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## Legislation and its Limits

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# Articles

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A. E. Anton\*

Legislation and its Limits<sup>1</sup>

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## 1. Introduction

Political philosophers throughout history have been shocked by the dictum of Ulpian that “Because it pleases the prince, it has the force of law”,<sup>2</sup> and have asked whether there are not moral principles which a legislator may not contravene, whatever the scope of his constitutional powers. The philosophers’ answers have been of crucial importance in the development of western legal thought and have influenced the content both of national constitutions and of national and international bills of rights. The reasoning, however, underlying those answers has usually been of an *a priori* character, based on the acceptance of theories of natural law which do not today attract universal acceptance. It is true that, if one probes beneath the surface of these theories, the ultimate appeal is not infrequently to the facts of everyday life.<sup>3</sup> Could we not, however, proceed directly to the underlying question: “Are there practical constraints which every legislature should in its own interests recognise, even when no legal limitations appear to affect it?”

This may be, strictly speaking, neither a legal nor a philosophical question, but it was touched upon by Dr. Horace E. Read in his *Cases and other Materials on Legislation*.<sup>4</sup> It is of perennial interest to those concerned with legislation and is, I suspect, as old as legislation itself. It must have given pause to the intelligent tyrants of history, as it certainly did to those who, like Machiavelli, analysed their political powers and strategies.

That eminent Victorian, Leslie Stephen, suggested that there were distinct limits to legislative power, because “the power of imposing laws is dependent upon the instinct of subordination,

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1. The Horace E. Read Memorial Lecture, delivered in Dalhousie Law School on 25th September 1978 by the author.

2. “Sed et quod principi placuit legis habet vigorem . . .” Justinian, *Institutes*, I.2.6, attributed to Ulpian in *Digest*, I.4.1

3. Cf. J. Bentham, *A Fragment of Government*, ed. W. Harrison (Oxford, 1960) at 92

4. (2nd. ed. Brooklyn: Foundation Press, 1959) at 75

which is itself very limited”.<sup>5</sup> Stephen suggested that the limits to legislative power were both external — relating to the attitudes of the people — and internal — being conditioned by the social background of the legislators. Dicey, in commenting on this, argued that this distinction must virtually dissolve in a society enjoying representative Government.<sup>6</sup> This comfortable suggestion may have had some basis in 19th century England, when the common ground of political parties was far more significant than their areas of controversy and when there was virtually a constitutional convention not to pass “any laws which any substantial section of the population violently dislikes”.<sup>7</sup> It certainly has little basis in the United Kingdom today, when relatively narrow political majorities in turn proclaim themselves to be the authentic voice of the people and enact laws which may be violently disliked by substantial sections of the population.

Legal and political philosophers today would no doubt agree with Stephen that a distinction should be drawn between the external and the internal limits to legislative power. They would be likely, however, to define the internal limits in a somewhat different way, and to regard them as being set by the constitutional structure of the legal system and, ultimately, by the *grundnorm* or rules of recognition which support that constitutional structure. It is arguable, however, that also in this sense there is a clear relationship between the external and the internal limits of legislative power.<sup>8</sup>

Leslie Stephen suggested that man’s instinct of subordination is very limited. Do we not, on the contrary, have a healthy instinct of insubordination, which is checked only by self-interest? It may be that, as Bentham<sup>9</sup> and, still more clearly, Austin<sup>10</sup> appreciated, our interests are rarely on the side of rebellion, but the interest of those who govern lies equally clearly in avoiding the creation of conditions favourable to rebellion.<sup>11</sup> The head that wears the crown

5. Leslie Stephen, *The Science of Ethics* (London, 1882) at 143

6. *Law of the Constitution* (9th ed. London: MacMillan & Co., 1952) at 82-83

7. Cf. R. Y. Jennings, *Law and the Constitution* (5th ed.) at 148

8. F. A. Hayek has expressed the same thought: “. . . but power to legislate presupposes the recognition of some common rules; and such rules which underlie the power to legislate may also limit that power.” *Law, Legislation and Liberty* (London: Routledge & Kegan Paul, Vol. 1, 1973) at 95

9. See, *supra*, note 3 at 55

10. J. Austin, *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (London, 1954) at 53

11. Cf. Hobbes’ remark “. . . and governing to the profit of the subjects is

will lie uneasily unless it can obtain, if not the support, then at least the acquiescence of the majority of the people. If a crowned head were to say, like Charles Fox, ‘I pay no regard whatever to the voice of the people’,<sup>12</sup> and were to decree the slaughter of blue-eyed babies<sup>13</sup> or the wicked withdrawal of free school milk, he might well suffer a fate worse than the indignity suffered by Fox of being attacked by the mob and rolled in the mud.

