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**THE EFFECTIVENESS OF LAW**

ANTONY ALLOTT\*

In this article I seek to examine how laws work, what factors make for the success or failure of law-making, and what guidance one can give to the practical legislator who wishes to achieve some social reconstruction or transformation through law. My concern with this theme is prompted by the evident failure of too many legislative initiatives in too many countries, developed and less developed, in the Second and Third Worlds as well as in the First. The failure of a law to achieve its intended effect may seem a matter of small moment when taken in isolation; but there are reasons why in fact such failures, when multiplied or when they touch some vital aspect of social life, imperil the whole fabric of law and order in a society by causing a general turning away from, a rejection of, or a contempt for law on the part of those subject to it. The biblical aphorism that "without vision the people perish" can be paralleled by the conclusion that "without a generally respected and effective legal system, a society will tend to its own disintegration." We play, then, for high stakes when we put laws and the legal system into jeopardy.

There has been a natural tendency on the part of the law-makers to put the blame for such a rejection of laws on those who should comply with them. If only, they may think, people would realize that obeying laws is essential for the smooth functioning of society and the achievement of the social goals set by those who appear to have command of that society! But in so doing the law-makers are putting the blame on the wrong segment of society: it is those who *make* the laws, rather than those who should keep them or actually break them, who are largely responsible for the failures. Self-examination by the law-makers of what they are doing, and of the nature of the legal instrument which they use, is thus imperative; at the same time, it is rare that such an examination is made.

In this article I try to summarize and extend the argument contained in my recent book *The Limits of Law*.<sup>1</sup> In this book I examined

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1. Butterworths, London, 1980.

the theoretical constraints on the effectiveness of law which derive from the characteristics of laws and legal systems; I then went on to examine in detail a number of specific instances where laws had been used for purposes of social transformation, both in England and the United States as well as in Third World countries of Asia and Africa. The remedy for every social ill, the mechanism for achieving every social goal, is—it seems—to make a law. But the ills continue, and the goals are not attained. Why?

Most jurisprudential and sociolegal accounts of laws in operation tend to be written out of a study of the legal systems of the advanced “civilized” (i.e., technically and educationally developed) parts of the world. The overwhelming weight of the laws now being made there, needs no special demonstration—all one needs is to look at the annual volumes of statutes and to compare their size with that of the laws of a generation or two ago. What is more, the study of such laws tends to be a study of statute-law; obviously so in civil-law countries which purportedly rely on codified law, but equally so in the common-law countries. This is because the overall purpose of the law-maker is more clearly revealed and declared in such statutes, their commencement is more sharply defined, and their impact on the existing legal system and on society therefore more acute. But this concentration on the legislated law misses out on two important dimensions of law-generation. The first—familiar to every common lawyer—is that of the work of the *judges* in making law; the second—less familiar to Western jurists or practitioners, and hence gaining only a grudging mention at best in their textbooks or discussions—is that of the *people* who make law, through their practice both in non-customary legal systems, and in those systems typically labelled “customary law.” The judges and the people are thus law-makers too.

Obviously, there has been a great deal of jurisprudential writing on judge-made law in common-law systems. We can immediately dismiss the query, do judges make law?, by answering that they do. Moreover, they do so not only when they face a novel situation for which they have to find a rule, but also when they apply a well-known or established rule of law and are continually stretching or reworking it by their decisions. This is inherent in the process of law-application. Nor need we discuss the desirability of this judicial law-making—it has to be; all that needs discussion is what its cumulative effects will be, and what the forces or processes are which operate to determine how this capacity is exercised. The case with codified law is not different: here too judges make law in applying the code provisions.

Specific laws, *i.e.*, normative provisions which lay down rules of behavior or which regulate institutions and processes concerned with social behavior, evolve or are promulgated or "emitted" at a specific time and within a specific social situation. Even when first promulgated, the normative provision cannot hope to be conclusive or comprehensive in its scope and effect; it is no more than a guide, both to those subject to it and to those called upon officially to apply it. The scope of the norms is continually defined and extended in their observance and application, both by its subjects and by the courts and other officials. The task of the judges (or others called on to apply the norms) is thus a task of matching and adjusting the norms to society in general and to the instant controversial situation in particular. I see courts, especially in common-law systems, as carrying on this work of adjustment of laws to social realities through two kinds of devices. The first is the use, and the later re-definition, of what I call "instrumental legal terms." The second is through the "contextual interpretation," and later "re-interpretation," of statutes.

