THE MECHANICS OF LAW MAKING TODAY[1]

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I

The Idea of Law Making

IN the agricultural and pastoral community of England in the Middle Ages law was largely customary: legislation was exceptional, save to confirm customs and privileges[2] and, occasionally, to limit royal or seignorial power and to set up administrative and judicial organs. For one thing, at that time legislation could not be readily known before the invention of printing, and three languages, Latin, Norman French and, later, English, competed to be the vehicle of its communication. Indeed, the notion that the law can be changed was not common in the Middle Ages.[3] *Nolumus leges Angliae mutare* was a typical reaction to the innovator.[4]

The term " statute " has certainly not always been regarded as meaning a *new* law. In the time of Edward III, for example, statutes were considered to be more permanent and difficult to change than Royal ordinances; for the statutes were largely regarded as affirmations of the common law. We repeat, in a static society, *status* does not vary much, and changes in the

[1] A lecture delivered in the John Rylands Library on Wednesday, the 18th of January, 1956.

[2] Plucknett, *Statutes and their interpretation in the fourteenth Century* (1922), p. 28.

[3] Maine's famous generalization that law reforms in Western European societies proceeded first by fiction, then by equity and finally by legislation is fairly true for England. See *Ancient Law*, 10th edn. by Pollock (London, 1906), p. 29.

[4] See Maitland, *Constitutional History* (1908), p. 16. This was the phrase traditionally used when in 1236 the Barons refused the Canon law doctrine of *legitimatio per subsequeus matrimonium*, a doctrine only introduced by Parliament for the first time by the *Legitimacy Act* 1926.

statute law are not common. The medieval common law was regarded as, in essence, " reason ".[1] The law could be developed, but its basic principles were not to be regarded as freely changeable. It must be remembered too, as Plucknett says,[2] that

> The difficulty of medieval statesmen was . . . getting law of any sort efficiently enforced and generally respected in the absence of a standing army or a permanent police force.

To believe that the formal enactment by a legislature, of an idea expressed in a solemn form of words, *inevitably* makes an *effective* law, is a modern superstition which is often the downfall of politicians in states where the administration is inefficient or corrupt. The system of legislation in Britain today is the product of, and is dependent upon, a highly organized and tightly-knit social system, with an effective civil service, a legal system, a police force and a tax-gathering machine ably supported by the accountancy profession, all of which provide the ways and means of administering, enforcing and paying for legislative projects.

Probably it was the growing participation of the Commons in law making, and their gradual control of finance, which slowly brought about an increased general interest in legislation. Bentham's work undoubtedly gave an impetus to this interest: and the reform of the Civil Service, the Judicial System and the tax-gathering machinery in the nineteenth century made law reform possible. And if the nineteenth century was the century of the *reform of the law*, by legislation, the twentieth century has been, so far, a period of widespread attempts to *reform society itself*, by vast and complicated legislation providing social services and imposing almost confiscatory taxation on incomes and inheritances, as well as imposing far-reaching legal controls on economic activity sometimes amounting to nationalization.

It is *de rigeur* now for a political party to go to the electorate with an elaborate programme of legislative measures to reshape and add to the volume of statute law in order to make its social

[1] See Maitland, *Constitutional History* (1908), pp. 268 f.

[2] *Statutes*, p. 29. C. St. German (ob. 1540 *c.*) in " Doctor and Student ", ch. xi, gives Statute as the sixth, and somewhat exceptional, ground of the Law of England.

programme effective if it obtains a Parliamentary majority.[1] Of the manipulation of the public opinion of electors by means of mass communication of ideas in the press, the wireless and the television I will speak later. What Sir Ivor Jennings calls " the art of management of a parliamentary majority " is a matter that does not concern my theme. Suffice it to say that, at the opening of a session of Parliament, it is customary for the Government of the day to outline their legislative programme in the Queen's Speech, a procedure reminiscent of the time when the Sovereign really did legislate by ordinance.

II

Law-Making Procedure

There is no written constitution [2] in this country which states how a programme is to be turned into law.

It is constitutional law that enables particular formulas to be made into statements of a legally binding character, distinct from other statements or exhortations, and the constitutional law governing Parliamentary procedure is made up of the custom and practice of each of the Houses of Parliament, together with their orders [3] and rulings from the Chair : only to a very small extent is it also a matter of statute.[4] Constitutional custom is still

[1] Ideas for law reform, or for laws to transform society itself, are nowadays largely formulated by politicians in the programmes of political parties which exist to promote, or to prevent, the application of legal and sociological ideas advanced by writers and philosophers who themselves often live and die in comparative obscurity.

[2] The Parliament Act 1911, passed under the Liberal Government of the day, was passed merely, according to its title, " to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament ". References to the ordinary procedure in the House of Commons appear incidentally in that Act, e.g. s. 2, but the normal procedure whereby a bill is passed into law is a matter not of legislation but of constitutional custom.

[3] The legislature consists of the Queen, more than 820 temporal and 26 spiritual Lords and 630 members of the Commons : and each of these bodies has its part to play in the making of a law. Wade and Phillips, *Constitutional Law* (1955), 5th edn., p. 74.

[4] Standing orders now give the Government of the day a strict control over Parliamentary business, and May suggests (p. liv) that since 1880, as a result of obstructionist tactics of the Irish Nationalist Party, standing orders have

the principal basis of our system of legislation. Statute does not explain the existence of statute, but custom does.[1]

The customary British practice is for each House to give three readings to every bill, to ensure its full consideration and *reconsideration* (consequently an amendment may be raised more than once). A committee of the whole House of Commons may alone originate bills " the main subject of which is the expenditure of money or the imposition of taxation ".[2] Bills with " money clauses " need not so originate, but the money clauses must be authorized by a committee of the whole House.[3] A bill certified by the Speaker to be a money bill does not now, since the Parliament Acts of 1911 and 1949, need to pass through the House of Lords before becoming law ; over non-financial bills the Lords have a suspensory veto for one year between the second reading in the Commons in one session and the third reading of the bill in the next session ; in that manner is the preponderance of the House of Commons assured. The only certain way to obtain legislation is to obtain its adoption by those in control of the House of Commons : in practice this means obtaining the support of the largest political party or combination of parties in the House of Commons.[4] If the party or coalition in power can be persuaded to adopt or decide upon a reform, then its passage can usually be assured by the Government whips, because the Government will be prepared to allot legislative time to its introduction and debate ; [5] where it is still legally necessary, the Government of the day can usually ensure the assent of the Lords even to non-money bills. Where the assent of the Lords is necessary and cannot be obtained, or speedily dispensed with under the Parliament Acts 1911 and 1949, then the Government

tended to reduce the opportunities of minorities to debate even on dates set apart for that purpose, and with the gradual increase in the materials fed into the legislative machine this is still the case. May, *Parliamentary Practice*, 15th edn. (1950), p. li.