It is a familiar lesson of history that obedience to the law and, therefore, the retention of political authority can seldom be taken for granted and that, in societies other than the most brutal tyrannies, such obedience depends less on the policeman, with or without a gun, than on the maintenance of a general — if in particular respects qualified — acceptance of the authority of the law. There is a clear relationship, that is, between the internal and the external limits of the law. Machiavelli saw this and there are passages in his writings to which he instructs the princes of his time how to preserve their powers by observing the principle of moderation in legislation.<sup>14</sup> Can we give similar advice to the Parliamentary princes of today? How can they best maintain respect for the authority of the law?

### *Physical laws of nature*

The trite remark that Parliament may do anything except turn black into white or a man into a woman carries the implication that there are practical limits to legislative power set by the physical laws of nature. Though perhaps even Dicey on reflection would have admitted this to be self-evident, it is a truism which less sophisticated persons may overlook. When Parliament, at the instance of My Lords Chesterfield and Macclesfield substituted the Gregorian for the Julian calendar, and declared that the day after 2nd September 1752 was to be reckoned the 14th, an omission of 11 days, ‘Polite society’, in the words of a historian<sup>15</sup> — ‘readily

governing to the profit of the sovereign’, in F. Tönnies, ed., *The Elements of Law*, Part II, ch. 9, para. 1 (London, 1928)

12. Cecil S. Ernden, *The People and the Constitution* (2nd. ed. London: Oxford University Press, 1956) at 53

13. See, *supra*, note 5 at 143

14. See, for example, Nicholas Machiavelli, *Works . . . in English* (London, 1680) at 284 ‘Those princes and commonwealth who would keep their Government active and uncorrupt, are above all things to have a care of religion and its ceremonies, and preserve them in due veneration in the whole world. There is not a greater sign of imminent ruine than when God and his Worship are despised.’

15. I.S. Leadam, *Political History of England*, Vol. 9 (London, 1909) at 423

accepted a reform introduced under such auspices; but the pious shuddered at the profanity of tampering with saints' days and the commonalty grudged that their lives should be shortened by Acts of Parliament.' Matters come to a more serious pass, however, when legislators themselves forget that they are men, and cannot change the laws of nature. When they do so, however, the judges may amiably come to Parliament's rescue by presuming that it was not Parliament's real intention to defy the laws of nature. In *Keogh v. Magistrates of Edinburgh*,<sup>16</sup> it was argued that Parliament had imposed on the magistrates of that windy city an absolute duty to keep the gas street lamps turned on throughout the hours of darkness, but Lord Sands remarked: "Great as are the powers of the legislature, it can control and give directions to persons only, and not to things. It can say to the Corporation 'Light', but it cannot say to the material universe 'Let there be light'. It appears to me reasonable to hold that the legislature recognises that similar limitations attach to the Corporation of Edinburgh, and that, in directing that the Corporation shall light the streets, the legislature recognises that even the Corporation are but men."<sup>17</sup>

In a juridical sense, apart from treaty obligations and apart from constitutional limitations in federal and quasi-federal States, the legislature may seem capable of doing what it pleases. It may deem an adopted child to be the child of its adopting parents, and not that of its natural parents, in any situations whatever. In a practical sense, however, the legislature must have regard to the laws of nature and, even where in general it deems an adopted child to be the child of its adopting parents, it will have regard to the natural relationship in limiting cases such as capacity to marry.<sup>18</sup> Scots law in the past ignored illegitimate relationships, not only in the law of succession but even in the rules prescribing the prohibited degrees of marriage.<sup>19</sup> But it has been found necessary to change all this.<sup>20</sup> In many situations the law can ignore the physical laws of nature only at the risk of seeming ridiculous to the public, and so rules of

16. [1926] S.L.T. 527.