An *instrumental legal term* is a linguistic assemblage of a word or phrase which is given a special coded function and which serves as a mechanism connecting the facts as perceived or found by a judge and the legal rules which he applies to those facts. Such terms are continually re-definable, in the sense that their function, though it may be precisely defined at any moment in time, is always open to re-definition at a later stage. The sovereign example of such an instrumental legal term in English law is the "reasonable man," so beloved of the judges in negligence cases. In a sense, though, every term with attributed specialized function in a legal statement has the potentiality of being instrumental. The importance of the instrumental legal term is precisely in its capacity: it is a container into which the judge can pour elements and items from the social world as viewed by him, which forms the background to the law and to the case in which it falls to be applied. Through this channel the judge receives impressions, influences, and messages from those who are subject to the law; this is one of the ways in which popular influence helps to make law through the instrumentality of the judge. No one can doubt that the very different view which contemporary judges in England take of, say, the liability of land-owners to trespassers reflects a change in popular attitudes to property ownership as well as to those who are vulnerable when they trespass.<sup>2</sup>

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2. See *British Railways Board v. Herrington* [1972] AC 877 (HL).

The *contextual interpretation* of statutes is by now a well-perceived and acknowledged story, both by jurists and by the judges themselves, who declare that, in applying a normative provision of a statute, a judge must have reference to the social and linguistic contexts of the provision. This is one of the trite principles of modern linguistics, of course, that context determines function. However, what is not remarked on so frequently is that the context can shift or be differently perceived at different epochs or by different judges; and secondly that the views of sections of society or of members of the public generally have the chance to make themselves felt in determining that context. Here, then, is another channel of communication, by which people influence law. The terms which are interpreted contextually are not those which are used instrumentally as coded signals of the law (terms of art), but ordinary words in the language, the meaning of which is in principle to be defined by the public as much as by the judge; whereas the meaning of instrumental legal terms is accessible only to the judge. A good recent example is the word "family," which generally in contemporary English law lacks any technical or pre-defined meaning; and in the recent case of *Dyson Holdings Ltd. v. Fox*<sup>3</sup>, the English Court of Appeal was prepared to hold that a woman who had lived with a man for twenty-one years as man and wife without being married to him was a "member of his family" for the purpose of taking over the benefit of a statutory tenancy which he enjoyed under the Rent Acts. "Family," in other words, was contextually re-interpreted so as to reflect what the judges called "a complete revolution in society's attitude to unmarried partnerships of the kind under consideration."

So much by way of preliminary. Now we must turn to the practical and analytical aspects of our theme. First, I analyze any "law" (a normative provision or set of provisions in a legal order) as consisting of one or more normative statements, each of which has the form of a hypothetical-conditional. The *if* part of the statement specifies a pattern or model of behavior or action or events; the *then* part contains an intended consequence centered on a model verb of the "ought" type. The work of the judge or applier of a norm is first to identify the relevant norms, then, for each of them, to see how far the facts as found by him match the *if* part of the hypothetical-conditional imperative of the norm. It is then his task, if he finds a sufficient match, to ordain or recognize the application of the consequence specified in the *then* part.

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3. [1976] QB 503 (CA).

There is obviously plenty of slack in this process of analysis and abstraction and matching and application. The formulation of the hypothetical-conditional, depending as it does on verbal items, is necessarily open-textured, and subject to the interpretation and re-definition we have already referred to. The matching process is necessarily crude; in the process, the norm may be stretched or distorted to accommodate situations not in the contemplation of the formulator of the norm, or to exclude what he wished to be included. At the point of application, the judge or official is left with a discretion; indeed, the whole process is riddled with instances of discretion, each of which severally makes less probable the exact execution of the will of the norm-emitter, if this was ever precisely formulated. Here, built into the very nature of the legal norm, is a sufficient explanation of ineffectiveness.