[1] Goodhart, *English Law and the Moral Law* (1953), p. 50, rightly says that constitutional law constitutes the state.

[2] May, p. 497. [3] Ibid. p. 498.

[4] Proposals for public expenditure must be recommended by a Minister of the Crown.

[5] Jennings, *Parliament* (1939), p. 109.

could conceivably change the composition of the Lords by requesting the Sovereign to create a sufficient number of Peers, of the appropriate frame of mind, to ensure the passage of legislation by the House of Lords. It was by the use of the threat to create Peers that the Parliament Act 1911 was passed; Asquith's Government had in fact prepared a list of persons who would have been nominated for peerages by the Crown if it had been necessary; the list is to be found in Spender and Asquith's *Life of H. H. Asquith.*[1] The Sovereign is now largely dependent upon the passing of financial legislation by the House of Commons, and it is not likely that the Sovereign would refuse the creation of peers in face of a determined majority in the House of Commons representing the public opinion of the electorate.

The bulk of legislation is then directly sponsored by the Government of the day, either as the direct result of its political programme, like the nationalization or denationalization of industries, or because the reports of some Government-sponsored committee like the Cohen Committee in Company Law,[2] indicate the urgency of some new reform.[3]

Parliamentary debate [4] not only informs the public and helps

[1] Vol. i (London, 1932), pp. 329-31.

[2] E.g. The Law Reform Committee and the Lord Chancellor's Committee on Private International Law.

[3] See 9 *Mod. Law Rev.*, p. 235.

[4] Criticism in the House of Commons can, however, be considerably controlled by the Government use of the procedural devices known as the closure, the Kangaroo and the guillotine. These have been admirably described by Griffith and Street in these words:

> "The first may, of course, be used on all kinds of motions: if moved (normally by a Government Whip), accepted by the Speaker or Chairman and supported by not less than 100 Members in the majority, discussion on the question is ended. It is not uncommon for the Speaker or Chairman to refuse to accept the motion in order to protect the rights of the minority. He is often consulted before the Government proposes to put the motion and often indicates at this stage that he will not accept it if it is put. Under the kangaroo power, the Speaker on the report stage, the Chairman of Ways and Means in committee of the whole House, and the Chairman of a standing committee have power to select the new clauses or amendments to be proposed. Since this power is provided for by Standing Orders and does not require a motion, it cannot accurately be called a governmental power; its effect, however, is to speed the passage of Bills. Guillotine

to form public opinion, but it may of course directly influence Government policy ; it may cause bills to be modified ; it may even cause bills to be withdrawn, as were the *Incitement to Disaffection Bill*, 1934, and the *Population Statistics Bill*, 1937.[1] More recently, the Road Traffic Bill was withdrawn after severe criticism in the Lords in 1955.

Bills may be divided into

(*a*) Public Bills introduced on Government initiative,
(*b*) Public Bills introduced on a private member's initiative, and
(*c*) Private Bills.

(*a*) *Public Bills* are usually the subject of a vote which goes on party lines, but they may also, by consent of the Government of the day, be the subject of a " free vote " ; more often then not, however, bills on which a free vote is allowed originate on the initiative of a member in his private and not in his party capacity.

Jennings says debates with a free or " non-party " vote, are " as rare as a hot summer in England " :[2] such things have occurred—we had a hot summer last year and there was the debate on Capital Punishment. The possibility of a free vote shows that parties are occasionally willing to give up their normal control of the legislative machine.

In the ordinary debate on party lines the Party Whips do their best to see that there is an adequate attendance " to make a House, to keep a House and cheer the Minister ".[3] The quorum of members in the Commons is forty. Members who do not accept their party's " three line whip " [4]—the telegram underscored with three lines—are not likely to be *personae gratae* with the party, and may lose the financial and moral support of the party when they offer themselves for re-election by their constituents.

resolutions, under which discussion on stages of Bills or parts of stages terminates at fixed times, are moved by the Government, although agreed timetables for proceedings on a Bill are often the result of consultation with the Opposition." *Principles of Administrative Law* (1952), p. 79 f.

[1] Griffiths and Street, op. cit. p. 79.
[2] *Parliament*, p. 148.
[3] Ibid. p. 75.
[4] Ibid. p. 78.

(*b*) *Public Bills introduced on private members' initiative.* In every session members have a limited chance to promote legislation of their own initiating; but, as Jennings pointed out, in 1939,[1] because of the pressure of Government business, the only time available for private members' Bills amounted to about eight Wednesdays and thirteen Fridays in the session.[2] But here again, as with Bills introduced on Government initiative, the Government of the day must be benevolently inclined to the Bill, or at least neutral, if it is to have a chance of passing: the strange story of A. P. Herbert's Marriage Bill and the way this private member's Bill, radically altering the Marriage and Divorce Law of this country, was passed, has been fully described in Herbert's book *The Ayes Have It.* It is no doubt sometimes politically convenient for highly controversial measures to be left to private initiative, and not to be undertaken by the Government itself. Again the amendment of "lawyers law", like the alterations to the law of libel undertaken by Mr. Lever,[3] may conveniently start as a private member's Bill, since its important but somewhat technical nature may not give it a wide electoral appeal.

(*c*) *Legislation by Private Bill procedure.* Distinct from Government sponsored Bills, and private members' Bills, is "Private Bill Legislation";[4] this consists of (i) "*Personal Bills*" such as those dealing with the divorce or naturalization on special grounds of particular individuals (these Bills must originate in the House of Lords) and (ii) "*Local Bills*" to promote public works or to give special powers to local or public utility corporations. Incidentally, many local acts of Parliament, such as the Manchester Housing Acts, have formed valuable

[1] *Parliament*, p. 110.

[2] A Bill promoted by a private member, after being formally introduced for "first reading" must either pass without the opposition of a single member, or must secure precedence for its second reading on a Friday when private bills are considered: this is because, in order to move the *second* reading of a bill, a member will have to be successful in the ballot which is held for the purpose: he must then secure majorities in the second and third readings in the Commons and in the House of Lords.

[3] Now the Defamation Act, 1952.