17. *Id.* at 531

18. Marriage (Scotland) Act 1977, s.2 and Sch. 1.

19. *Philp's Trustees v. Beaton*, [1938] S.C. 733

20. As to succession, see the Report of the Scottish Law Commission on the Reform of the Law Relating to Legitimation *per subsequens matrimonium*, (1967; Cmd. 3223) the Legitimation (Scotland) Act 1968 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.5. As to marriage, see the Marriage (Scotland) Act 1977, s. 2 and Sch.1

law prescribing the duration of the period of conception and the limits of a woman's capacity to conceive have been gradually modified to take account of advances in medical knowledge. At present the Scottish Law Commission is examining, in the light of medical and other evidence, the law relating to incest where, even to this day, Scots law draws its prohibitions from Leviticus. Chapter XVIII. Currently, in various legal systems, legal definitions of life and of death are in process of reformulation in the light of recent advances in medical science and technology.

The risk remains, however, that the legislature, in seeking to adapt the law to fashionable ideology, may ignore the facts of nature or of life. The Scottish Police Federation recently attacked the provisions of the United Kingdom Sex Discrimination Act 1975 in so far as they apply to the recruitment to the police.<sup>21</sup> As their spokesman said of women: "They have their limits. God made us differently and an Act of Parliament cannot change that." Here, as elsewhere, the judges endeavour to inject commonsense into the law.

"El Vino" is a pub in Fleet Street at the heart of the English newspaper industry and a lady journalist recently complained to the court that the publican would serve only men at his bar, and required her to sit at an adjacent table. Though it might have been thought that this amounted to discrimination in the provision of goods, facilities or services contrary to section 29(1) (b) of the 1975 Act, the County Court judge would have none of this, and said that the Act should not be interpreted in a legalistic vacuum but in a commonsense way by reference to its object, which was to promote harmony between the sexes. The publican, he held, had clearly introduced his rule through motives of chivalry. Again, on 28 July 1978, the Court of Appeal in England had to decide the important question whether the Act entitled a girl of 12 to play football for her local football team. Lord Denning, though he was otherwise on firm ground in terms of section 44 of the Act, suggested that the law would be "an ass and an idiot" if it tried to make girls into boys so they could join in all boys' games.

### *Nature of a legal system*

The judge in the El Vino case remarked that the Sex Discrimination Act should not be interpreted in a legalistic way. We

21. *Scotsman*, April 27, 1978

are often impatient with legalistic interpretations of statute law: “If only”, we may say, “the judges would more often forget about the rules, and rely more on their commonsense and sense of justice”. But it must be remembered that legal rights, including our rights to property, our rights to reputation, our rights not to be injured or discriminated against, will be found on analysis to be no more than conclusions which are drawn from the existence of legal rules.<sup>22</sup> The paradox is that without rules, and without their fair application in particular cases, there can be no freedom. This points to another limit to the power of a legislature, perhaps a limit intrinsic to the nature of a legal system.

The essence of a legal system is that it is a rule-applying rather than an equity-dispensing system. The layman may be perturbed, and even may profess to be shocked, by particular applications of rules of law, but a legal system must seek less to maximise the happiness of individuals in particular cases than to find and to apply rules which, if applied generally, would maximise happiness in the community. In other words, a legal system is a species of rule-utilitarianism in action. Wasserstrom, in *The Judicial Decision*,<sup>23</sup> points out that the foreclosure of a mortgage may occasion hardship and distress to a widowed farmer and her six children but, if the legislature or the courts were to look simply to the interests of the particular parties concerned and to refuse foreclosure in cases of hardship, the system of borrowing money on the security of property would become commercially unattractive and in this way greater hardship might be occasioned to poor farmers as a class. Analogous problems are currently facing the Scottish Law Commission in its examination of the law relating to the enforcement of court decrees. Similar problems, indeed, underlie every attempt to reform the law, and they are all the more difficult to resolve because the competing policies may be difficult to identify and evaluate.