This is at the level of theory. When we come to look at the laws in practice, the first task we must perform is to define our terms, and especially the meaning of "effectiveness" itself. I can best do this by summarizing my view of a legal system. To me a legal system is a purposive system existing in a society, whose component laws are made by those having positions of power or influence in the society. The purpose of the laws is to regulate or shape the behavior of the members of the society, both by prescribing what is permitted or forbidden, and by enabling them, through the establishment of institutions and processes in the law, to carry out functions more effectively. A general test of the effectiveness of a law (a particular provision of a legal system) is therefore to see how far it realizes its objectives, *i.e.* fulfills its purposes. There are two difficulties here. The first is that, even in a society with express law-making (through legislation or otherwise), the purpose of a particular law may not be clearly stated by its maker or emitter. What is more, as the law acquires a history, those who apply it, follow it, or disregard it re-shape both the law and its purposes to correspond to their power and their influence. A law lives and develops. Most normative statements are not originated by those who propound them; but to the recipient of the legal message, what counts is not what the originator of the norm may have intended, but what the current emitter of it intends. Secondly, there are societies and laws (both of them highly significant juristically and numerically in the perspective of comparative law) which place little or no emphasis on expressly promulgated law, and which are claimed to be regulated by customary law. How can laws which apparently develop from the habitual practices of the people be said to have a purpose, or indeed to achieve such a purpose effectively?

This is an aspect which has been generally neglected in legal analysis heretofore. I would suggest, though, that the question just posed rests to some extent on a misconception. If we study such customary-law societies, we see that the legal norms of such a society are, despite their "customary" character, capable at any time of being formulated ("articulated," as I would put it) by persons—whether in authority or not—involved in situations where such norms are relevant. Such situations are not restricted, *pace* Llewellyn,<sup>4</sup> to situations of conflict or "trouble cases"; though certainly when a matter becomes disputed it is most likely that the participants and those implicated in resolving the dispute will tend to articulate the norms they think applicable. Norms can be articulated at any time by anyone. It is of the essence in the customary society that ordinary people can join in this process of articulation. This is not to say (*contra* Ross<sup>5</sup>) that "anyone's account of the directive is correct and justified . . .;" quite the contrary, a person's formulation of a norm will be evaluated by his fellow-members in the light of *their* opinion of its accuracy or acceptability *and* their estimate of the emitter's authority or claim to speak. Such customary legal norms, then, are crystallized by a process of interchange and articulation, supported and strengthened by reliance on them, not only in disputes but in the conduct of ordinary life. Although there may therefore not be a sole begetter of a norm (though legislation by chiefs, councils of elders, and so on is well recognized in many customary-law societies), yet there would be general approbation or converging recognition of a norm, and the possibility that members of the society would generally agree as to its purpose or purposes. The testing and reworking of such norms in action require the re-assessment of that purpose and how far it is carried forward by the normative provision. I conclude that, even in customary-law societies, the legal norms have identifiable purposes.

Effectiveness of a law, as I see it, is measured by the degree of compliance; in so far as a law is *preventive*, *i.e.*, designed to discourage behavior which is disapproved of, one can see if that behavior is indeed diminished or absent. In so far as a law is *curative*, *i.e.*, operating *ex post facto* to rectify some failing or injustice or dispute, we can see how far it serves to achieve these ends. In so far as a law is *facilitative*, *i.e.*, providing formal recognition, regulation and protection for an institution of the law, such as

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4. See, *e.g.*, K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENE WAY*, chap. 2 (1941).

5. See A. ROSS, *DIRECTIVES AND NORMS*, 97 (1968).

marriage or contracts, presumably the measure of its effectiveness is the extent to which the facilities are in fact taken up by those eligible to do so and the extent to which the institution so regulated is in fact insulated against attack. Disregard of the norms of matrimony by a third party adulterer, for instance, indicates a partial failure in the protective mechanism of the law of marriage.

Compliance with a law may be intentional or accidental. In the former case, the subject is aware of the norm, and conforms his behavior to it. In the latter case, he is unaware, and compliance is hence unintended. It is suggested that, because (i) of the vast weight and complexity of the laws in a modern state, and (ii) of failures in communication of those laws to their subjects, who may be quite unaware that the law exists or what it provides, much compliance (and indeed much disregard also) is unwitting. It is quite obvious in this latter case that compliance is more probable if the pattern of behavior prescribed by the law corresponds to, or at least does not fundamentally contradict, the pre-existing behavioral patterns in that society. It is also clear that in the former case, of deliberate compliance, where acceptability of a law comes in as well as awareness of it, a new law consistent with present attitudes, aspirations and habits has greater chances of acceptance and hence of compliance.