[4] See Jennings, op. cit. chap. xii, for a characteristically illuminating account of this.

precedents for later national legislation. The procedure on Private Bill legislation is rather special and has links with the earlier practice of petitioning. Elaborate provision is made for the advertisement of the Bill and for objections to be made at the Committee stage after the second reading in the Commons in what is very much like a court of inquiry, where counsel are heard for interested parties in "opposed Bills". This procedure is often extremely expensive; the cost of a local Bill to create a new county borough could amount to something in the order of £30,000 before the first world war.[1] The object of the elaborate semi-judicial procedure at the Committee stage is to enable opposition to be placated, so that, if possible, the Bill can pass speedily through the remaining stages of the legislative process.

III

The Importance of the Formalities of Legislation

(*a*) Subject to the Parliament Act, 1911 and 1949, restricting the powers of the House of Lords, any Bill, if it is to become an Act of Parliament, needs the assent of the three parts of the legislature, the Queen, the Lords Spiritual and Temporal and the Commons. Each House of Parliament may control and vary its form of assent and may adopt unusually expeditious methods of passage [2] without invalidating its own procedure, and subject to the Parliament Acts of 1911 and 1949, the assent of each House to amendments by the other must be communicated *before* the Royal Assent.[3] May cites the *Cotton Factories Regulation Bill*, 1829 and the *Schoolmasters' Widows Fund Scotland Bill*, 1843 which it was thought necessary to validate by new enactments because of a failure to convey certain amendments in the Bill to the Commons before the Royal Assent was given to the Bill.[4]

[1] Jennings, op. cit. p. 450.

[2] May, p. 570.

[3] The Royal Assent, which is still given in Norman French, must be formally given: in 1546, because Henry VIII was dying, he was unable to assent to the Act of Attainder in respect of the Duke of Norfolk, who was thus spared: v. May, p. 577, he also instances cases where the Royal Assent was given by mistake, and required a further Act of Parliament to put matters right. The lack of a necessary assent will prevent a Bill from becoming a law.

[4] May, p. 576.

(*b*) *The date of the Royal Assent will normally be the date when a Bill becomes law.* Since the *Acts of Parliament (commencement) Act*, 1793, the date of the Royal Assent, completing the passage of the Act, must be stated in the text; if the assent be not given the Bill never becomes an Act. A Bill will be operative from the date of the Royal Assent unless a special provision is contained in the Act giving a different date or dates for its commencement.

Before 1793 a Bill was deemed to have commenced at the beginning of the Parliamentary session in which it was introduced and the Sovereign's assent, when given, was deemed to relate back to that day, in much the same way as when a treaty is ratified in international law, it may relate back to the date of its signature of a plenipotentiary. English law has never had any difficulty in accepting retro-active legislation, and the Annual Finance Bill is put into operation to some extent before it becomes an Act, since the doctrine *Bowles* v. *Bank of England* [1913] 1 Ch. 57 was overruled by *The Provisional Collection of Taxes Act*, 1913. There is no legal objection in England to a Bill operating by resolution of the Committee of Ways and Means varying or renewing an existing tax before the date of the Royal Assent, to a new Finance Bill, if the *Provisional Collection of Taxes Act*, 1913 authorizes it. Nor is there any objection to the assent by the Sovereign to a Bill which itself purports to operate retrospectively, though such Bills are disliked by the legal profession throughout the world and are expressly forbidden in some constitutions. But without the Royal Assent, we repeat, there is no Act. Our constitutional history shows that after James II dropped the Great Seal in the Thames, on the 11 December 1688, no Royal Assent was available until William and Mary accepted the Crown on 13 February 1689, as a result of the 1688 Revolution.

(*c*) Acts passed after 1850 are currently accepted for legal purposes and judicially noticed under s. 9 of the *Interpretation Act*, 1889, which provides that references to statutes refer to those printed in any revised editions " purporting to be printed by authority " and " in case of statutes not so included, and passed before the reign of King George the First, to the edition prepared under the direction of the Record Commission; and

in other cases to the copies of the statutes purporting to be printed by the Queen's Printer, or under the superintendance or authority of Her Majesty's Stationery Office."

Discrepant versions of statutes certainly exist. Indeed, even the official *translation* from the original Norman-French or Latin of old statutes, " printed by authority " in the " Statutes of the Realm ", is often defective,[1] and when the translation is accurate even the *texts* of some old statutes " printed by authority " may be of doubtful authenticity,[2] some are frankly characterized by Plucknett as apocrypha.[3] Ancient Statutes must still be consulted because English statutes do not fall into desuetude, they need a further statute to repeal them.[4] " Lord Haw Haw " and Roger Casement were prosecuted under the *Treason Act* 1351, and in *Hemmings* v. *Stoke Poges Golf Club* [1920] 1 K.B. 720, the Statute of Forcible Entries of 5 Ric. 2 St. 1, c. 7, 1381 was relied on. The problem of textual authenticity may still occur in litigation as well as in matters of historical scholarship. Many publicists, including Thomas More, Francis Bacon, and James the First, have inveighed against the danger of leaving obsolete legislation on the Statute Book, and much has in fact been done formally to repeal obsolete statutes by successive statute law revision committees during the last 150 years,[5] but the legal historian and scholar will still have to

[1] Plucknett, p. 15. See Chapter ii of his *Statutes and their Interpretation in the Fourteenth Century* (Camb., 1922), which gives eight examples.

[2] Ibid. p. 13. [3] Ibid. p. 12.

[4] *H.R.H. Prince Augustus* v. *A.G.* [1955] 3 All. E.R. 647.

[5] Successive statute law revisions have tried to reduce the accumulated bulk of more than seven centuries of statute law. The *Statute Law Revision Act*, 1948 " for further promoting the Revision of the Statute Law by repealing Enactments which have ceased to be in force or have become unnecessary and for facilitating the publication of a Revised Edition of the Statutes and the citation of Statutes " contains, for example, a list running into 100 pages of repealed enactments, from Chapter 2 of the Statute of Merton (20 Henry III) " Widows may bequeath corn on their lands ", to the Duchy of Cornwall Act 1860 : all good historical material ! The result of successive statute law revision Acts has been that it could be said in 1948 that " the whole of the living Statute law of Great Britain is now comprised in . . . 32 volumes ". Lord Jowett has said :

> " The publication of this, the third, edition of Statutes Revised, therefore, marks a stage of permanent importance because, by publishing all its volumes

consult the whole corpus of English law from the time of the Conquest. Many of our early laws are not Acts of Parliament by modern standards,[1] and their authority may sometimes be called in doubt even when their authenticity as documents cannot be questioned: if it can be shown that from the terms of an early "statute" the two Houses of Parliament and the king

> simultaneously, we have secured a clean start for all future editions; and I may tell you that already a matrix copy of the new edition is being kept up to date in the Statutory Publications Office, each Act as it is passed being worked into it, so that future editions can be brought out when required, at short notice."

