The Limits of Law, by Antony Allott, London, Butterworths, 1980, xxii + 322 pp. $25 (limp).

One would not normally review a book published nearly five years before, but this penetrating and original work seems so far not to have attracted in Australia the attention that it deserves. The author is Professor of African law at the School of Oriental and African Studies, a branch of the University of London which offers a law degree course in which there is particular emphasis on comparative law and the legal experience of Asian and African countries. From this starting-point, Professor Allott has set out to explore a sector of the legal landscape which other writers have left virtually uncharted: the effectiveness and usefulness of law, the limits of law. How far is legislation successful? How far can the law not merely reflect, but actually bring about, social change? The statute book grows longer every day, but what is the effect of legislative inflation on the effectiveness of all law?

The author assembles a great deal of empirical data relating to these questions and concludes from it that limits to law can arise from the nature of law itself, which can only induce, but cannot actually compel, conforming behaviour; from the fact that some societies are geared to customary law and do not accept the idea that law can be manufactured and imposed from above; from problems of communication, especially when the volume of new law is increasing at the rate now seen in Western countries; from competition with other normative systems such as pre-existing social customs, and the like.

There are especially severe limits to legal effectiveness when it is sought to use the law as a weapon for transforming society. That these limits are widely disregarded accounts for a great many legal failures, both in Third World countries and in the West. The aim of the transforming legislator is, after all, to damage the fabric of society. If the proposed change is radical enough, society may fight back through massive disobedience and non-compliance, and through the growth of official corruption, which Professor Allott believes is a tolerable index of the excessive weight of laws and of their unacceptability. This resistance can be so effective that "There is practically no example of a programmatic law which has been entirely successful, if by successful we mean succeeding in its aim of securing a radical transformation of society, the way people live and behave".[1]

Many examples can be given. In Ethiopia there was a general refusal to give up customary and Islamic personal laws, despite the civil code of 1960. The people of the Ivory Coast totally refused to abandon customary family and marriage law despite new uniform legislation. Old customary land tenures and practices survived in Kenya despite having in theory been destroyed by land consolidation and registration statutes. The Tanzanian legislation designed to impose collectivist agricultural methods in the guise of the traditional *Ujamaa* system of communal property was likewise ill received by the population.[2] In the early stages the army was called in to resettle people by force and burn down existing villages. Between August

[1] A. Allott, *The Limits of Law* (1980) at 196.
[2] *Id.* 197, 209 ff., 213, 302.

and November 1974, what has been described as a "national cataclysm" supervened as people were uprooted *en masse* and abandoned in the outback, away from their established plantations, on land which they knew full well could never be made productive. They were ordered to grow cotton in marginal areas but were supplied with no insecticides to help them to do so. The result was that all production dropped and the country faced, and still faces, famine.[3]

Numerous instances can be found in the more developed countries. Italy is said to be largely supported by its extra-legal alternative economy. Naples is the centre of the Italian glove-making industry, but officially there is not a single glove-making factory anywhere in the area. In fact some 400 small establishments are busily making and selling gloves, out of sight of the tax authorities and the trade unions. In the Soviet Union, an unlawful undercover free market and an elaborate network of corruption are said to be all that enables the economy to keep going. In England, the mass refusal of Sikhs to wear crash helmets on motor cycles forced the government to abandon any attempt to enforce the compulsory helmet regulation against them. In Australia, open disobedience of the law resulted in the removal of prohibitions on citizen-band radio transmitters. The Australia Post monopoly of letter carrying is held in such contempt that the postal administration itself makes use of the services of private couriers who carry letters in breach of the law. In almost all countries speed limits and "Don't Walk" lights are regarded purely as a guide. The consensus against modern rates of progressive income taxation is such that in most countries revenue law is in serious difficulties; a social custom has grown up whereby people help one another to evade tax by paying in cash for personal services wherever possible. Professor Allott concludes that "massive disobedience of or non-compliance with a law will triumph in the long run".[4]