Another constraint arises, as the Marxist philosopher Frederick Engels, pointed out, because of the need to maintain consistency in the law: “The law”, he said,<sup>24</sup> “must not only correspond to the general economic condition and to its expression, but must also be

22. H.L.A. Hart, *Definition and Theory in Jurisprudence* (1954), 70 L.Q.R. 37 at 47-49

23. (Stanford, 1961) at 140-142

24. *Selected Works* (London, 1968) at 686. I owe this reference to Alan Watson, *Society and Legal Change* (Edinburgh, 1977) at 7

an *internally coherent* expression which does not, owing to inner contradictions, reduce itself to naught. And in order to achieve this the faithful reflection of economic conditions suffers increasingly''. If legislation were merely a profusion of rules of singular application, glaring anomalies and absurdities would be inevitable. There would still be unforeseen cases and, because the rules would be likely to lack inner consistency, the gaps could not be filled by the normal processes of induction and analogy.<sup>25</sup> The lawyer's call for the inner consistency of the law is not motivated simply by his desire for juristic elegance but by his insistence that the legislature must create the necessary conditions for the juristic development of the law. The lawyer will freely concede that the demand for consistency may cause hardship in some cases but he will claim, and I think with reason, that in the end this consistency permits the legal system more effectually to do justice in the vast majority of cases.

Lack of coherence in the law may arise because responsibility for separate branches of the law may be allocated to separate Departments of State, and each, in seeking to give its own policies immediate legislative effect, may tend to ignore the long-term implications of these policies in other branches of the law. The consequences were graphically stated by a Scottish commentator in 1873:

But your departmental prepared Code stands out of all relations. Each separate doctrine is but the cold and frigid dictum of the despotic power which made it. Each doctrine is, so to speak *sui juris*, acting independently of all its neighbours. As soon hope that chaos would not return again if the planets were allowed to go at large through space, as that a law so framed may be otherwise than productive of mischief and confusion.<sup>26</sup>

This problem is exacerbated in legal systems which are parts of a federal or devolutionary constitutional structure because attempts may be made to extend the rules of one system into another where they simply do not fit. In the United Kingdom, around the 1850s, English Chambers of Commerce became impatient of the distinctions between the commercial laws of England and Scotland, because those distinctions might constitute a trap for the unwary. In consequence, the Mercantile Law Amendment Acts of 1856 were

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25. See A. Tune, *The Grand Outlines of the Code Napoleon* (1955), 29 *Tulane Law Review* 431 at 441

26. (1873), 17 *Journal of Jurisprudence* 1 at 6

passed. Their preambles say that they were to remedy “the inconvenience felt by persons engaged in trade, by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence”. The Acts introduced a few Scottish rules into English law but on the whole the principles which they adopted were principles of English law. A contemporary Scottish commentator remarked:

This is not the time, were it the place, to question the policy of the measure; but aware as we are of the danger of voluntarily engrafting a rule, the growth of another law, on a system foreign to it in principle and practice, we shall certainly watch this operation with some degree of anxiety . . . our judges will have to solve the novel problem of reconciling principles flowing from one source with others from a directly opposite.<sup>27</sup>

These prophetic words were amply justified by events and the next century presented the spectacle of the Scottish judges attempting with indifferent success to marry the ale of English law with the whisky of Scots law, an undistilled with a distilled product.<sup>28</sup>

The Scotland Act 1978 provides for the setting up of a Scottish Assembly and for the devolution to it of certain legislative powers. In a Memorandum<sup>29</sup> to Government on the Implications of Devolution, the Scottish Law Commission argued as follows: “There would be a risk of loss of functional efficiency if there were a division of legislative authority in important areas of private law. We have explained above that the private law of a country is not an assemblage of largely independent acts or rules, but a single and integrated piece of machinery whose component parts must fit in with one another and serve the needs of the machine as a whole. To divide legislative authority for parts of the machine will certainly reduce its efficiency and utility.” The problem, indeed, is one which affects any minority legal system, and it is interesting to

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27. (1857), 1 Journal of Jurisprudence 13

28. See, for example, *McBain v. Wallace & Co.* (1880-81), 18 S. L. Rep. 227 (H.L.); see also *McCowan v. Wright* (1851-52), 24 S.J. 575 per L.J.C. Hope at 576. An unhappy attempt to assimilate the Scottish and English legal systems may be found in s.2 of the Sale of Goods Act 1893. This declares that capacity to buy and sell is regulated by the general law of capacity to contract, but adds the proviso that ‘where necessaries are sold and delivered to an infant or minor . . . he must pay a reasonable price therefor’. This merely confuses the law of Scotland where minors have capacity to contract, subject only to reduction on the ground of lesion. Section 2 says nothing on the other hand about the position of pupils who have no capacity to contract.