(*Statute Law Revision and Consolidation: Address to the Holdsworth Club of Birmingham University Law Faculty*, p. 19.) There were further Statute Law Revision Acts in 1951 and 1953. I was asked recently, at an international conference, by an innocent foreign jurist, to furnish him with the English legislation on the matter of a man's duty to maintain his wife and family and any illegitimate children. The research to supply the answer took some days and finally resulted in a list of 37 Acts, beginning with the Poor Law Amendment Act, 1844, and ending with the Affiliation Orders Act, 1952: i.e. Poor Law Amendment Act, 1844 (s. 5, up to words "and the clerk" and s. 8); Bastardy Act, 1845 (s. 6); Bastardy Laws Amendment Act, 1872; Summary Jurisdiction (Process) Act, 1881; Guardianship of Infants Act, 1886; Summary Jurisdiction (Married Women) Act, 1895; Licensing Act, 1902; Affiliation Orders Act, 1914; Criminal Justice Administration Act, 1914 (s. 40); Married Women (Maintenance) Act, 1920; Maintenance Orders (Facilities for Enforcement) Act, 1920; Guardianship of Infants Act, 1925; Summary Jurisdiction (Separation and Maintenance) Act, 1925; Adoption of Children Act, 1926; Marriage Act, 1929 (s. 2); Children and Young Persons Act, 1932; Children and Young Persons Act, 1933; The Money Payments (Justices Procedure) Act, 1935; Children and Young Persons (Scotland) Act, 1937; Matrimonial Causes Act, 1937 (s. 11); Family Allowances Act, 1945, amended by Family Allowances and National Insurance Act, 1952; Army Act; Air Force Act, s. 144 A. and 145; Naval Discipline Act, s. 87 and 98 A; National Assistance Act, 1948; Children Act, 1948; Married Women (Maintenance) Act, 1949; Justices of the Peace Act, 1949, s. 21 amended by Magistrates Court Act, 1952; Adoption of Children Act, 1949; Law Reform (Miscellaneous Provisions) Act, 1949; Adoption Act, 1950; Matrimonial Causes Act, 1950; Maintenance Orders Act, 1950; Guardianship and Maintenance of Infants Act, 1951 (s. 1 and 2); Magistrates Courts Act, 1952; Affiliation Orders Act, 1952; Visiting Forces Act, 1952 (s. 9).

See also: U.S.A. (Visiting Forces) Order, 1942, discussed in *R.* v. *Birkenhead J. J.* [1954], 1 A.E.R. 503, and now Visiting Forces Act, 1952 and S. I. 1954 No. 635, bringing that Act into operation.

N.B.—I am indebted to my colleague Peter Bromley, M.A., Lecturer in Law, for his valuable assistance in preparing this list of current legislation.

[1] Plucknett, *Concise History of the Common Law*, 4th edn. (1947), p. 309.

did not pass the legislation, it will not strictly be an Act of Parliament in the modern sense but may well need to be justified either as a Royal Ordinance, or as a customary rule.[1] Constitutional custom has evolved slowly.

(*d*) It is customary to prepare two copies of every Act of Parliament, on vellum. These are the originals, one is placed in the House of Lords, the other in the Record Office and in the event of a discrepancy the former will prevail over any other version.

Now there is a dictum of Lord Campbell which is often cited that would make it appear that the courts are conclusively bound by the vellum record of legislation resulting from proceedings in Parliament and kept in the House of Lords.[2]

It is as follows :

"All that a Court of Justice can do is to look to the Parliamentary Roll: if from that it appears that a Bill has passed both Houses and received the Royal Assent, no Court of Justice can inquire into the *mode* in which it was introduced into Parliament, *nor into what was done previous to its introduction, or what passed in Parliament* [our italics] during its progress in its various stages through both Houses. . . ." *Edinburgh Railway* v. *Wauchope* [1842], 8 Cl. & Fin. at p. 725.

This case concerned an attempt by a person who considered the withdrawal of his opposition to a private Bill had been improperly obtained, and he alleged that the Act was invalid. He did not, however, raise an objection to the formal manner in which each of the Houses of Parliament had assented to the legislation, the legislation in question was the result of the customary expression of the will of each House and of the Crown. There was no allegation that the custom of the constitution which required the assent of each House and the sovereign had not been obtained. It was only suggested that the consent had been obtained by wrongly suppressing the opposition of a private person interested in the Bill.

The dictum probably went further than the decision required.

It seems clear to us that the customary forms of legislation must in fact be observed if a statute is to result, and the vellum might not be conclusive in all cases. If, therefore, to take a far-fetched example, a malevolent individual were to forge a statute

[1] *v.* Allen, *Law in the Making* (1951), 5th edn. p. 418.
[2] Maitland, *Constitutional History* (1908), p. 382.

and insert it in the Parliamentary vellum, the apparent " Statute " would, in our view, be a nullity and incapable of conferring any right. In the event of an allegation of nullity because of the forgery being made in a court, the proper course, it would seem to be for the court to adjourn the matter until the allegation of forgery could be investigated by Parliament, and no doubt Parliament would regard the matter, if proved, as a breach of privilege : the court could *then* deal with any criminal law aspect of the forgery and would be justified in declaring the *apparent* statute to be no statute at all and not to confer any rights.[1]

Parliament could, we suggest, only regard it as a friendly act of the Court to draw its attention to an allegation which, if proved, might amount to an impropriety probably amounting to a breach of Parliamentary custom and privilege.

(*e*) *Can each House cut down the three readings?* The customary rights of each part of the legislative must be recognized if legislature is to be created. Provided the assent of each part of the legislature has been obtained it seems to us that the formal three readings in each House might be dispensed with by each House, and we think perhaps that Mr. Latham goes too far when he says :

> The King, Lords and Commons, meeting in a single joint assembly, and voting by majority, or even unanimously, could not enact a statute.[2]

But the three parts of the legislature must give their clear assent even if they suspend their usual standing orders to do so.