Part of the limits-of-law problem in Westminster-type democracies lies, according to the author, in the nexus between legislator and people, in the feedback mechanism represented by the people's right to elect or refuse to re-elect its law-makers from time to time. He points out that "if we look only at the modern British Constitution, which after all has been evolved by the law-makers rather than by those subject to them, one might almost say that it has been expressly designed so as to reduce any such feedback to a minimum". First, the feedback is generalised and diffuse; it is not specific to any particular law. If the people do not like a new law, there is no immediate comeback for them, except to refuse to obey it. Secondly, the feedback is delayed; an unpopular law-maker with his unpopular law will not be turned out of office until the life of the parliament has ended. Even then, the legislator may be willing to take his chance that by then the objection will have been forgotten, or that the voters may be willing to waive it for the sake of gaining some other promised good.[5] In Anglo-Australian Constitutions, there is no provision for referendums on new projects of law; no referendums for the repeal of existing laws, and no right of recall whereby the electorate can demand

[3] R. Granger, "La Tradition en Tant que Limite aux Réformes du Droit", [1979] *Revue Internat. de Droit Comparé*, 37, 80; R. Dumont, M.-F. Mottin, *L'Afrique Etranglée*, Paris 1980, 130-37.

[4] *Supra* n. 1 at 213-214.

[5] *Id.* 70-71.

that elected or unelected public officials should expose themselves to a popular vote to see whether their actions are supported, and if not, to require that the official be removed from office. There is a legislative elite, increasingly dominated by a political-intellectual clerisy, the so-called New Class or New Elite, which regards itself as separate from and superior to the rest of the population.[6] The author points out that most discussion of political elites is concentrated on old-fashioned targets—the "Establishment", the company chairmen, the generals, the chancellors, and the newspaper owners.[7] But these are no longer the main holders of power or of influence on legislative policy. It is the intellectual elites who wield real power now, through their positions in what has been called the "consciousness industry". As broadcasters, clergymen, journalists, academics in the soft faculties (or the soft parts of the hard faculties) and bureaucrats they have the power to define the issues, set the legislative agenda and communicate the arguments in such a way as to favour their side of the dispute. They do not need to occupy the top executive positions in order to wield this influence; indeed by not holding the now-empty symbols of power, they are able to keep the heroic image and posture of the dissenter. Their business is the manufacturing and marketing of theories. This means that they reject experience as a guide to decision-making, an attitude which, when applied to legislation, produces consequences of the kind outlined above.

Professor Allott says that as an academic he has "naturally come across many representatives of this group busily at work imposing their ideas on others, treating only one opinion as acceptable or rational, controlling the lives of others on the basis of this sole opinion. There is a network of such elitists who support and advance each other".[8] He concludes, ironically, that today "overweening elitism has a freer hand than it did in the aristocratic England of the 18th and 19th centuries".[9]

It is not surprising, therefore, to see that despite all the cant about "participatory law reform", law reformers seldom make any attempt to discover the attitudes of the people (as opposed to those of pressure groups) to the problems they are considering. On the rare occasions when they do, they feel entitled to ignore the results when they do not agree with the conclusion which the reformers intend to reach.[10] Again, as Professor Allott points out, it is probably with respect to the most sensitive subjects that parliament is least likely to consult public opinion generally: such matters as taxation, immigration, trade union reform, homosexuality, compulsory financing of party electoral expenses and the like.[11]

The book contains an excursus on Soviet law, the theme being to ask whether the legal system in a totalitarian state can properly be called "law" at all. This discussion is somewhat distinct from the main theme of the book, but the author includes it on the ground that his primary definition of law requires this issue to be considered. The Soviet legal order certainly

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[6] See generally D. Lebedoff, *The New Elite* (New York, 1981).

[7] *Supra* n. 1 at 288.

[8] *Ibid.*

[9] *Id.* 71.

[10] A. L. Diamond, "Law Reform and the Legal Profession", (1977) 51 *A.L.J.* 396, 406.

[11] *Supra* n. 1 at 205. The author refers also to capital punishment, which has been abolished by statute but which has the support of about 80 per cent of the population, a much higher percentage than in Australia.

differs from ours in important respects. Whereas the underlying premise of Western legal systems is that anything which is not specifically prohibited is permitted, the basic premise of the Soviet system is that anything which is not specifically permitted is prohibited.[12] There is also a different conception of judicial independence and the rule of law. The author cites the striking case of a group of alleged Estonian war criminals who went on trial in 1961-62. The official journal of the Public Prosecutor's Office in its issue of 27 December 1961, reported the questioning of the witnesses in the trial, their cross-examination, the reactions of the public, the public prosecutor's speech, and the fact that sentences of death were passed. Unfortunately for the journalist, all these facts, though quite correct, did not happen until *after* the journal had been published, as the trial had been postponed, without the journalist's knowledge, until 16 January 1962.[13] It is partly in order to remove the risk of such embarrassing incidents that the authorities have since made use of "psychiatric" detention in place of criminal prosecution, thereby obviating the need to stage any form of trial.[14] Professor Allott concludes that notwithstanding the role of power, dictate and discretion, the Soviet Union cannot be called a no-law state.