Even when a person is aware of a law, he cannot be compelled to observe it. This is so even if the form of the law is mandatory, and even if sanctions for non-compliance are built into the law. A law cannot compel action. All that a law can do is to try to induce someone to a particular course of action, by threats or rewards, perhaps. In other words, a law is, despite its imperative form, essentially a kind of persuasion. The history of intensified penal sanctions in response to non-compliance with a mandatory law shows the self-deception of the legislator. One striking example is to be found in Kenya, where, since independence, robbery on the highway has been a grave and growing problem. The response of the government was first of all to substitute a minimum term of imprisonment for the maximum formerly provided in the Penal Code; when this did not work, life imprisonment was imposed as the penalty instead. Even this did not serve to diminish the number of robberies; capital punishment was accordingly substituted as the penalty. And yet the number of such robberies continued to increase. The subject, *viz.*, the potential robber, thus had an option, which he has taken, to commit the offense however draconian the penalty.



If laws cannot compel action, then, neither can one say that anyone is "bound" by a law. Too much of the discussion of the effectiveness of law, of the reasons for compliance with it, has been confused by the assumption that in some way laws are "binding" on their subjects. I would submit that the idea of the binding character of norms is unnecessary for an analysis of them, that the term "binding" corresponds to no phenomenon in the real world, and that we would be better off without it. People conform to laws for a variety of reasons; those reasons lie in the realm of psychology and not of juristics. Law is persuasion; sometimes we submit to it because we believe that we have a duty to do so; sometimes because we feel that there is no alternative; and sometimes because we believe that it is positively to our advantage; but in each case we conform because we are persuaded.

### *Reasons for Ineffectiveness of Laws*

The first reason lies at the originating or transmitting end, in the equipment which formulates and "emits" a norm. All verbal formulations, legal as well as non-legal, are subject to the defects of every linguistic message. We need not press this point, which has been well explored by Glanville Williams<sup>6</sup> and others. It may, however, be worthwhile pointing out that it is not only the inherent limitations of linguistic expression which get in the way of the efficient formulation of a legal message; it is also the fact that, in developed legal systems, the linguistic register and structure used for such messages is an artificial one. It corresponds only fragmentarily with the language habitually employed by ordinary persons in communicating. In ordinary communications systems we try to ensure greater effectiveness for our messages by various devices, notably through redundancy, through better design, and through feedback. Legal systems are generally deficient in each of these areas. The message has little chance of getting through to its intended recipients, and needs reinforcement by education and parallel communication. Statutes are ill-adapted as instructional messages, needing special decoders (lawyers) which most citizens do not have available by their side. Lastly, legislators fail to realize that it is not enough to make a law, and even to communicate it effectively to its subjects, if there is no monitoring of its reception and implementation; no feedback, in other words. Iceland, I believe, is one of the few countries in the world which has institutionalized such monitor-

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6. See G. Williams, *Language and the Law*, 61 L. Q. Rev. 71, 179, 293, 384 (1945), 62 L. Q. Rev. 387 (1946).

ing of new laws. I would suggest that it should be mandatory for every legislature to provide, at the same time as it sends out its legislative text, for scrutiny of how it has worked, and a review by the legislature of its working after a stated interval.

We may contrast the situation in the traditional customary-law societies, in which none of these criticisms obtain. The language of the law is the language of everyday converse; there is no need for professional intermediaries to decode it; there is ample scope, in the small-scale and face-to-face society, for those who emit laws to see immediately how they are working and to take remedial action if they are not working well.

A second reason for ineffectiveness of laws lies in the possible conflict between the aims of the legislator and the nature of the society in which he intends his law to operate. Here, the contrast between the customary society and the modern society is most acute. Even in customary-law societies where leadership roles are well defined (including those with centralized governments, such as chiefly societies), the people and their representatives have a much more active role in the making of laws. In many instances propositions for new laws only take effect after they have been put to and accepted by those who will be subject to them; though this may not be so in some instances, the legislator generally works within the presuppositions, practices, and limits of acceptance of his community. The role of the people in making law is seen as frankly in the patterns of adjudication and arbitration as in the overt law-making. The nature of the traditional judicial and arbitral process in many customary societies has ensured that those who were affected by the norms of the law as formulated and applied by the courts would have a chance to take a part in their shaping. In many instances this was done through allowing ordinary people to take an active part in discussing cases before a court or arbitral proceeding, so that the eventual decision tended to be a harmonization of what the rulers, if any, thought desirable, what the parties would be prepared to agree to, and what the bystanding public accepted as right and fair.