(*f*) *Acts of Parliament, duly passed by the three components of the U.K. Parliament, will not, however, now be set aside as unconstitutional, or* ULTRA VIRES by reason of their content [3] by

[1] Maitland, op. cit. p. 382, says : " Perhaps a court of law would allow a litigant to prove that as a matter of fact this document had never received the consent of the King, Lords and Commons : but I am not sure of this."

[2] T. E. Latham, *The Law and the Commonwealth* (Oxford, 1949), p. 523, note 3.

[3] See Allen, *Law in the Making*, 5th edn. (Oxford, 1951), for a discussion of the refusal of seventeenth-century judges to enforce statutes deemed to be contrary to the law of God or to right reason : modern judges are more careful, or more timid, than their predecessors in this respect, according to one's view of the matter, but they still take the oath " to do right by all manner of men ".

our courts ; in this respect they are unlike the legislation of some Dominions and Colonies, and that of the states of the U.S.A., and unlike British delegated legislation, all of which can be declared *ultra vires.*

The same inhibition would not apply in a court applying international law, such as the International Court of Justice at the Hague, an International Arbitral Tribunal or a Prize Court [1] which can declare legislation to be contrary to international law. So that an Act of Parliament which violates international law may bind the national courts in the U.K. but it will not prevent an international court from declaring it to be *ultra vires* so far as international law is concerned ; nor will it prevent a foreign state from making a diplomatic protest, or reclamation, or even from carrying out measures of retortion or reprisals by way of counter measure. For example, in *Mortensen* v. *Peters* [1906], 14 S.L.R. 227, 43 S.L.R. 872 a Scottish court fined a Norwegian trawlerman for fishing within the Moray Firth by virtue of s. 6 of the *Herring Fishery (Scotland) Act,* 1889, but when Norwegian diplomatic representations were made to point out that the Act, though binding upon the Scottish court, exceeded the three miles limits of territorial waters allowed by the custom of international law, the fine was remitted by the Crown and the law was amended by the *Trawling in Prohibited Areas Prevention Act,* 1909.

(*g*) Some British legislation today, like the *Exchange Control Act,* 1947, s. 1, applies to all residents in the U.K., of whatever nationality, and purports to forbid certain contracts they may make abroad. Such legislation is, however, only effective in so far as anyone violating it can be reached, either in respect of his person or his property, in the U.K. It is essentially penal or persuasive. It does not change the law relating to transactions completed abroad if the foreign state chooses to disregard it. Each state is sovereign only in its own territory and its territory, in the event of a clash of views, is settled by international law as the recent cases before the International Court of Justice at the Hague show. I refer to the decision that the islands of *Minquier*

[1] *The Zamora* [1916], 2 A.C. 77.

and Ecrehous[1] were British and not French, and to the recent decision in the *Norwegian Fisheries Case*,[2] settling the territorial waters of Norway. One could also cite among many others the decision of the Permanent Court of International Justice[3] in the dispute between *Norway and Denmark* which settled the title to *Eastern Greenland* in favour of Denmark. Thus it is international law, not national law, which supplies the rules for settling the extent of a sovereign's territory, and the word "United Kingdom" in a statute or a treaty will mean what is comprised in that term for the time being, a variable quantity.

A law made by the Parliament of a territorial sovereign is directed to the administrators, lawyers and judges in the sovereign's territory. It is not, and cannot in the nature of things, be addressed to the whole world. It may threaten or reward individuals for what they have done or might do *outside the Sovereign's territory*, but it cannot require other sovereigns, in the absence of a binding treaty or custom or international law, to pay regard to its precepts.

Finally, Statute law, though formally valid, is not law in any absolute sense. Its operation is limited in time and space—it has a definite commencement and ends when it is repealed, and it does not reach out to the whole world.

IV

The Intelligibility of Laws

If a law that innovates is to be observed, it must be known, and to be known it must be intelligible. To be intelligible a law must be couched in language that is understandable by those to whom it is addressed. It is now recognized that the task of drafting of a Bill is a skilled job that calls for expert training, since the machinery of the law will be needed to put the statute into effect and to integrate it in the system. Jennings tells us that "all Government Bills except Scottish Bills and certain annual Bills which do not vary substantially in form, are drafted in the Office of Parliamentary Counsel to the Treasury".[4] The

[1] *I.C.J. Report*, 1953, p. 47.
[2] Ibid. 1954, p. 116.
[3] P.C.I.J. Ser. A/B No. 53, p. 23.
[4] Op cit. p. 221.

advantage of this is a certain co-ordination in form and style. Bills are not usually drafted until the Government has consulted appropriate interests : in some cases this is done informally, in others by circular, and in other cases after committees or commissions have been set up to deal with a subject ripe for legislation by hearing evidence of interested parties and reporting on it. The form of a Bill to be presented to Parliament will be established as a result of consultation between the Government Departments concerned and the Parliamentary Counsel acting as draftsman. When the Bill is ready it will be subject to the normal procedure of Parliamentary debate ; the intelligibility of a Bill will depend not only upon the skill with which the Bill is drafted but also upon the dexterity with which it is steered through Parliament ; for if amendments are carefully incorporated the Bill may be improved, if they are hastily accepted they may play havoc with the unity and clarity of the Bill, and so with the final statute. Indeed, it is not impossible in a long statute of some 200 pages, to find a contradiction between an earlier and a later section, and between an earlier and a later enactment. Artificial rules exist to resolve these contradictions ; a document must be read as a whole and a later statement will prevail over an earlier one and so on ; but the fact remains that a long and controversial statute is open to this sort of danger : it is not easy for a busy man to carry 200 pages of a statute like the Town and Country Planning Act, 1947, in his head, and ambiguous amendments may sometimes be accepted for the sake of getting the Bill through Parliament.

Ideally, the language of a statute must be clear and appropriate to the circumstances. Scientists must be spoken to in scientific terms, commercial men in commercial terms, and the man in the street in plain English. Some of the best drafted statutes are those which have been drafted by one expert lawyer familiar with his material, addressed to legal experts, and dealing with a field in which the law is being codified without any major revision or political battle. Such statutes are Sir Malcolm Chalmers' *Bills of Exchange Act*, 1882 and *Sale of Goods Act*, 1893, and Sir Frederick Pollock's *Partnership Act*, 1890. Such Acts are founded upon Bills that have not been subject to a

constant stream of amendments as a result of pressure in the lobbies,[1] and the purpose of the framers remains expressed therein without serious modification.

