of racial discrimination as instanced in the text (p. 227), the affecting and transforming of structural discrimination in housing and employment (p.227), dealing with direct and indirect discrimination (p. 228), and most importantly changing people's hearts as well as their behaviour (p. 235). See also pp. 193-194. As regards British statutes enacted by Parliament in relation to which parliamentary opinion did not mirror public opinion, I mention at the page cited (p. 205) two examples of such statutes. Woodman comments that I give no analysis of the reasons why these came to be enacted. As to the first example, the abolition of the death penalty in 1967, I agree--all I have done in my book is to select instances of the processes at work; but in a sense the whole book is an analysis of the reasons why such statutes get on the statute-book, and in any event, with the second example, viz. the 1965 race relations legislation, I try to examine the process by which it came on the statute book, at pp. 229-231. I trust that, within the limits of space which I mentioned at the beginning of this Rejoinder, this represents a sincere attempt to meet Woodman's criticism.

### III. LAW IN ITS SOCIAL CONTEXT

This, the third main accusation, equally provokes my astonishment, astonishment because I share what I see to be Dr. Woodman's concern to see laws whole, within the context of the society in which they operate and from which they spring. Woodman asserts that concentration on compliance studies prevents an accurate perception of a law's total effects, and may lead "to an attribution to laws of events which they did not cause, and a failure to attribute some of their true consequences." What can I say? As to the former proposition, Woodman first grossly over-simplifies both my position and my method, and then concludes that one will fail to perceive a law's effects correctly if one adopts this position (which I do not hold) and that

method (which I do not recommend)! I see nothing wrong in compliance studies at all, provided always that they take in the societal context as a full component in the dynamics of law-making and law-application. Without such a context, studies of compliance are meaningless. Since I am trying, for the benefit of future legislators, to show what are the factors, both in the nature of law and the legal process and in the particular society where such a law and legal process have to operate, which help to determine whether a law will successfully achieve the purposes set or intended for it, both elements are equally important components in the study. (For reasons already given, I do not accept the opinion that I suppose a unilinear process of law-making and application.) I expressly warn, in terms which Woodman may find superficial but which correspond pretty closely to his own depth of analysis at this point, that one may be misled into attributing to laws events which they did not cause: see p. 236 where I make the point about race relations and the "educational" process as opposed to the legislative impact. Woodman's further points on this aspect are good ones: a factor may produce both laws and behaviour, or the legislative "class" may influence social behaviour as well as the pattern of laws which give legal form to the desired social behaviour; changes in social behaviour may be explicable by "historical circumstances" or by public debate, rather than from a law. Yes, indeed! All I can say is that I repeatedly stress the importance of the social context for an understanding of the law, both in its static and in its dynamic aspects. Thus I generally discuss the relation of law and society in Chapter 3, and "Environmental and social limitations on law..." in Chapter 4. I mention the "play of social forces [which] is endlessly moulding the existing principles of the Law and leading to the formation of new ones" (p. 159); I devote a section to the relationship between "Law and mores"; and so on.

As to the effects of laws, one has to recognise that certain effects may be produced by some factor other than a law which purports to prescribe accordingly--this is parallelism of causes; and a law may have unintended or unpredicted effects--this is multiplicity of consequences (cf. my pp. 173-174). However, every student of history, be it social, political or economic, is familiar with the difficulty (or maybe the philosophical impossibility) of identifying the historical causes of anything--what, for instance, has led to greater "individualism" in the customary systems of land tenure in West Africa? Any student of laws and their effects, including Woodman and myself, must be on his guard against simplistic monocausal explanation of intricate historical processes.

Finally, Woodman asks for "the empirical investigation of the continuing law-making process", which would "encompass comprehensively the social effects of each part of the process". I have argued in another place for the use of legal history as a valid and important way of making such studies in parallel with the more popular contemporaneous sociological investigation of laws, their causes and their effects. Woodman in his comments favours this approach among others, so we find ourselves in agreement with the need, and partly in agreement over the method. But the suggestion, if it is made, that my own

scrutiny of actual examples of law-making and effectiveness of laws is non-empirical or even anti-empirical is one which I would seek to reject. Having asked myself some general questions about laws and law-making, I then looked for documented examples which might yield provisional conclusions. I selected a number of these, both for their intrinsic interest and because there was some documentation on them. It depends on what one means by "empirical", but I hope that these brief studies would be accepted as empirical controls upon, even if not detailed empirical sources for, the elaboration of a general theory. I was the first to recognize that both the materials and the analysis of them were tentative only; and I saw the way forward as being by "appropriate in-depth field studies of the effectiveness of laws, studies which need the resources of the sociologist as well as the jurist if they are to be accurate and convincing," (p. 287).

I cannot therefore accept the criticism in the final paragraph of Woodman's review, since it formulates once again an analysis of law which I do not advocate, invalidates my studies on the basis of this incorrectly attributed analysis, and then, by asking for a different approach to law (which I actually share!), looks for "more realistic" empirical studies in the future. For the reasons just given, I tried to anchor my own analysis to a realistic appreciation of actual functioning legal systems in many different kinds of society. In adopting this line I believed that I was being more "realistic" than previous legal analysts, whether of the purely analytical or the sociological type.

I find myself in the situation of the long-distance walker, who sets off over wild country to reach a certain point. Using his map, he gets there, or at least in sight of it. His friend, also a walker, wishes to reach the same point. He gets there, and criticises the first man for using the wrong map and so arriving at the wrong place. The first man finds that he has actually met his friend at the point in question; he finds that his map is substantially the same as that of his friend--what, at this juncture, can he say except "Here I am too!"?