29. Memorandum No. 32, para. 17, p.63

notice that it is now being encountered in England in the context of legislation emanating from the European Communities. Recently, a Select Committee of the House of Lords in a Report<sup>30</sup> on the "Approximation of Laws under Article 100 of the EEC Treaty" found it necessary to emphasize that "A national system of law should be regarded as a coherent whole, and there is a danger that sporadic incursions into it will affect its structure; a real need ought therefore to be shown before approximation is embarked upon".<sup>31</sup>

Practical constraints affecting legislative power spring less often from the physical laws of nature, or from the nature of a legal system, than from limitations on available resources, problems of communication, the limited effectiveness of sanctions, and the social attitudes of men.

#### *Limitations on resources*

Little need be said about limitations on resources. It is obvious that nearly every legislative intervention involves costs for the State or for the parties concerned. Parliament may decide, as it did in the Moneylenders Acts, to intervene merely to prevent flagrant abuses of economic power but, once legislation has been enacted, a Department of State will be asked to supervise the operation of the Act, and may well tend to expand the range of its controls. This happened recently in the same area in the United Kingdom under the Consumer Credit Act 1974. Since the matters with which it deals are far removed from the public order, and the ordinary law enforcement agencies would be unlikely to intervene with appropriate zest, a special enforcement agency, the Director of Fair Trading, was given new and extensive powers. Even the Act itself, complicated though it may appear to be, turns out on analysis to be little more than a skeleton to be clothed with flesh by statutory instruments creating a system of Licensing and further controls. We have today innumerable governmental agencies of one sort or another, from the Health and Safety Commission to the Race Relations Board. The growing importance of these institutions has received attention only from specialists in the particular fields. The general problem is that certain social policies may be given legal effect only by the provision of appropriate institutional support<sup>32</sup>

30. Dated April 18, 1978, H.L. (1977-78) 131

31. *Id.* at 15

32. Adam Podgorecki, *Law and Society* (London: Routledge & Kegan Paul, 1974) at 254

and there is in consequence a gradual intrusion of public law into the private sector, with possible damage to the coherence of the system of private law. It is not clear that the consequences of this transformation are fully appreciated or that those who originally sought to extrapolate the particular policies always took full account of the financial and other costs.

In Bills presented to the United Kingdom Parliament, there is always attached an "Explanatory and Financial Memorandum" which explains the financial effects of the Bill upon the public purse. This Memorandum, however, will totally ignore the financial and manpower implications of the proposed legislation for commerce and industry, and for society as a whole. The financial implications for commerce may be burdensome and the manpower implications, particularly for higher management, extremely serious. Their problems are not alleviated by the complexity of much modern legislation, and its pedantic concern for the trivial.

### *Problems of communication*

One important, though today all too neglected, practical limit to legislation is imposed by the limited capacity of the public to digest it. Viscount Stair, who might be described as the founder of modern Scots law, writing in 1681 when our statute law was both simple in its expression and trifling in its volume, remarked that written laws tended to "increase to such a mass, that they cease to be evidences and securities to people, and become labyrinths, wherein they are fair to lose their rights, if not themselves".<sup>33</sup> There is a tendency in modern legislative drafting to seek to anticipate every possible situation and to state each rule with every appropriate qualification. The result may seem perfection itself to the draftsman or specialist, but it may puzzle the ordinary solicitor and be quite incomprehensible to the man in the street. If it is to the latter that modern social legislation is directed, can it function effectively if it cannot be understood by him?<sup>34</sup>

Only too often the man in the street, in Bentham's phrase, is "unconscious with respect to the law".<sup>35</sup> He cannot be expected to consult it in his daily life and, in consequence, has to be content to apply fashionable legal superstitions. I suspect that these have a

33. *Institutions* (3rd. ed.) at 10

34. See Jane Fortin, [1978] *New L.J.* 700 at 702

35. See, *supra*, note 3 at 45

more pervasive influence on social and business conduct than the law itself.<sup>36</sup> What I am suggesting is that life and the law have a habit of not intersecting until some family or business crisis arises. Then the law may intervene, and the conduct of the persons concerned is analysed *ex postea* within what to them may be a new and artificial legal framework. If this is so, and I believe it to be so,<sup>37</sup> the legislature will occasion hardship and even injustice if rules of law are not stated in an intelligible and accessible form. This is true even of statements of the rules of criminal law. I suggest that the real need is not — as is the current fashion in England today — to aim for a precision in the drafting of offences which would not discredit a taxing statute but rather to ensure that penal legislation — drafted with however broad a brush — conforms by and large to reasonable standards of moral achievement. This is important because, as suggested above, obedience to the law depends in the final analysis upon the maintenance of a general — if in particulars qualified — acceptance of the authority of the law.