Some statutes, notably those of an amending character, are clothed in obscurity, when they legislate by reference. Legislation by reference may save Parliamentary time, it may even render opposition more difficult,[2] but it certainly does not render the law intelligible. To give a single example, the Parliament Act, 1949, passed to amend the Parliament Act, 1911, states:

"1. The Parliament Act, 1911, shall have effect, and shall be deemed to have had effect, from the beginning of the session in which the Bill for this Act originated (save as regards that Bill itself), as if—

(*a*) there had been substituted in subsections (1) and (4) of section two thereof, for the words 'in three successive sessions', 'for the third time', 'in the third of those sessions', 'in the third session', and 'in the second or third session' respectively, the words 'in two successive sessions', 'for the second time', 'in the second of those sessions', 'in the second session', and 'in the second session' respectively; and

(*b*) there had been substituted in subsection (1) of the said section two, for the words 'two years have elapsed' the words 'one year has elapsed': Provided that . . ."

How much clearer it could have been if both Acts could have been consolidated as were, for example, the *Diplomatic Privileges (Extension) Acts*, 1944 to 1950 by the *International Organisations (Immunities and Privileges) Act*, 1950.

One factor which makes for precision in drafting may itself be a snare for the unwary: i.e. the practice whereby many statutes contain their own definitions *for the purposes of those statutes*. It does not by any means follow that a definition given of a word for the purposes of one Act, will be used again in the same sense in another Act. A glance at the six volumes of Halsbury's *Words and Phrases* reveals many discrepancies: the meaning of a word is too often only related to the legislation using it.

The English method of drafting statutes is to set out in great

[1] Jennings, *Parliament*, p. 227.
[2] Allen, *Law in the Making*, 5th edn., p. 461.

detail what the draftsman thinks the Act will cover so as to leave little or no discretion to the judge. It is a curious contrast to codified systems, like the French Civil Code, where the law is enunciated in the most general terms so that, for example, the whole of the law of tort is contained in some five articles; in such a codified system the judge is left with a considerable amount of discretion in his interpretation. The main object of framers of English statutes seems to be to draft them in such detail as to leave no discretion to the judge. The more general the precept, the more discretion will be available: the more detailed the precept the less discretion. It may be that the English judges' habit of interpreting deeds and wills as literally as possible, has been carried over into the interpretation of statutes, and early statutes are certainly similar in form to charters and similar documents. Whatever the reason, judges have by this method of interpretation, compelled the creation of statutes of a most detailed kind: if so they are the unconscious authors of their own inconveniently straightened circumstances as interpreters. It may be, too, that the private law rules which exclude evidence of prior negotiations in the interpretation deed that has been formally drawn up and solemnly executed by the parties also explains the reluctance of English judges, at any rate since the decision in *Millar* v. *Taylor*, 4 Burr. 2303 [1769], to look at the *travaux préparatoires* to clear up an ambiguity. This rule is well established, but other rules equally well accepted till recently, like the well known "Coronation cases", have been advantageously over-ruled by the House of Lords in recent times. Certainly foreign and international tribunals habitually look at preliminary enquiries and debates to ascertain the meaning of a piece of legislation or a treaty which seems ambiguous. However, the practice has grown up recently whereby a treaty or an international convention on which a statute is based is printed in a full English text or translation in an appendix to the statute framed to carry it out, as for example in the Arbitration Act, 1950: in this way a treaty or convention can be referred to in court even though it is part of the *travaux préparatoires* of Parliamentary legislation. By requiring international conventions adhered to by this country to be passed

into legislation intelligible to English or Scots lawyers,[1] our judges and bar are saved the difficulties which might occur if, as in the U.S.A., France and Holland, treaties drafted in unfamiliar terms, or even in a foreign tongue, became law when adhered to by the State. Here, however, English caution in rewording an international convention in a statute may, as Gutteridge has shown, lead to insular interpretations contrary to the intention of the convention [2] and to the views of foreign co-signatories.

The machinery of Parliament often creaks when it attempts to implement the increasing volume of international agreements on such matters as international trade and transport, but at least no one in England is in danger of confusing legislation with *law* in the general sense ; in a codified system this does happen and *la législation* is often used to mean the whole law of a country.

[1] When a statute applies to Scotland the practice is to provide a glossary of equivalent Scottish terms so that the Act may be fully understood by Scots lawyers and integrated by them into their Roman-based legal system, e.g. the *Sale of Goods Act*, 1893. Different words in England and Scotland may be necessary to ensure that the intention of Parliament is interpreted in the same sense on each side of the Border. Lord Goddard, C.J., recently said :

> " It is very desirable that with statutes of this nature the same interpretation should be given on either side of the Border. It would be very unfortunate to have, on a similar set of facts, a conviction in England and no conviction in Scotland or vice versa. In this class of case dealing with this class of subject-matter this court always tries to follow the decisions of the Scottish courts if they can, and I think that Scottish courts always pay the same respect to decisions in this country so that one may get uniformity, which is certainly very desirable. I do not mind saying that I think that, if the present case had come before me in 1936 before the decision in *McCowan* v. *Stewart*, 1936 S.C. (J.) 36, I should have been very much inclined to take the view which the justices took, but as the Court of Justiciary decided as they did, and as Parliament has obviously, as it seems to me, accepted that decision and for finance purposes has cleared up the matter by using the word ' additional ' instead of ' alternative ', I think that we must hold that the facts disclosed in the present case do not amount to an offence against section 26, and for those reasons, with some reluctance, I feel that this appeal must be allowed. It is a matter for the Ministry of Transport to consider whether an alteration of the law is desirable, and if so to ask Parliament for it, but I think that we ought to keep to the decision which I have just indicated." *Cording* v. *Halse* [1955], 1 Q.B., 63 at p. 70.

[2] *Comparative Law*, 2nd edn. (Cambridge, 1949), p. 106.

Our judges rightly insist that the first principles of the common law exist in our case-law and that legislation must, as far as possible, be integrated with those principles, rather than be deemed to replace them.