The author's general conclusions are that laws are often ineffective, doomed to stultification almost at birth, doomed by the over-ambitions of the legislator and the under-provision of the necessary requirements for an effective law, such as adequate preliminary survey, communication, and acceptance. The more such laws there are, the less effective each cumulatively will be; weight of laws is not only oppressive, but ultimately self-defeating. Secondly, he finds that laws intended to alter the structure of society are on the whole less effective than those which serve as frameworks or models. The reason for this lies in the resistances of human nature to being told what to do, especially to change deep-seated practices and, still more, to change ingrained prejudices. Weak law, he finds, invalidates the very notion of law. Strong-sounding laws may still be weak because they are not complied with, and the major reason for non-compliance seems to be resistance caused by the unacceptability of the law. This resistance can be overcome by careful persuasion and by winning eventual acquiescence, in other words, by a policy of consensus.[15] Customary laws are especially effective because they rely on the consensus principle.

If the law is to have greater legitimacy, and therefore greater effectiveness, there will need to be more popular involvement in law-making. Professor Allott does not explore in detail the ways in which this

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[12] As a Soviet writer puts it, "the fundamental principle of our legislation and our private law, which the bourgeois theorist will never recognize is: everything is prohibited which is not specifically permitted": A. L. Malitzki, translation quoted in F. A. Hayek, *The Constitution of Liberty* (London, 1960) 240.

[13] *Supra* n. 1 at 239.

[14] J. Barron, *KGB: The Secret Work of Soviet Secret Agents* (London, 1974) Ch. 5. From the authorities' point of view, this approach has the further advantage of allowing torture to be used in the guise of diagnosis and therapy. At the Serbsky Institute in Moscow, for example, it is the practice of Colonel-Doctor D. L. Lunts to require women "patients" to stand naked before him while he sticks pins in their breasts to measure "hypersensitivity" and through it "pathological characteristics". Detainees are injected with the drug aminazin, which causes acute suffering followed by permanent brain damage. This therapy is considered particularly indicated for intellectuals, many of whom remain unable to even read afterwards: *ibid.*

[15] *Supra* n. 1 at 287.

might be done, but he does mention the initiative, the referendum and the recall. Some or all of these reforms have been adopted in Switzerland, Italy and most of the American states, the initiative being available in 23 states. There is currently a proposal for a national initiative system at the federal level in the United States. A similar bill for a constitutional amendment for this purpose has been introduced in Australia by the Democrat Senator Colin Mason. These institutions have been highly successful and are greatly prized by the citizens of the jurisdictions where they exist. In only one jurisdiction where these devices have been introduced have they subsequently been abolished. That was Ireland, where the initiative and referendum were removed at the instance of Eamon de Valera, who considered them to be dangerous in a social setting where a substantial minority of the population was violently opposed to the basic structure and constitution of the Irish Free State itself.

Since they enable the citizens to propose a law for enactment or repeal irrespective of the wishes of the government of the day, and to compel the holding of a binding referendum, the initiative and the referendum constitute a powerful reassertion of the people's sovereignty. They are not a panacea for all the legal ills of modern democracy, but they are an effective remedy for the problem of legislation that is severely out of alignment with popular opinion.

Professor Allott's researches highlight the strength and effectiveness of customary law. Perhaps this gives us a clue to another possible means of securing genuine popular involvement in law-making in modern societies, though Professor Allott does not himself follow up this point. It is this: there is great support for the idea that Aborigines should be able to live under their own customary laws. Why, in that case, should the rest of the population not be allowed to live under theirs? Positivists will argue that modern societies do not have customary laws, but even casual observation suggests the contrary, especially in settings where social interaction is easily observed, such as in country towns or in commercial circles. Reformers could give some thought to ascertaining and clarifying the customs of the people, rather than seeking to eradicate them as they do now.[16]

This book should be read by anyone seeking a balanced perspective on the function and operation of law in society.

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[16] I have developed these points in two forthcoming works, *The Rule of Law: Dimensions of Crisis and Transformation* and *Initiative and Referendum: The People's Law.*

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