I am not arguing that any and every departure from the law is a threat to the legal system. If that were so, there would be little hope for society. The breaking of laws relating to Sunday Observance or even to the parking of motor vehicles would be a threat to the social structure. While this extreme position would be widely rejected, disobedience to the law on any substantial scale is an infection difficult to quarantine and it seems best to design the law as to maximise potential compliance.

#### *Limited Effectiveness of sanctions*

Sanctions have their own inherent limitations. Idealists who wish to fashion the conduct of others by applying the canons of their own critical morality are liable to forget that in some important areas of conduct no legal machinery is likely to secure the desired result. A decree of restitution of conjugal rights is unlikely to rekindle the embers of dying love. The law can often punish us for being bad, but can less frequently make us good. The impotence of the law to secure the desired result lies behind such rules as the rule that the courts will not specifically enforce promises to marry or indeed any

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36. Cf. Edwin M. Shur, *Law and Society* (New York, 1968) at 129-131; and Sir Maurice Amos, *Should we Codify the Law* (1933), 4 *Political Quarterly* 317 at 364.

37. Cf. *Royal Commission on Civil Liability* (Pearson Commission) (1978; Cmd. 7054) at 62, para. 250

contract, such as a contract of service or a contract of partnership, which involves a close personal relationship between the contracting parties.<sup>38</sup> In those cases, forced compliance would be worse than none and the remedy of the other party is merely one for damages.

The effectiveness of the criminal law is obviously limited in some cases because of the practical difficulties in identifying and catching the culprit. It is increasingly recognised today that the severity of sanctions is less likely to constitute an effective deterrent than the certainty of their incidence.<sup>39</sup> And there are many activities which may be carried on well out of reach of the agencies of law enforcement. The United Kingdom customs and excise authorities have now given up the onerous task of policing the home-brewing of beer, but there are other activities equally difficult to detect which the law still classifies as offences. Here the legislature should remember that the detection and punishment of breaches of the law involves the use of scarce and expensive legal resources, including those of the police, prosecutors, defending counsel (who may now be paid by the State), courts, prison authorities, and social, welfare and aftercare authorities. The dangers of the legislature declaring criminal everything which it dislikes have been trenchantly delineated by a representative of the U.S. Federal Bureau of Investigation: "The result is that the criminal code becomes society's trash bin. The police have to rummage around in this material and are expected to prevent everything that is unlawful. They cannot do so because many of the things prohibited are simply beyond enforcement, both because of human inability to enforce the law and because, as in the case of prohibition, society legislates one way and acts another way."<sup>40</sup> Punishment *prima facie* is an evil and the mere fact that it is imposed by state authority is not necessarily a justification for it. The benefits which rules of law seek to ensure must always be weighed against the disadvantages which may be associated with their enforcement.<sup>41</sup>

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38. *Macarthur v. Lawson* (1877), 4 R. 1134 at 1136; *Skerrat v. Oliver* (1896), 23 R. 468. Cf. *Murray v. Dumbarton C.C.*, [1935] S.L.T. 239

39. Erherd Blakenburg, *The Selectivity of Legal Sanctions* (1976), 11 Law and Society Review 109

40. Cited by J. H. Skolnick, *Coercion to Virtue: A Sociological Discussion of the Enforcement of Morals* (Berkeley: University of Calif., 1967), submitted to The President's Commission on Law Enforcement and Administration of Justice.