To sum up, the present method of drafting statutes with a great deal of detail is bound up on the one hand with the procedure of Parliament, which provides for a clause by clause debate which makes it tempting to legislate by references, and with the attitude of the judges who consult the *litera legis* of a statute rather than the preliminaries of the statute. Until Parliament is prepared further to cut down our volume of legislation and indeed to legislate in much less detail, and until it is prepared to give the judges much more freedom to interpret statutes, it is unlikely that the present cumbersome system will alter. It may well be that with the increasing complexities of legislation on scientific subjects the assistance of more and more specialists in Government departments will be essential in the preparation of any bill; the best Parliamentarian will always be he who can explain highly technical matters in simple language that will commend the assent of suitable Parliamentary majorities. Given the chance, a good draftsman could help the politician by formulating a bill that is intelligible enough to be debated with a full appreciation of the references involved, and yet without going into the great detail which the present system demands. The late Harold Laski in his dissenting note on the Report on Ministers' powers [1] suggested that every Act should contain either a long "Tudor" preamble or at least an explanatory paper. He said:

> But it seems to me that there is a middle way. If statutes do not plainly avow their intention by their words, the desirable thing is, I submit, to attach to them an authoritative explanation of intention. This could be done in one of two ways: (1) as was so often the case in the Tudor period, by way of preamble to the statute itself. There would here be set out, as clearly as draftsmanship will permit, the end the statute has in view; or (2) by way of memorandum in explanation of the statute. It is well known that it has become increasingly the practice in modern legislation to issue to members of Parliament a memorandum in explanation of any complex legislation that is laid before them; a good example is the explanatory memorandum which accompanies the Children's Bill now under discussion by Parliament. The value of these memoranda is great; and they would, I suggest, be of real assistance to the judge in discovering the purpose the statute is intended to serve.[2]

[1] Cmd. 4060/1932.

[2] Ibid. p. 136.

But this useful suggestion has not been taken up, nor will it be until legislation becomes more general in its terms and judges are given more discretion in its interpretation.

The preparation of the " authoritative explanation of intention " would, we suggest, best be done by Parliament as an integral part of the statute. Constitutionally it is not open to a Minister of the Crown to interpret the meaning of an Act with authority. That is the business of the courts. All that a Minister can do is to circularize his department on what *he* thinks is the object of a statute: that is, of course, unless a statute gives a Minister power to make rules to implement a new statute by delegated legislation,[1] and an authoritative statement of intention would be valuable when such delegated legislation was prepared.

V

The Enforcement of Legislation

Written Laws are enforced when they are interpreted and applied by administrators, legal advisers and judges, to specific cases. They are in vigour, in potential action, whilst they remain unrepealed. The technique of reducing the potential to the actual is an essential part of government if a statute is not to be a dead letter.

Modern schemes of defence in war-time and of social services have led to a vast proliferation of legislation and of delegated legislation: just as, towards the end of the Second World War, printed weekly instructions to officers in the Navy (Admiralty Fleet Orders) alone often ran into more than 100 pages of close printed text. The result was that specialist officers learned the specialist rules affecting their jobs and ignored the rest. To some extent this is true nowadays of the mass of detailed subordinate legislation issued, not by, but under the authority of, Parliament. The trade unionist, the importer, the educational

[1] We cannot enter into the vast subject of delegated legislation in this paper. Suffice it to say that some order has now been put into this complex collection by the *Statutory Instruments Act*, 1946, and every piece of such delegated legislation is reviewed by select " Scrutiny " committee of the House of Commons set up in 1948.

administrator and other specialized social groups keep up to date with their branch of the law and often ignore the rest: the existence of a vast mass of legislation on detailed aspects of modern social life can, in general, be blissfully ignored by the general public until some crisis arises that brings the machine into operation.

A modern sociologist describing the military machine has said:

> The power relationship exists between officers and soldiers not only at the moments when military drill is being performed and the officers determine the behaviour of the soldiers by certain pre-established words representing Commands, or when, during a war, the officers send the soldiers to certain death and are obeyed by them, but also during inactive periods, as long as the readiness to obey remains untouched. . . .
>
> The situation can be summarized in the following way. The power phenomenon may exist as an active process or as a latent disposition. When a command is given by the dominators and acts of obedience are performed by the subjects, the phenomenon is in its active stage. If such a sequence of overt events is not repeated, we cannot yet speak of a power relationship. Only when repeated, perhaps many times, can the power relationship arise. Repetition creates in the consciousness of the subjects a disposition to obey and the corresponding disposition to command on the part of the dominators. Only under such conditions does a power relationship unite group-members.[1]

Much modern statute law is not generally "repeated" by Parliament to the electorate in such a way that a direct power relationship is created between the king in Parliament and his subjects. Whenever a statute is not primarily addressed to the legal profession, or to the corpus of civil and local government servants, then a whole hierarchy of command may have to be set up. The comparative failure of the elaborate legislation scheme of the Town and Country Planning Act, 1947, may to some extent have been caused by the lack of adequate machinery to ensure the co-operation of those affected to secure a whole system of effective planning control, and compensation for "development-value". An Act of Parliament is no substitute for an enforceable chain of command when it is desired to create a "power relationship" affecting the vast majority of citizens.

During the recent war the extreme complexity of the legal arrangements to secure the orderly obedience to a scheme of

[1] Timasheff, *The Sociology of Law* (1939), p. 179.

wartime mobilization of resources showed the elaborate care needed to carry out new wartime legislation intended to create a direct power relationship between Government and people.

On 24 August 1939, just before the outbreak of war, Parliament passed the Emergency Powers (Defence) Act, 1939, to enable His Majesty by Order in Council:

> To make such Regulations "as appear to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged, and for maintaining supplies and services essential to the life of the community," s. 1 (1).

On 22 May 1940, just before France fell, Parliament strengthened this Act, to meet the threat of invasion, by the Emergency Powers (Defence) Act, 1940.

The amended Act enabled His Majesty:

> By Order in Council, "to make such defence regulations making provisions for requiring persons to place themselves, their services and their property at the disposal of His Majesty as appear to him necessary or expedient for securing the public safety, the defence of the Realm, the maintenance of public order or the efficient prosecution of any war . . . or for maintaining supplies or services essential to the life of the community," s. 1 (1).

This brought every person, and all the property in the country, under *potential* Government control. The problem was to actualize that control in the interests of the war effort.

Orders in Council were made under the authority of these statutes; they were called Defence Regulations and formed a war-time code of emergency laws. The Defence Regulations often in turn authorized ministers to make Orders having the force of law: Defence Regulations 27 A and B, for example, permitted the Minister of Home Security to make various Orders to secure Fire Prevention Orders and a further delegation of Ministerial powers to Regional Commissioners enabled the Fire Prevention Duties to be imposed upon the occupants of particular buildings or upon the inhabitants of particular areas, so that they were under a legal duty to act as Fire Guards in relation to specific premises, and so that they could be prosecuted if they did not. Indeed in the end a complete system of part-time paid conscription was set up in the Fire Guard service. This was secured by combination of appeal to patriotism, enlightened

self-interest and to some very small extent by the threat of prosecution. When this social revolution had been carried out, the raids had already almost ceased !