None of these statements is true, or wholly true, in modern Western societies. The so-called "representatives" of the people in countries with representative institutions are in fact typically unrepresentative of their constituents; the law-making elite feels itself free to make laws, indeed to impose laws, even if well aware that these laws will meet serious popular resistance or fail to accord with public attitudes and wants. There is frequently no mechanism for securing popular acceptance of such laws (excluding the occa-

sional case such as that of referendums in California or Switzerland). Laws which conflict with the mores and aspirations of the governed must rely on their own built-in means of efficacy—they will get no support from society as it is presently constituted. So far as adjudication is concerned, Western legal systems openly try to insulate judges from popular pressure. In England particularly, the higher judiciary are forced into an almost monastic life-style, and attempts to influence their judgments would be met by proceedings for contempt of court. (However, this insulation is not complete, as I note below).

Lastly, we note failures in implementation of laws. Very often there are no sufficient implementing norms, orders, institutions, or processes incorporated in the law, which is left to make its way, along with all the rest of the legislated and unlegislated law, as best as it can. The enormous volume of road traffic and vehicle legislation in Britain demonstrates this situation at its worst. It is no use enacting masses of regulations controlling vehicle construction and use if there are insufficient vehicle examiners and if the police are too busy with other duties to carry out what to them are unimportant tasks. As the result, implementation of construction and use regulations is sporadic and ineffective. A similar tale could be told with many other branches of the law, such as town planning, theft and dishonesty cases, company regulation, industrial legislation, and public health. Even if there are implementing norms or processes provided, there may be a lack of zeal in using them on the part of the public authorities. In this connection, one may refer to what I call "social drag" on the police. The police are often reluctant to prosecute various offenses either because they wish to avoid causing themselves needless unpopularity, or because there is a low chance of conviction if the case gets to court, or where the duties involved in pursuing and detecting such crimes are unattractive, or where a conscious decision may have been taken to make a better use of police time. The discretions implicit in the enforcement of the law (especially criminal and regulatory law), and in judicial application of it, lower the effective implementation rate by a percentage which cannot be estimated but is probably in the nineties.

To set in the balance against this, we must note the ways in which popular opinion reaches the courts and influences their behavior, or the behavior of the law-enforcing agencies. Mention has already been made of the contextual interpretation of statutes; by this means popular opinions, not just on the meaning of a word, but as to what is acceptable or unacceptable behavior, are

transmitted to the judges. In England the institution of justices of the peace is another crucial transmission mechanism. JPs are selected out of the body of the citizenry. They are laymen, with a layman's perceptions of justice and indeed with a layman's difficulty in following the niceties of legal argument and distinction. They are often exceptional laymen, who have distinguished themselves in social life before being appointed to the bench; yet they remain open to the influences all around them mediated by television, the newspapers, and their circle of acquaintances. In this way they bring to bear on the trial of criminal and matrimonial cases a common-sense view of rights and responsibilities. Juries too, in England in serious criminal cases, and in some other parts of the common-law world (notably the United States) in civil cases as well, are by definition members of the public with the authority to find and apply the law. In their work of finding the law, juries are theoretically under the control of the presiding judge; but it is notorious that the decision, on law and fact combined, is at the end of the day the jurors', and that juries can disregard or mold law which they do not accept so as to make it fit in with their perceptions of justice. We assign, by accident rather than design, a power of disallowance to juries which overrides the word of parliament.<sup>7</sup>

### *Law and Social Transformation*

How far and fast can a legislator go in seeking to reshape society to his own image? In the 19th and 20th centuries the ambitions of the legislator have steadily expanded. The use of codified law, originally intended to improve the form, the technical performance of the legal system, has now been extended to embrace the transformation of society and social relations themselves, whether generally, as with the installation of a socialist regime of property relations, or in some particular but vital area of life, like the family, or sex, or racial equality. Not every social transformer is a modernizer, by any means. Today we increasingly witness the efforts of the regressive reformer, who (in Muslim countries particularly) wishes to restore what he believes to be a purer and earlier form of society. The colonial situation can be taken to be a general example of such social transformation. The ambitions of the earliest colonists, in continents like Africa particularly, were restricted to the facilitation of trade and the securing of military or economic advantage for the colonial power, and not to the restructuring of the societies that such a

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7. See Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 459-460 (1899).

power found there. Religion, notably Christianity, came in with a transforming mission; but, at least in the British territories, this was generally not an incorporated aim of the government itself, but rather a parallel and private enterprise.

However, the colonial administrations came, after a lapse of time, to recognize that their task went beyond the holding down of the population and the securing of its minerals or crops for export. The transforming process generally began in the penal sphere. It was then extended to the matrimonial sphere, by the introduction of Western forms of marriage; further extended to the lower level of commercial activity, by the provision of Western forms of contract and legal institution; and finally enlarged to cover the basis of indigenous society in those countries where the land tenure and property systems were radically revised.