41. A. M. Rose, *Sociological factors in the Effectiveness of Projected Legal Remedies* (1959), 11 J. of Legal Education 470

A most interesting discussion of this general problem is contained in the Report of a United Kingdom Departmental Committee on Human Artificial Insemination.<sup>42</sup> The Committee were clear in their opinion “that having regard to the dangers and disadvantages for the child, the parents, the donor, and for society as a whole, A.I.D. is undesirable. We, therefore, wish to discourage the practice.” But they pointed out that it would be extremely difficult to detect. It could be easily concealed and, if it became criminal, would be even more carefully concealed. The Committee concluded, therefore, that “to attempt to prohibit by law a practice which is very difficult to detect, which is so far of very small extent and not demonstrably harmful to the community as a whole, which, if prohibited, might get into worse hands or offer scope for blackmail and which some people do not regard as morally wrong would, we think, be liable to encourage a general disrespect for the criminal law”.<sup>43</sup>

These arguments may be applied with certain changes of emphasis to current controversies in other fields, for example, that of abortion. The principal difference is that abortion is widely felt to be gravely immoral. Those, however, who wish to repeal the *Abortion Act* tend to forget that, though it might be relatively easy to prevent abortions being conducted in State hospitals, the demand for them on the part of the girls involved is so inelastic that they are willing to pay almost any price and to go to almost any place to obtain one. Abortions by qualified persons would become extremely expensive, abortions by unqualified persons would be resumed, and the women exposed to all the risks of unskilled treatment. The law would be enforced with difficulty and with reluctance on the part of police and prosecutors. Judges and juries would be reluctant to convict.<sup>44</sup> In consequence, the law would often be broken with impunity, and to that extent the law would fall into disrepute.

Simple and obvious though these considerations may be, they are often, to use the language of Austin, “overlooked by legislators. If they fancy a practice pernicious, or hate it they know not why, they proceed without further thought to forbid it by positive law. They forget that positive law may be superfluous or impotent, and

42. (1860; Cmd. 1105) at para. 264

43. *Id.* at para. 2.39

44. The refusal of juries to convict in dangerous driving cases in the United Kingdom is notorious. They took the same attitude to the Cromwellian offence of adultery. See J. W. Davies, *The Early Stuarts* (Oxford, 1937) at 302

therefore may lead to nothing but purely gratuitous vexation. They forget that the moral or religious sentiments of the community may already suppress the practice as completely as it can be suppressed".<sup>45</sup>

*Can legislation change social attitudes?*

My general conclusion is that legislation has little chance of success if it demands unreasonable standards of moral attainment.<sup>46</sup> This, however, is not to suggest that the law can do nothing more than reflect current social attitudes and canons of behaviour and is wholly powerless to change them. This pessimistic view of the power of legislation was characteristic of lawyers and of sociologists in the 19th century. Sir Frederick Pollock pointed out that the law could punish stealing but not covetousness and argued that, because the law could not know or control the thoughts and conscience of the individual, "The law does not aim at perfecting the individual character of man, but at regulating the relations of citizens to the commonwealth and to one another".<sup>47</sup> It does not follow, however, that, because the effective intervention of the law is limited to overt acts, the law cannot aim indirectly towards perfecting man's character. The lawyers of Pollock's time were apparently influenced by the pessimistic view taken by contemporary sociologists, such as Ehrlich and Sumner, of the power of the law to modify or change the folkways of society.<sup>48</sup> They said that the law cannot alter prejudices which are deep-seated in the minds of men, and even that the law's intrusion might serve to harden these prejudices. Because of this, some of them argued that it might be counterproductive for the law to intervene to shield those subject to racial discrimination in the typical fields of employment, housing and education. These views had great influence on judges in the United States.<sup>49</sup> This pessimism is odd, since the 19th century itself

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45. See, *supra*, note 10 at 162

46. See Herbert L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1969) at 262

47. *Justice According to the Law* (1875), 9 Harvard L. R. 295 at 303

48. See in particular, Sumner, *Folkways* (New York: Mentor Books, 1960) at 89; and (1962), 67 American Journal of Sociology at 532-540