To impose an obligation by legislation is not always effective in itself : when support for a policy, however reasonable, has to be obtained to secure widespread obedience the mere threat of a possible prosecution is not enough. It was not enough to say that Fire Watching must be done in buildings where more than thirty persons work : a suitable method of organizing the watch had to be provided by detailed rules so that the rights and duties of everyone affected could be clearly seen and appreciated.

Legislation can be a voice crying in the wilderness if it is purely exhortatory and carries only a slight possibility of willing acceptance, or of enforcement by prosecution. It is not enough to say, with Austin, that a rule imposed by a political superior to a political inferior carrying with it the slightest chance of incurring the slightest evil in case of disobedience, is a law. To be enforceable, much more than the mere threat of prosecution is needed : the subject must be shown *how* to comply with an obligation, and the necessary machinery must be provided for the creation of new social habits.

The more elaborate the social changes wrought by legislation, the more delicate will be the administrative machinery required to carry it out.[2]

[1] Fire Watching involved spending regular night watches in buildings or places of business in vulnerable areas ; men and women returned to these places and following a strict rota camped out there one night in six.

[2] Since the period of the enlightenment, a new type of legislation was added : rational legislation based upon general concepts. This new type first appeared in a metaphysical form : the legislation of the French Revolution and of the first half of the nineteenth century was in general based upon abstract theories and doctrines (" rights of men ", liberty, equality and fraternity, " psychic coercion " in criminal law, *raison d'état*, et cetera). With the second half of the century a new form of rational legislation appeared : scientifically grounded legislation. A glance at the parliamentary papers of our own time reveals numerous statistical data, quotations from scientific authorities, studies in comparative legislation accompanying draft laws of major importance (civil and criminal codes, codes of social insurance, et cetera). " Expert legislative draftsmen are commonly attached to legislators ". The idea of " social engineering " is gradually gaining the upper hand. Timasheff, *The Sociology of Law* (1939), pp. 288-9.

The essence of "social engineering" by legislation is not only that legislation be intelligible in form and known to the public, but that the means must be at hand for its enforcement if necessary by persons whose business it is to exhort, cajole and even threaten. This is the price paid for schemes of social improvement.

The mechanics of making laws effective is a complicated process today, when legislation tends to touch every branch of social life and often has international repercussions. The machinery of legislation must not be given credit for more than it can in fact accomplish; be on your guard when you hear such phrases as "Parliament is omnipotent", lest reverence for the expressed will of the legislature should lead to a superstitious exaggeration of its efficacity by the sanction of a prosecution.

In the heyday of legislative optimism the fact that the court would accept and apply statutes gave rise to the belief that legislation could *always* make effective law. In a formal sense the legislative could make *a* law, but whether the law would have any practical effect on the life of the nation depended on much more than the mere formal compliance with customary constitutional procedures: even today, when legislation can be popularized and explained as never before with the help of newspapers, broadcasting and television, complicated schemes of social changes can be effectively realized not solely by threat of prosecution but rather by the creation of special machinery to ensure good relations between legislators and the public.

Are our means of publicity for new laws adequate to secure their observance? Is the good work of H.M. Stationery Offices, now run on modern lines, enough? Perhaps not: but sound broadcasting and television can do much to popularize a legislative programme of reform before and after passage of a statute? The "14 day rule" may prevent broadcast and televised discussion from usurping the place of Parliamentary debate, but it does not prevent a series of programmes preparing the way for legislation on such matters as smoke-abatement: nor does it prevent a clear statement of the obligations resulting from new legislation such as the obligation to carry two reflectors at the back of a motor vehicle.

Can new legal rules and the social reason behind them be demonstrated by the new mass media without any danger of the announcer developing into the " Big Brother " of 1984? We think they can, if handled with discretion and tact. But badly handled broadcast and televised programmes may cause the public to resent the use of their time by the Government, and too didactic a tone may result in a revulsion of feeling. The publicity afforded to legislation has developed to an amazing extent since the " horse and buggy " days when the French Civil Code provided different dates for the operation of laws according to the distance of the place of passing from the *chef lieu* of promulgation.

Theoretically everyone is bound to know a law as soon as it is made in Parliament, said Thorpe, C. J. in *R.* v. *Bishop of Chichester*, Y.B. 39 Ed. I II 7.[1] Ignorance even of statute law is no defence: in a democracy, therefore, modern means of knowing a new law should be used to disseminate it to those it affects. Not to do so may be as dangerous, politically, as the resurrection of obsolete and forgotten statutes to serve some new purpose. In a democracy, to know a law is not only to be able to carry it out and to criticize it, but also to be able to change it.

The danger now is that ideas may be elevated one day to the height of legislation, the supreme expression of Parliament's will, and the next day dropped just as quickly. Lord Radcliffe has recently drawn our attention to the danger of regarding law as a mere party matter in these prescient words:

> When the control of the law-making body must be entirely in the hands of one of two political parties, each of which, for the sake of survival, is forced to require an orthodoxy of political conduct and opinion from all its members; and when, in order to be elected at all, each party must devise for the electorate a programme of action calculated to appeal to the material interests of the greatest number; it becomes increasingly unlikely that any general belief will survive to teach us that the system of law by which we are governed bears any recognizable relation to those ideas of equity and wisdom which most men would wish to see imprinted on the fabric of society. This gloomy conclusion does not bear upon the policies of any one party. It is a criticism of a social theory to which the system itself subscribes.[2]

[1] J. C. Gray, *The Nature and Sources of Law* (N.Y., 1909), p. 160.

[2] *Law and the Democratic State. The Holdsworth Club of the Faculty of Law, University of Birmingham* (1955), pp. 8-9.

A mechanistic view of the social process of legislation is not enough. Too much legislation can lead to the anarchy of conflicting rules, to a loss of the sense of relevance and cohesion in a legal system. To quote Lord Radcliffe again :

> But what does seem to me to have become pretty plain is that the popular democracies cannot go on for long in the way that they have been doing, in which legislation is not only regarded as being an expression of the popular will but is regarded as needing no other justification than that it is such an expression, and at the same time retain a system of law which enjoys the prestige and the intellectual content of what stood for Law in the older forms of their Society.[1]

To be effective legislation must depend not only upon the power relationship between those in control of Parliament and of the mass media of information, but also upon the assent, and above all upon the reasoned assent of those to whom it is addressed, and it should only be addressed to those to whom the Sovereign is entitled to address it by the rules of international law.

[1] Op. cit. p. 9.