What is of interest to the student of "social engineering" through law is that there were two possible ways in which these ends might have been secured. The first, the more ambitious and radical, was for the legislator to seek to impose his new vision of society on his subjects by a *programmatically* law, *i.e.*, one which laid down a would-be obligatory pattern of behavior for the future, radically different in its features from that of the past. The British way—characteristically—was less ambitious. This was to use new laws as *models*, *i.e.*, to offer new choices to the subjects of the law which they were at liberty to adopt or not as they chose. Thus in British Africa monogamous marriage was offered as an alternative to customary and religious marriage forms; the possibility of making a written will (so foreign to traditional ideas) was provided for; and most generally a power to make contracts, and hence to make new laws, was conceded by the legislation.

It can be confidently asserted that most programmatic laws have been partial or total failures. Among examples one can cite are India, where the commitment under article 44 of the Constitution of 1950 was that "[t]he State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India." This endeavor has come to a dead stop after the formulation of the so-called "Hindu Code." The rock which has blocked the way has been the existence of Islamic personal and family law. Ethiopia in Africa under imperial rule both provided the most extreme example of a programmatic law, in the Civil Code of 1960, and the most comprehensive example of failure. The Civil Code purported to replace totally the pre-existent religious, customary and local laws by a single uniform code largely borrowed from France though with

English-law and other admixtures. It thus constituted a legal revolution, which was intended to lead to a social and economic revolution. Most of the population, by the date of the replacement of the imperial system by the present socialist government, had remained immune to, and indeed quite ignorant of, this purported transformation of their lives. The introduction by Kemal Ataturk of the Swiss Civil Code as the basis of the new Turkish private law in 1926 was in many ways as bold a venture. It undoubtedly has been much more successful than the Ethiopian codification; but one must admit at the end of the day that there has been considerable disregard of the Code, by the Turkish rural population especially. This has shown itself particularly in the vast number of marriages which were not duly celebrated under the Code, and which had to be retrospectively validated by legislation from one year to the next. In Kenya the British began, and the independent government carried on, an ambitious program for the transformation of rural African land tenure. This involved the replacement of customary tenures by a single form of Western registered land holding. Despite the enormous support which the program received through propaganda, extensive consultation of the populace, a strong administrative machine, and the will to make a new start, the program has met severe and perhaps insuperable obstacles to its effective implementation in the twenty-odd years of its operation. Noteworthy here has been the general reluctance to register devolutions of title, so that the register no longer records who actually lays claim to what interests in land. As S.F.C. Coldham has said in an article, "This undermines the basis of the statutory system of registration and control and indeed prompts doubts about the wisdom of introducing the system in the first place."<sup>8</sup> Furthermore, parallel systems of occupation "rights," not based on the Act but recognized perforce by the courts as equitable claims, now compete with the registered rights which are the sole alleged titles admitted under the statute. If the Kenya land consolidation program, with all its advantages, has in large measure failed, what hope is there for schemes which lacked the administrative backup and know-how which the Kenya program could boast? England has endeavored, with its legislation on race relations and sex equality,<sup>9</sup> to outlaw discrimination on these grounds. There are few writers who would claim that either law has succeeded in its basic aim. In other words, the failure of transforming laws is not a function necessarily of under-development—popular will and acceptance also com· into the picture.

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8. S. Coldham, *Land Control in Kenya*, [1978] J. of African L. 63, 74.

9. See the Race Relations Act, 1976, and the Sex Discrimination Act, 1975.

There is no need to multiply the examples. The message is clear: programmatic laws are on the whole less successful than model ones, which the citizen can voluntarily adopt if persuaded of their advantages. Laws may become ineffective even if they were originally effective, thanks to a change in the social context in which they operate. But the major reason for failure due to non-compliance is resistance caused by the unacceptability of the law; and this unacceptability is traceable mainly to the lack of an appropriate consensus. There are two major arguments for a consensus approach to law-making: the first is a pragmatic one, that this is the best way to get effective laws which people will comply with; the other is a moralistic one, that it is wrong in principle to impose laws on people against their will, if at the same time one subscribes to a "democratic" thesis of political organization. Customary laws often relied on the consensus principle for their effectiveness; at the same time they had more effective sanctions attached to non-compliance. The task now for the legislator in the advanced societies is to translate these principles and perceptions into his own approach to law-making.