49. Cf. *Plessy v. Ferguson* (1896), 163 U.S. 537, per Mr. Justice H. B. Brown at p. 551: "The argument [of the plaintiff] also assumes that social prejudices may be overcome by legislation and that equal rights cannot be secured to the negro except by an enforced co-mingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality it must be the result of natural

witnessed striking changes of attitude, in part at least, attributable to the effects of the social legislation of the period.<sup>50</sup> More recently, in the field of race relations, legislation in the United States and in the United Kingdom has tended to create a more prevalent acceptance of racial equality and, from the point of view of the racially disadvantaged, to reduce their sense of injustice.<sup>51</sup> It need not be suggested that rules of law are more than one catalyst in the process of forming public opinion, but their existence on the statute book may help to impress upon individuals the attitude of society to certain forms of conduct. In some cases, indeed, when it has the support of informed public opinion, legislation may achieve gradual, but in time striking, success in changing the customs and attitudes of society.<sup>52</sup>

### *Moderation in recourse to legislation*

It may be conceded, however, that there are distinct limits to the law's practical ability to change social attitudes and customs, especially where related to man's physical or psychological needs. Bentham asked, though in a slightly different context,

With what chance of success, for example, would a legislator go about to extirpate drunkenness and fornication by dint of legal

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affinities, a mutual appreciation of each others' merits and a voluntary consent of individuals."

50. A. V. Dicey, who analysed the reciprocal influences of the law and public opinion in England during this period remarked:

"Every law or rule of conduct must, whether its author perceives the fact or not, lay down or rest upon some general principle and must, therefore, if it succeeds in attaining its end, commend this principle to public attention or imitation, and thus affect legislative opinion" — *Law and Public Opinion* (2nd. ed. London: MacMillan & Co., 1962) at 41

51. Morroe Berger, *Equality by Statute* (Garden City, N.Y.: Doubleday, 1967); John P. Roche and Milton M. Gordon, "Can Morality be Legislated?" Cited in Charles G. Howard and Robert S. Summers, *Law, Its Nature, Functions and Limits* (Englewood Cliffs, N.J.: Prentice-Hall, 1965) at 439; J. R. Pennock and J. W. Chapman, eds., *The Limits of the Law: Nomos XV* (New York: Lieber-Atherton, 1974) at 1-2; A. M. Rose (1959), 11. J. of Legal Education 470; Edwin M. Shur, *Law and Society* (New York, 1968) at 135-139; Davis McEntire, "The Efficacy of the Law in Inter-Group Relations" in *Residence and Race* (Berkeley, 1960) set out in Grossman and Grossman at 268-280

52. Cf. L. S. Robertson, *An Instance of Effective Legal Regulation* (1967), 10 *Law and Society Rev.* 467. In 17th century England, the attempt was made to proscribe duelling by law: "This legislation was fairly successful, for public opinion supported it, and a jury did not hesitate to convict a duellist" — J. G. Davies, *The Early Stuarts* (Oxford, 1938) at 302. The author contrasts the failure of the attempts to proscribe adultery.

punishment? Not all the tortures which ingenuity could invent would compass it: and, before he had made any progress worth regarding, such a mass of evil would be produced by the punishment, as would exceed, a thousand-fold, the possible mischief of the offence.<sup>53</sup>

Unfortunately, this singular prophet has been ignored, and not only in his own country. But, to take one illustration only, the failure of the United States National Prohibition Act is a striking testimony to the soundness of his predictions. Since systematic and notorious inobservance of the law may undermine public respect for it, legislators frustrate those wants and desires at their peril.

The law is a weapon of such power and effectiveness when properly deployed that society is always tempted to use the law too freely. Legislators often place on the criminal law burdens more suitably borne by churches, schools and, dare it be said, by parents and neighbours. Even in matters of civil law legislators tend to forget that life is always more complex than we suppose and that every disturbance of traditional legal relationships risks producing unpredicted and unwelcome remote affects.

The law is a weapon whose steel may be blunted by clumsy use against inappropriate targets, and it would seem better to keep it sharp for these targets which it has a reasonable chance of striking: “Multiply the laws”, said a Roman jurist, “and you will multiply lawyers and criminals”. Though I take some exception to that juxtaposition, I am prepared to admit — or even assert — that if you multiply the laws then you multiply the chances of their being unknown and disregarded in practice. You multiply also the chances of their being harsh when applied, and you sensibly diminish man’s freedom of choice of action. In the words of Thomas Hobbes: “. . . the greatest liberty of the subject dependeth on the silence of the law”.<sup>54</sup>

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53. W. Harrison, ed., *Principles of Morals and Legislation* (Oxford, 1960) at 420

54. *Leviathan* (Oxford: Clarendon Press, 1960) at 143